CITY COUNCIL AGENDA

CITY COUNCIL CHAMBERS . 11465 WEST CIVIC CENTER DRIVE . AVONDALE, AZ 85323

REGULAR MEETING
January 3, 2011
7:00 PM

CALL TO ORDER BY MAYOR ROGERS
PLEDGE OF ALLEGIANCE
MOMENT OF REFLECTION

1 ROLL CALL AND STATEMENT OF PARTICIPATION BY THE CITY CLERK

2 UNSCHEDULED PUBLIC APPEARANCES

(Limit three minutes per person. Please state your name.)

3 CONSENT AGENDA

Items on the consent agenda are of a routine nature or have been previously studied by the City Council at a work session. They are intended to be acted upon in one motion. Council members may pull items from consent if they would like them considered separately.

a. APPROVAL OF MINUTES
1. Work Session of December 13, 2010
2. Regular Meeting of December 13, 2010

b. RESCHEDULING OF CITY COUNCIL MEETING
City Council will consider a request to reschedule the City Council meeting of January 17, 2011 in observance of Martin Luther King Jr. Day and to accommodate scheduling conflicts. The Council will take appropriate action.

c. MEMORANDUM OF AGREEMENT - CHILDHELP INC.
City Council will consider a request to approve a Memorandum of Agreement with Childhelp Inc. to assign two full-time Masters Level therapists to the Southwest Family Advocacy Center and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

d. PROFESSIONAL SERVICES AGREEMENT - BROWN AND CALDWELL FOR ARC FLASH ANALYSIS
City Council will consider a request to approve a Professional Services Agreement with Brown & Caldwell to perform ARC Flash Analysis for an amount not to exceed $141,086.00 and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

e. SECOND AMENDMENT TO SOFTWARE SUPPORT AGREEMENT - INFOR GLOBAL SOLUTIONS (MICHIGAN), INC.
City Council will consider a request to approve the second amendment to software support agreement with Infor Global Solutions (Michigan), Inc., for Enterprise Asset Management annual technical support services not to exceed $40,317.92, and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

f. **RESOLUTION 2949-111 - SUPPORTING A GRANT APPLICATION TO THE ADOH FOR THE OWNER-OCCUPIED HOME REHABILITATION PROGRAM**
City Council will consider a resolution authorizing the submission of a grant application to the Arizona Department of Housing for additional funding to the existing City of Avondale Owner Occupied Home Rehabilitation Program and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

g. **RESOLUTION 2948-111 - INTERGOVERNMENTAL AGREEMENT WITH THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY FOR COST SHARING DRAINAGE IMPROVEMENTS ON 6TH STREET AND WESTERN AVENUE**
City Council will consider a resolution authorizing an Intergovernmental Agreement with the Flood Control District of Maricopa County allowing payment of $187,500 from FCDMC to the City of Avondale for their share of the cost to construct drainage improvements along Western Avenue from 6th Street to Dysart Road, and authorize the Mayor, or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

h. **RESOLUTION 2950-111 - AUTHORIZING SUBMITTAL OF AN APPLICATION FOR LTAF II GRANT FUNDING**
City Council will consider a resolution authorizing the City to submit an application to receive remaining FY2010 Local Transportation Assistance Funds (LTAF II) in the amount of $61,744.34 and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

i. **RESOLUTION 2947-111 AND ORDINANCE 1436-111 - AMENDMENT TO THE MUNICIPAL CODE CHAPTER 20, ARTICLE III - ALARM SYSTEMS**
City Council will consider a resolution declaring as a public record the "City of Avondale Alarm System Ordinance, Amended and Restated January 3, 2011" and an Ordinance adopting the same relating to the addition of alarm registration and alarm renewal fees. The Council will take appropriate action.

j. **ORDINANCE 1440-111 - AUTHORIZING THE DEDICATION OF A USA EASEMENT FOR THE AVONDALE BOULEVARD AND INTERSTATE 10 TRAFFIC INTERCHANGE IMPROVEMENT PROJECT**
City Council will consider an ordinance authorizing the dedication of an easement to the United States for the Avondale Boulevard and I-10 Traffic Interchange Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents. The Council will take appropriate action.

k. **ORDINANCES 1437-111 AND 1438-111 - DEDICATION OF EASEMENTS TO SRP FOR THE AVONDALE BOULEVARD AND I-10 TRAFFIC INTERCHANGE IMPROVEMENT PROJECT**
City Council will consider two ordinances dedicating power distribution easements to Salt River Project for the Avondale Boulevard and I-10 Traffic Interchange Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents. The Council will take appropriate action.

4 LEASE AGREEMENT - GROUND CONTROL COFFEE AND WINE BAR, LLC

City Council will consider a request to approve a Lease Agreement with Ground Control Coffee and Wine Bar, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents. The Council will take appropriate action.

5 ORDINANCE 1441-111 - AUTHORIZING THE ACQUISITION OF REAL PROPERTY FOR PUBLIC USE

City Council will consider an ordinance authorizing the purchase of approximately 15.36 acres of real property generally located south of City Center Drive, north of Van Buren Street and east of Avondale Boulevard from Carlos O'Brien's Scottsdale, LLC in the amount of $3,100,000, authorize the use of general fund cash balance, an interfund transfer of appropriation and authorize the Mayor or City Manager, City Attorney and City Clerk to execute the necessary documents. The Council will take appropriate action.

6 **LEASE AGREEMENT - CARLOS O'BRIEN'S SCOTTSDALE, LLC**

City Council will consider a request to approve a Lease Agreement with Carlos O'Brien's Scottsdale, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents and authorize the use and transfer of contingency funds. The Council will take appropriate action.

7 **PUBLIC HEARING AND ORDINANCE 1439-111 – HOLY CROSS SPECIAL USE OVERLAY REZONING (PL-10-0063)**

City Council will hold a public hearing and consider an ordinance establishing the Special Use Overlay Zoning District to allow for the expansion of the Holy Cross Cemetery located at the southwest corner of 99th Avenue and Thomas Road. The Council will take appropriate action.

8 **EXECUTIVE SESSION**

a. The Council may hold an executive session pursuant to ARIZ. REV. STAT. § 38-431.03 (A)(4) for discussion or consultation with the City's Attorney in order to consider its position and instruct the City Attorney regarding the Council's position regarding (a) the *Hurst v.City of Avondale* matter and (b) a potential Economic Development Agreement.

9 **ADJOURNMENT**

Respectfully submitted,

Carmen Martinez
City Clerk

Individuals with special accessibility needs, including sight or hearing impaired, large print, or interpreter, should contact the City Clerk at 623-333-1200 or TDD 623-333-0010 at least two business days prior to the Council Meeting.

Personas con necesidades especiales de accesibilidad, incluyendo personas con impedimentos de vista u oído, o con necesidad de impresión grande o interprete, deben comunicarse con la Secretaria de la Ciudad at 623-333-1200 o TDD 623-333-0010 cuando menos dos días hábiles antes de la junta del Concejo.

CITY COUNCIL REPORT

SUBJECT:
APPROVAL OF MINUTES

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Carmen Martinez, City Clerk (623) 333-1214

THROUGH: Charlie McClendon, City Manager

PURPOSE:

1. Work Session of December 13, 2010
2. Regular Meeting of December 13, 2010

ATTACHMENTS:

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CITY COUNCIL REPORT

SUBJECT:
Rescheduling of City Council Meeting

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Carmen Martinez, City Clerk (623) 333-1214

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council reschedule the City Council meeting of January 17, 2011 in observance of Martin Luther King Jr. Day and to accommodate scheduling conflicts.

BACKGROUND:

The City Council Rules of Procedure read that when the day of a regularly scheduled City Council meeting falls on a legal holiday, no meeting shall be held on such holiday, but said meeting may be held at the same time and the same location on the next succeeding business day thereafter that is not a holiday or at such other time as designated by the City Council.

On November 15, 2010, the Council approved Staff's recommendation to reschedule the meeting of January 17, 2011 to January 18, 2011 in observance of Martin Luther King Jr. Day. Since then, Mayor Rogers was elected as Second Vice President of the National League of Cities (NLC) and has been asked to attend a meeting on January 18, 2011.

DISCUSSION:

Staff is recommending the rescheduling of the January 17, 2011 to January 24, 2011 in observance of Martin Luther King Jr. Day holiday and to accommodate the Mayor's attendance at the NLC meeting.

The City Charter requires that any change in the regular meeting day, time or place be published in a newspaper of general circulation. In order to comply with this requirement and to notify the citizens of the meeting change, city staff will publish notices in the West Valley View on January 11, 2011.

RECOMMENDATION:

Staff recommends that the City Council reschedule the City Council meeting of January 17, 2011 to January 24, 2011 in observance of Martin Luther King Jr. Day and to accommodate scheduling conflicts.

ATTACHMENTS:

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No Attachments Available

CITY COUNCIL REPORT

SUBJECT:
Memorandum of Agreement - Childhelp Inc.

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Kevin Kotsur, Police Chief (623) 333-7201

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council approve a Memorandum of Agreement (MOA) with Childhelp Inc. to assign two (2) full-time Masters Level therapists to the Southwest Family Advocacy Center (SWFAC).

BACKGROUND:

Childhelp Inc. is a non-profit organization committed to being a primary source and leading provider of prevention and rehabilitation services in the areas of child abuse and neglect. Services include victim advocacy, prevention education, counseling services, case management and case investigation.
The SWFAC is a multidisciplinary facility developed and funded by the City of Avondale, the Town of Buckeye and the City of Goodyear. The SWFAC's purpose is to provide quality investigations of abuse in the most sensitive, appropriate manner to crime victims. The SWFAC staff is a team dedicated to serving victims of domestic violence and sexual assault, understanding that the community is diverse and that by focusing on the needs of each victim, staff will provide the most comprehensive services possible.

DISCUSSION:

Staff has determined that it is necessary for the SWFAC to maintain the availability of therapy services for the children who are abused, neglected or otherwise at-risk. Staff desires that such services shall include, without limitation, advocacy, prevention, intervention and treatment related programs, case management, immediate crisis intervention, therapy by a designated behavioral health professional or behavioral health technician, and community information services (the "Therapy Services").

The SWFAC and Childhelp wish to enter into this MOA to utilize Childhelp's expertise and resources to provide the Therapy Services to SWFAC clients who are victims or secondary victims of child abuse or neglect or who are otherwise at-risk.

BUDGETARY IMPACT:

Funding for the two (2) full-time Masters Level therapists will be provided by Childhelp through their contract with the Regional Behavioral Health Authority and there are no financial obligations to the City of Avondale.

RECOMMENDATION:

Staff recommends that the City Council approve a Memorandum of Agreement with Childhelp Inc. to assign two (2) full-time Masters Level therapists to the SWFAC for a six (6) month period effective January 03, 2011 and terminating on June 30, 2011, at no direct cost to the City of Avondale. These therapists shall provide Therapy Services to SWFAC clients who are between 0 and 18 years of age.

ATTACHMENTS:

Click to download

- MOA - Childhelp Inc.

MEMORANDUM OF AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
CHILDHELP INC. d/b/a CHILDHELP CHILDREN'S CENTER OF ARIZONA

THIS MEMORANDUM OF UNDERSTANDING (this "Memorandum") is made as of January 3, 2011, between the City of Avondale, an Arizona municipal corporation (the "City"), by and through the Southwest Family Advocacy Center (the "SWFAC") and Childhelp Inc. d/b/a Childhelp Children's Center of Arizona, a California non-profit corporation ("Childhelp") (hereinafter referred to individually as "party" or collectively as "parties").

RECITALS

A. Childhelp is a non-profit organization committed to being a primary source and leading provider of prevention and rehabilitation services in the areas of child abuse and neglect. Services include victim advocacy, prevention education, counseling services, case management and case investigation.

B. The SWFAC is a multidisciplinary facility developed and funded by the City of Avondale's, the Town of Buckeye's and the City of Goodyear's police departments, and the SWFAC's purpose is to provide quality investigations of abuse in the most sensitive, appropriate manner to crime victims. The SWFAC staff is a team dedicated to serving victims of domestic violence and sexual assault, understanding that the community is diverse and that by focusing on the needs of each victim, staff will provide the most comprehensive services possible.

C. The SWFAC currently provides counseling and other related crime advocacy services to child and adult victims and witnesses in cases of domestic violence, sexual assault, child physical and sexual abuse, neglect, elderly abuse, homicide and drug endangerment. The overall goal of advocacy centers is to ensure that the victims who are entrusted to the centers are not further victimized by the systems that are designed to protect them.

D. The City has determined that it is necessary for the SWFAC to maintain the availability of therapy services for the children who are abused, neglected or otherwise at-risk. The City desires that such services shall include, without limitation, advocacy, prevention, intervention and treatment related programs, case management, immediate crisis intervention, therapy by a designated behavioral health professional or behavioral health technician, and community information services (the "Therapy Services").

E. The SWFAC and Childhelp wish to enter into this Memorandum to utilize Childhelp's expertise and resources to provide the Therapy Services to SWFAC clients who are victims or secondary victims of child abuse or neglect or who are otherwise at-risk (the "SWFAC Clients").

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing description of parties and services, which are incorporated herein by reference, the following mutual covenants and conditions, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and Childhelp hereby agree as follows:

II. ROLES AND RESPONSIBILITIES.

A. Childhelp shall:

(1) Place two Masters Level therapists (the "Therapists") at the SWFAC to provide Therapy Services to SWFAC Clients who are between 0 and 18 years of age. Such Therapists shall meet all requirements of ARIZ. ADMIN. CODE § R9-20-204 and any other applicable federal, state or local law. Provide documentation upon request that the Therapists meet the essential components of the National Children's Alliance Mental Health Standard for accreditation.

(2) Provide Therapy Services on a full-time basis for the duration of this Memorandum. The Therapists shall conduct all Therapy Services at the SWFAC at no cost to the clients/victims. Therapy Services and treatment are separate from the forensic interview process.

(3) Ensure that the assigned Therapists will attend Childhelp meetings, training, supervision and in-service days as required by Childhelp and any applicable federal, state or local law. Ensure that the assigned Therapists will attend SWFAC staff meetings, multi-disciplinary meetings and case reviews and provide insight and information relevant to the multi-disciplinary case review while protecting client confidentiality.

(4) Require a weekly clinical supervision meeting for each Therapist assigned to the SWFAC, which supervision meeting shall be conducted by Childhelp's Clinical Supervisor in order to ensure ongoing clinical support and training for each assigned Therapist. Any Clinical Supervisor assigned by Childhelp to supervise any Therapist placed at the SWFAC shall meet all requirements of ARIZ. ADMIN. CODE §§ R9-20-204, R9-20-205, and any other applicable federal, state or local law. The Therapists will demonstrate and provide documentation to the SWFAC Director of ongoing education in the field of child abuse consisting of a minimum of 8 contact hours per year.

(5) In order to protect the best interests of the SWFAC Clients, require each Therapist will review all DSM-IV R diagnostic assessments with the Childhelp clinical supervisor if the Therapist is not independently licensed. Every effort will be made to avoid diagnoses that do not serve the best short and long-term interests of the client, without compromising adherence to Behavioral Health Licensure requirements and professional ethics and standards.

(6) Ensure that the Therapists' client focus will be specialized trauma-focused mental health services designed to meet the unique needs of the children who are victims of abuse and/or neglect and non-offending family members. Specialized trauma-focused mental health services for the child client include, without limitation thereto:

(a) Crisis intervention services
(b) Trauma-specific assessment including full trauma history
(c) Use of standardized measurers (assessment tools) initially and periodically
(d) Family/caregiver engagement
(e) Individualized treatment plan that is periodically re-assessed
(f) Individualized evident-informed treatment appropriate for the children and family seen
(g) Referral to other community services as needed
(h) Clinical supervision.

(7) Provide a computer, printer, office supplies and counseling resources for the Therapists to perform his/her duties while at the SWFAC. Childhelp will provide all necessary information technology services related to the Therapists internet and network access.

(8) Provide clients with access to appropriate mental health evaluation and treatment based on the Therapists assessment. Provide case management for treatment plans for SWFAC Clients between 0 and 18 years of age. The Therapists may provide crisis intervention during the first advocacy center appointment as needed and appropriate. Cases will be reviewed at the weekly clinical supervision meetings, or more frequently as needed.

(9) Provide the Therapy Services in a designated Childhelp office at the SWFAC located in Goodyear, Arizona. All clients will be given a copy of the applicable "client's rights" and grievance process as required by ARIZ. ADMIN. CODE § R9-20-203.

(10) At Childhelp's sole cost and expense, obtain and maintain all licenses required by the Arizona Department of Health Services' Office of Behavioral Health Licensing ("ADHS OBHL") regulations and any other applicable federal, state, or local law for the provision of the Services under this Memorandum.

(11) The SWFAC Director and Childhelp's Clinical Supervisor shall meet monthly, or more frequently as needed, to review this Memorandum and the Therapy Services being provided by the Therapist at the SWFAC.

(12) The Therapists, while maintaining confidentiality, will provide SWFAC with data related to the following: the number of clients served, number of counseling sessions, number and types of prevention education classes and groups provided and general client demographical information on a semi-annual basis.

B. The SWFAC shall:

(1) Provide the Therapists with office space and a desk at the SWFAC in order to conduct Therapy Services for SWFAC clients and to complete the necessary clinical documentation and case management of SWFAC Clients between 0 and 18 years of age.

(2) Provide a lockable file cabinet that will remain in the designated Childhelp office. Both the office and the file cabinet will remain locked when not in use.

(3) Provide copier access to the Therapist while at SWFAC.

(4) Provide Therapists with a telephone land line with voicemail capabilities and Internet-access while at SWFAC.

(5) The SWFAC Director and Childhelp's Clinical Supervisor shall meet monthly, or more frequently as needed, to review this Memorandum and the Therapy Services being provided by the Therapist at the SWFAC.

C. Client Requirements.

(1) Therapy Services are free to SWFAC Clients between the ages of 0 and 18 and are funded through Childhelp's operating budget and contracts with other funding agencies.

(2) SWFAC Clients who receive Therapy Services provided by the Childhelp Therapists must be primary or secondary victims of child abuse or neglect.

(3) SWFAC Clients will be required to make contact with a Therapist to schedule an appointment at a mutually suitable time.

III. TERM OF MEMORANDUM, TERMINATION, AMENDMENTS AND CLIENT RECORDS.

A. This Memorandum shall be effective January 3, 2011 and shall terminate on June 30, 2011.

B. Either party, in writing, may terminate this Memorandum for any reason in whole, or in part, at any time before the date of expiration. Termination of this Memorandum will be accomplished by delivering or mailing to the other Party a Notice of Intent to Terminate not less than 30 days prior to the termination date contained in such notice. Such notice shall be mailed to the other Party's contact at the address listed below in this Memorandum.

C. This Memorandum may be amended at any time upon written, mutual agreement of both parties. No modification to this Memorandum shall be binding upon the SWFAC or Childhelp unless and until a signed amendment is executed.

D. All data or communications, regardless of form, including originals, images and reproductions, prepared by, obtained by, or transmitted in connection with this Memorandum or the Services is confidential and privileged information (the "Client Records"). Each Party shall

retain such Client Records as it may receive or obtain during the term of this Memorandum in accordance with ARIZ. REV. STAT. §§ 8-409, 13-4430, ARIZ. ADMIN. CODE § R9-20-302 and any other applicable federal, state or local record retention law. In addition, each party shall maintain the Client Records in accordance with its own internal record retention policy and procedure to the extent such policy and procedure does not conflict with any applicable federal, state or local law.

E. Personal identifying information, financial account information, or restricted SWFAC or Childhelp information, whether electronic format or hard copy, must be secured and protected at all times to avoid unauthorized access. At a minimum, both Parties must encrypt and/or password protect electronic files. This includes data saved to laptop computers, computerized devices or removable storage devices.

F. When personal identifying information, financial account information, or restricted SWFAC or Childhelp information, regardless of its format, is no longer necessary, the information must be redacted or destroyed through appropriate and secure methods that ensure the information cannot be viewed, accessed, or reconstructed.

G. In the event that a Party discovers, believes or has reason to believe that the confidentiality of Client Records obtained by it in connection with this Memorandum or the Services has been compromised, such Party shall notify the other Party and any affected clients.

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

IV. INDEMNIFICATION; INSURANCE.

A. Indemnification.

(1) Childhelp shall indemnify, defend, save and hold harmless the SWFAC its officers, officials, agents, and employees (hereinafter referred to as "Indemnitee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys' fees, and costs of claim processing, investigation and litigation) (hereinafter referred to as "Claims") for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Childhelp or any of its owners, officers, directors, agents, employees or subcontractors. This indemnity includes any claim or amount arising out of or recovered under the Workers' Compensation Law or arising out of the failure of such Childhelp to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties that the Indemnitee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the

Indemnitee, be indemnified by Childhelp from and against any and all claims. In consideration of the award of this contract, Childhelp agrees to waive all rights of subrogation against the Southwest Family Advocacy Center, its officers, officials, agents and employees for losses arising from the work performed by Childhelp for the SWFAC.

(2) SWFAC shall indemnify, defend, save and hold harmless Childhelp, its officers, officials, agents, and employees (hereinafter referred to as "Indemnitee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys' fees, and costs of claim processing, investigation and litigation) (hereinafter referred to as "Claims") for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of SWFAC or any of its owners, officers, directors, agents, employees or subcontractors. This indemnity includes any claim or amount arising out of or recovered under the Workers' Compensation Law or arising out of the failure of such SWFAC to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties that the Indemnitee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnitee, be indemnified by SWFAC from and against any and all claims. In consideration of the award of this contract, SWFAC agrees to waive all rights of subrogation against Childhelp, its officers, officials, agents and employees for losses arising from the work performed at the SWFAC by Childhelp.

B. Insurance Requirements.

(1) Insurance Required. Childhelp shall procure and maintain until all of their obligations have been discharged, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Childhelp, its agents, representatives, employees or subcontractors.

(2) No Representation of Coverage Adequacy. The insurance requirements herein are minimum requirements for this Memorandum. Neither the City nor SWFAC in any way warrants that the minimum limits contained herein are sufficient to protect Childhelp from liabilities that might arise out of this Memorandum by Childhelp, its agents, representatives, employees or subcontractors and Childhelp is free to purchase additional insurance as may be determined necessary.

(3) Waiver. All policies, except for Professional Liability, including Workers' Compensation insurance, shall contain a waiver of rights of recovery (subrogation) against the City, its agents, representatives, officials, officers and employees for any claims arising out of the work or services of Childhelp. Childhelp shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement thereto.

(4) Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the City. Childhelp shall be solely responsible for any such deductible or self-insured retention amount.

(5) Use of Subcontractors. If any work under this Memorandum is subcontracted in any way, Childhelp shall execute written agreements with its subcontractors containing the indemnification provisions set forth in this Section and insurance requirements set forth herein protecting the City and Childhelp. Childhelp shall be responsible for executing any agreements with its subcontractors and obtaining certificates of insurance verifying the insurance requirements.

(6) Minimum Scope And Limits Of Insurance. Childhelp shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a "following form" basis.

(a) Commercial General Liability – Occurrence Form

Policy shall include bodily injury, property damage and broad form contractual liability coverage.

(i)	Each Occurrence	$1,000,000
(ii)	General Aggregate	$2,000,000
(iii)	Products – Completed Operations Aggregate	$1,000,000
(iv)	Personal and Advertising Injury	$1,000,000
(v)	The policy shall be endorsed to include coverage for sexual abuse and molestation.	

(b) Automobile Liability—Bodily Injury and Property Damage for any owned, hired, and non-owned vehicles used in the performance of this Contract.

(i)	Combined Single Limit (CSL)	$1,000,000

(c) Worker's Compensation and Employers' Liability

(i)	Workers' Compensation	Statutory
(ii)	Employers' Liability Each Accident	$100,000
(iii)	Disease – Each Employee	$100,000
(iv)	Disease – Policy Limit	$500,000
(v)	Policy shall contain a waiver of subrogation against the SWFAC.	

(d) Professional Liability (Errors and Omissions Liability)

The policy shall cover professional misconduct or lack of ordinary skill

(i)	Each Claim	$2,000,000
(ii)	Annual Aggregate	$2,000,000

(iii) In the event that the professional liability insurance required by this Memorandum is written on a claims-made basis, Childhelp warrants that any retroactive date under the policy shall precede the effective date of this Memorandum; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of two (2) years beginning at the time this Memorandum is terminated.

(7) Notice Of Cancellation. Each insurance policy required by the insurance provisions of this Memorandum shall provide the required coverage and shall not be suspended, voided or canceled except after thirty (30) days prior written notice has been given to the City and the SWFAC, except when cancellation is for non-payment of premium, then ten (10) days prior notice may be given.

(8) Acceptability Of Insurers. Insurance is to be placed with insurers duly licensed or authorized to do business in the state of Arizona and with an "A.M. Best" rating of not less than B+ VI. The SWFAC in no way warrants that the above-required minimum insurer rating is sufficient to protect Childhelp from potential insurer insolvency.

(9) Verification Of Coverage. Childhelp shall furnish the City with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Memorandum, issued by Childhelp's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Memorandum and that such coverage and provisions are in full force and effect. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and any required endorsements are to be received and approved by the City before any work commences. Each insurance policy required by this Memorandum must be in effect at or prior to commencement of work under this Memorandum and remain in effect for the duration of the Memorandum. Failure to maintain the insurance policies as required by this Memorandum or to provide evidence of renewal is a material breach of Memorandum.

V. MISCELLANEOUS.

A. Independent Contractor. Childhelp acknowledges and agrees that the Services provided under this Memorandum are being provided as an independent contractor, not as an employee or agent of the City. Childhelp, its employees and subcontractors are not entitled to workers' compensation benefits from the City. The City does not have the authority to supervise or control the actual work of Childhelp, its employees or subcontractors. Childhelp, and not the City, shall determine the time of its performance of the services provided under this Memorandum so long as Childhelp meets the requirements of its agreed scope of work as set forth in Section 2 above. Childhelp is neither prohibited from entering into other contracts nor

prohibited from practicing its profession elsewhere. City and Childhelp do not intend to nor will they combine business operations under this Memorandum.

B. Laws and Regulations. Childhelp shall keep fully informed and shall at all times during the performance of its duties under this Memorandum ensure that it and any person for whom Childhelp is responsible remains in compliance with all rules, regulations, ordinances, statutes or laws affecting the Services, including the following: (a) existing and future City and County ordinances and regulations, (b) existing and future state and federal laws and (c) existing and future Occupational Safety and Health Administration ("OSHA") standards.

C. Amendments. This Memorandum may be modified only by a written amendment signed by persons duly authorized to enter into contracts on behalf of the City and Childhelp.

D. Provisions Required by Law. Each and every provision of law and any clause required by law to be in the Memorandum will be read and enforced as though it were included herein and, if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party, the Memorandum will promptly be physically amended to make such insertion or correction.

E. Severability. The provisions of this Memorandum are severable to the extent that any provision or application held to be invalid by a Court of competent jurisdiction shall not affect any other provision or application of the Memorandum which may remain in effect without the invalid provision or application.

F. Relationship of the Parties. It is clearly understood that each party will act in its individual capacity and not as an agent, employee, partner, joint venturer, or associate of the other. An employee or agent of one party shall not be deemed or construed to be the employee or agent of the other for any purpose whatsoever. Childhelp is advised that taxes or Social Security payments will not be withheld from any City payments issued hereunder and Childhelp agrees to be fully and solely responsible for the payment of such taxes or any other tax applicable to this Memorandum.

G. Entire Agreement; Interpretation; Parol Evidence. This Memorandum represents the entire agreement of the parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Memorandum are hereby revoked and superseded by this Memorandum. No representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Memorandum. This Memorandum shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of, or against the party drafting the Memorandum. The parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Memorandum.

H. Notices and Requests. Any notice or other communication required or permitted to be given under this Memorandum shall be in writing and shall be deemed to have been duly given if (a) delivered to the party at the address set forth below, (b) deposited in the U.S. Mail,

registered or certified, return receipt requested, to the address set forth below, (c) given to a recognized and reputable overnight delivery service, to the address set forth below or (d) delivered by facsimile transmission to the number set forth below:

If to the City:	City of Avondale 11465 West Civic Center Drive Avondale, Arizona 85323 Facsimile: (623) 333-0100 Attn: Charles P. McClendon, City Manager
With copy to:	GUST ROSENFELD, P.L.C. One East Washington Street, Suite 1600 Phoenix, Arizona 85004-2553 Facsimile: (602) 340-1538 Attn: Andrew J. McGuire, Esq.
With copy to:	Southwest Family Advocacy Center 140 North Litchfield Road Goodyear, Arizona 85338 Facsimile: (602) 340-1538 Attn: Debra Olson, Director
If to Childhelp:	Childhelp Inc. 15757 North 78th Street Scottsdale, Arizona 85260 Facsimile: (480) 869-0039 Attn: Maureen Basenberg, Director

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this subsection. Notices shall be deemed received (a) when delivered to the party, (b) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, (c) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day, or (d) when received by facsimile transmission during the normal business hours of the recipient. If a copy of a notice is also given to a party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

I. Assignment. No right or interest in this Memorandum shall be assigned by Childhelp without prior, written permission of the City signed by the City Manager and no delegation of any duty of Childhelp shall be made without prior, written permission of the City signed by the City Manager. Any attempted assignment or delegation by Childhelp in violation of this provision shall be a breach of this Memorandum by Childhelp.

J. Subcontracts. No subcontract shall be entered into by Childhelp with any other party to furnish any of the material or services specified herein without the prior written approval of the City. Childhelp is responsible for performance under this Memorandum whether or not subcontractors are used.

K. Rights and Remedies. No provision in this Memorandum shall be construed, expressly or by implication, as waiver by the City of any existing or future right and/or remedy available by law in the event of any claim of default or breach of this Memorandum. The failure of the City to insist upon the strict performance of any term or condition of this Memorandum or to exercise or delay the exercise of any right or remedy provided in this Memorandum, or by law, or the City's acceptance of and payment for services, shall not release Childhelp from any responsibilities or obligations imposed by this Memorandum or by law, and shall not be deemed a waiver of any right of the City to insist upon the strict performance of this Memorandum.

L. Attorneys' Fees. In the event either party brings any action for any relief, declaratory or otherwise, arising out of this Memorandum or on account of any breach or default hereof, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees and reasonable costs and expenses, determined by the court sitting without a jury, which shall be deemed to have accrued on the commencement of such action and shall be enforced whether or not such action is prosecuted through judgment.

M. Confidentiality of Records. Childhelp shall establish and maintain procedures and controls that are acceptable to the City for the purpose of ensuring that information contained in its records or obtained from the City or from others in carrying out its obligations under this Memorandum shall not be used or disclosed by it, its agents, officers, or employees, except as required to perform Childhelp's duties under this Memorandum. Persons requesting such information should be referred to the City. Childhelp also agrees that any information pertaining to individual persons shall not be divulged other than to employees or officers of Childhelp as needed for the performance of duties under this Memorandum.

N. Records and Audit Rights. Childhelp's and its subcontractor's books, records, correspondence, accounting procedures and practices, and any other supporting evidence relating to this Memorandum, including the papers of any Childhelp and its subcontractors' employees who perform any work or Services pursuant to this Memorandum to ensure that Childhelp and its subcontractors are complying with the warranty under subsection O below (all the foregoing hereinafter referred to as "Records"), shall be open to inspection and subject to audit and/or reproduction during normal working hours by the City, to the extent necessary to adequately permit (a) evaluation and verification of any invoices, payments or claims based on Childhelp's and its subcontractors' actual costs (including direct and indirect costs and overhead allocations) incurred, or units expended directly in the performance of work under this Memorandum and (b) evaluation of Childhelp's and its subcontractors' compliance with the Arizona employer sanctions laws referenced in subsection O below. To the extent necessary for the City to audit Records as set forth in this subsection, Childhelp and its subcontractors hereby waive any rights to keep such Records confidential. For the purpose of evaluating or verifying such actual or claimed costs or units expended, the City shall have access to said Records, even if located at its subcontractors' facilities, from the effective date of this Memorandum for the duration of the work and until three years after the date of final payment by the City to Childhelp pursuant to

this Memorandum. Childhelp and its subcontractors shall provide the City with adequate and appropriate workspace so that the City can conduct audits in compliance with the provisions of this subsection. The City shall give Childhelp or its subcontractors reasonable advance notice of intended audits. Childhelp shall require its subcontractors to comply with the provisions of this subsection by insertion of the requirements hereof in any subcontract pursuant to this Memorandum.

O. E-verify Requirements. To the extent applicable under ARIZ. REV. STAT. § 41-4401, Childhelp and its subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and compliance with the E-verify requirements under ARIZ. REV. STAT. § 23-214(A). Childhelp's or its subcontractor's failure to comply with such warranty shall be deemed a material breach of this Memorandum and may result in the termination of this Memorandum by the City.

P. Scrutinized Business Operations. Pursuant to ARIZ. REV. STAT. §§ 35-391.06 and 35-393.06, Childhelp certifies that it does not have scrutinized business operations in Sudan or Iran. For the purpose of this subsection the term "scrutinized business operations" shall have the meanings set forth in ARIZ. REV. STAT. § 35-391 or 35-393, as applicable. If the City determines that Childhelp submitted a false certification, the City may impose remedies as provided by law including terminating this Memorandum.

Q. Non-Exclusive Contract. This Memorandum is entered into with the understanding and agreement that it is for the sole convenience of the City. The City reserves the right to obtain like goods and services from another source when necessary.

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date and year first set forth above.

"**City**"

CITY OF AVONDALE, an Arizona municipal corporation

_____
Charles P. McClendon, City Manager

ATTEST:

_____
Carmen Martinez, City Clerk

"**Childhelp**"

CHILDHELP INC. d/b/a CHILDHELP CHILDREN'S CENTER OF ARIZONA a California non-profit corporation

By:_____

Name:_____

Title:_____

(ACKNOWLEDGEMENTS)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

This instrument was acknowledged before me on _____, 2011, by Charles P. McClendon, the City Manager of the CITY OF AVONDALE, an Arizona municipal corporation, on behalf of the City of Avondale.

_____
Notary Public in and for the State of Arizona

My Commission Expires:

_____

STATE OF _____)
) ss.
COUNTY OF _____)

This instrument was acknowledged before me on _____, 2011, by _____ _____ as _____ of CHILDHELP INC., a California non-profit corporation, on behalf of the corporation.

_____
Notary Public in and for the State of _____

My Commission Expires:

_____

CITY COUNCIL REPORT

SUBJECT:
Professional Services Agreement - Brown and Caldwell for ARC Flash Analysis

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Wayne Janis, P.E., Public Works Director, (623) 333-4444

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that City Council approve a Professional Services Agreement between the City of Avondale and Brown & Caldwell, to provide Arc Flash studies and Arc Flash labeling required to meet the requirements of Arc Flash hazards based on the National Electric Code, the Institute of Electrical and Electronic Engineers-1584 and National Fire Protection Association-70E, for a price not to exceed$141,086.00 and to authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

BACKGROUND:

An arc flash (or arc blast) is a type of electrical explosion that results from a low impedance connection to ground or another voltage phase in an electrical system. A typical arc flash incident can be inconsequential but could conceivably produce a more severe explosion. The result of the violent event can cause destruction of equipment involved, fire, and injury not only to the worker but also to nearby people.

The National Electric Code (NEC) added a requirement in 2002 mandating that potential arc flash hazards be labeled to warn of the hazard. The National Fire and Protection Association (NFPA) -70E recommends employers conduct an arc flash analysis to determine the amount of thermal energy that could be generated in an arc flash incident. The information is then used to define a flash protection boundary around the potential source and to determine the level of flame resistant apparel and other personal protection equipment (PPE) required when employees cross the boundary while they work on or near the exposed live parts. In addition, the Occupational Safety and Health Administration under (OSHA 1910.132) are now citing and fining employers for failure to protect employees from the dangers of arc flash.

The engineering services provided by Brown & Caldwell will ensure that the Water Production, Wastewater Collection, and the Charles M. Wolf Water Resources Center facilities are in compliance with the above codes and that staff members are provided with additional and required safety tools and procedures in the workplace.

DISCUSSION:

The City of Avondale has secured a contract price with Brown & Caldwell, Inc. by selecting this vendor initially from the FY2010/2011 Professional Consultants Selection list. As Arc Flash analysis was not listed as a Category of Interest in the initial selection process, the Water Resources department requested vendors from the approved list to present supplemental statements of qualifications information as it pertains to their level of experience with Arc Flash analysis. This additional information was reviewed and rated by the department with Brown & Caldwell providing qualifications and experience that best fit the needs for this desired scope of work.

BUDGETARY IMPACT:

The funding for the work associated with this Professional Services agreement is available in the Water Administration Budget, Other Professional Services, line item: 501-9110-00-6180 and the Wastewater Administration, Other Professional Services, line item: 503-9210-00-6180.

RECOMMENDATION:

Staff is recommending that City Council approve a Professional Services Agreement between the City of Avondale and Brown & Caldwell, to provide Arc Flash studies and Arc Flash labeling needed to meet the requirements of Arc Flash hazards based on the National Electric Code, the Institute of Electrical and Electronic Engineers-1584 and National Fire Protection Association-70E, for a price not to exceed$141,086.00 and to authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- PSA

PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
BROWN & CALDWELL, INC.

THIS PROFESSIONAL SERVICES AGREEMENT (this "Agreement") is made as of January 3, 2011, between the City of Avondale, an Arizona municipal corporation (the "City") and Brown & Caldwell, Inc., a California corporation (the "Consultant").

RECITALS

A. The City issued a Request for Qualifications, EN 10-057 "FY 2010/2011 Professional Consultants Selection List" and amended on April 6, 2010, by that certain Addendum No. 1 (collectively the "RFQ"), a copy of which is attached hereto as Exhibit A, and incorporated herein by reference, seeking statements of qualifications from vendors for professional consulting services.

B. The Consultant submitted a Statement of Qualifications (the "SOQ") in response to the RFQ, attached hereto as Exhibit B, and incorporated herein by reference, and the City desires to enter into an Agreement with the Consultant for the Consultant to perform ARC Flash hazard testing, electrical system evaluations and ARC Flash labeling (collectively, the "Services").

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing 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 is hereby acknowledged, the City and the Consultant hereby agree as follows:

1. Term of Agreement. This Agreement shall be effective as of the date first set forth above and shall remain in full force and effect until August 31, 2011.

2. Scope of Work. Consultant shall provide the Services as set forth in the Scope of Work, attached hereto as Exhibit C and incorporated herein by reference.

3. Compensation. The City shall pay Consultant a price not to exceed $141,086.00 for the Services as set forth in the Fee Proposal, attached hereto as Exhibit D and incorporated herein by reference.

4. Payments. The City shall pay the Consultant monthly, based upon work performed and completed to date, and upon submission and approval of invoices. All invoices shall document and itemize all work completed to date. The invoice statement shall include a record of time expended and work performed in sufficient detail to justify payment.

5. Documents. All documents prepared and submitted to the City pursuant to this Agreement shall be the property of the City.

6. Consultant Personnel. Consultant shall provide adequate, experienced personnel, capable of and devoted to the successful completion of the Services to be performed under this Agreement. Consultant agrees to assign specific individuals to key positions. If deemed qualified, the Consultant is encouraged to hire City residents to fill vacant positions at all levels. Consultant agrees that, upon commencement of the Services to be performed under this Agreement, key personnel shall not be removed or replaced without prior written notice to the City. If key personnel are not available to perform the Services for a continuous period exceeding 30 calendar days, or are expected to devote substantially less effort to the Services than initially anticipated, Consultant shall immediately notify the City of same and shall, subject to the concurrence of the City, replace such personnel with personnel of substantially equal ability and qualifications.

7. Inspection; Acceptance. All work shall be subject to inspection and acceptance by the City at reasonable times during Consultant's performance. The Consultant shall provide and maintain a self-inspection system that is acceptable to the City.

8. Licenses; Materials. Consultant shall maintain in current status all federal, state and local licenses and permits required for the operation of the business conducted by the Consultant. The City has no obligation to provide Consultant, its employees or subcontractors any business registrations or licenses required to perform the specific services set forth in this Agreement. The City has no obligation to provide tools, equipment or material to Consultant.

9. Performance Warranty. Consultant warrants that the Services rendered will conform to the requirements of this Agreement and to the highest professional standards in the field.

10. Indemnification. To the fullest extent permitted by law, the Consultant shall indemnify, defend and hold harmless the City and each council member, officer, employee or agent thereof (the City and any such person being herein called an "Indemnified Party"), for, from and against any and all losses, claims, damages, liabilities, costs and expenses (including, but not limited to, reasonable attorneys' fees, court costs and the costs of appellate proceedings) to which any such Indemnified Party may become subject, under any theory of liability whatsoever ("Claims"), insofar as such Claims (or actions in respect thereof) relate to, arise out of, or are caused by or based upon the negligent acts, intentional misconduct, errors, mistakes or omissions, in connection with the work or services of the Consultant, its officers, employees, agents, or any tier of subcontractor in the performance of this Agreement. The amount and type of insurance coverage requirements set forth below will in no way be construed as limiting the scope of the indemnity in this Section.

11. Insurance.

11.1 General.

a. Insurer Qualifications. Without limiting any obligations or liabilities of Consultant, Consultant shall purchase and maintain, at its own expense, hereinafter stipulated minimum insurance with insurance companies authorized to do business in the State of Arizona pursuant to ARIZ. REV. STAT. § 20-206, as amended, with an AM Best, Inc. rating of A- or above with policies and forms satisfactory to the City. Failure to maintain insurance as specified herein may result in termination of this Agreement at the City's option.

b. No Representation of Coverage Adequacy. By requiring insurance herein, the City does not represent that coverage and limits will be adequate to protect Consultant. The City reserves the right to review any and all of the insurance policies and/or endorsements cited in this Agreement but has no obligation to do so. Failure to demand such evidence of full compliance with the insurance requirements set forth in this Agreement or failure to identify any insurance deficiency shall not relieve Consultant from, nor be construed or deemed a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.

c. Additional Insured. All insurance coverage and self-insured retention or deductible portions, except Workers' Compensation insurance and Professional Liability insurance, if applicable, shall name, to the fullest extent permitted by law for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials and employees as Additional Insured as specified under the respective coverage sections of this Agreement.

d. Coverage Term. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement are satisfactorily performed, completed and formally accepted by the City, unless specified otherwise in this Agreement.

e. Primary Insurance. Consultant's insurance shall be primary insurance with respect to performance of this Agreement and in the protection of the City as an Additional Insured.

f. Waiver. All policies, except for Professional Liability, including Workers' Compensation insurance, shall contain a waiver of rights of recovery (subrogation) against the City, its agents, representatives, officials, officers and employees for any claims arising out of the work or services of Consultant. Consultant shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement thereto.

g. Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the City. Consultant shall be solely responsible for any such deductible or self-insured retention amount.

h. Use of Subcontractors. If any work under this Agreement is subcontracted in any way, Consultant shall execute written agreements with its subcontractors containing the indemnification provisions set forth in this Section and insurance requirements set forth herein protecting the City and Consultant. Consultant shall be responsible for executing any agreements with its subcontractors and obtaining certificates of insurance verifying the insurance requirements.

i. Evidence of Insurance. Prior to commencing any work or services under this Agreement, Consultant will provide the City with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Consultant's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The City shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. In the event any insurance policy required by this Agreement is written on a "claims made" basis, coverage shall extend for two years past completion of the Services and the City's acceptance of the Consultant's work or services and as evidenced by annual certificates of insurance. If any of the policies required by this Agreement expire during the life of this Agreement, it shall be Consultant's responsibility to forward renewal certificates and declaration page(s) to the City 30 days prior to the expiration date. All certificates of insurance and declarations required by this Agreement shall be identified by referencing the RFQ number and title or this Agreement. A $25.00 administrative fee shall be assessed for all certificates or declarations received without the appropriate RFQ number and title or a reference to this Agreement, as applicable. Additionally, certificates of insurance and declaration page(s) of the insurance policies submitted without referencing the appropriate RFQ number and title or a reference to this Agreement, as applicable, will be subject to rejection and may be returned or discarded. Certificates of insurance and declaration page(s) shall specifically include the following provisions:

(1) The City, its agents, representatives, officers, directors, officials and employees are Additional Insureds as follows:

(a) Commercial General Liability – Under Insurance Services Office, Inc., ("ISO") Form CG 20 10 03 97 or equivalent.

(b) Auto Liability – Under ISO Form CA 20 48 or equivalent.

(c) Excess Liability – Follow Form to underlying insurance.

(2) Consultant's insurance shall be primary insurance as respects performance of the Agreement.

(3) All policies, except for Professional Liability, including Workers' Compensation, waive rights of recovery (subrogation) against City, its agents, representatives, officers, officials and employees for any claims arising out of work or services performed by Consultant under this Agreement.

(4) A 30-day advance notice cancellation provision. If ACORD certificate of insurance form is used, the phrases in the cancellation provision "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted. Certificate forms other than ACORD form shall have similar restrictive language deleted.

11.2 Required Insurance Coverage.

a. Commercial General Liability. Consultant shall maintain "occurrence" form Commercial General Liability insurance with an unimpaired limit of not less than $1,000,000 for each occurrence, $2,000,000 Products and Completed Operations Annual Aggregate and a $2,000,000 General Aggregate Limit. The policy shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury. Coverage under the policy will be at least as broad as ISO policy form CG 00 010 93 or equivalent thereof, including but not limited to, separation of insured's clause. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, officials and employees shall be cited as an Additional Insured under ISO, Commercial General Liability Additional Insured Endorsement form CG 20 10 03 97, or equivalent, which shall read "Who is an Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you." If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

b. Vehicle Liability. Consultant shall maintain Business Automobile Liability insurance with a limit of $1,000,000 each occurrence on Consultant's owned, hired and non-owned vehicles assigned to or used in the performance of the Consultant's work or services under this Agreement. Coverage will be at least as broad as ISO coverage code "1" "any auto" policy form CA 00 01 12 93 or equivalent thereof. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials and employees shall be cited as an Additional Insured under ISO Business Auto policy Designated Insured Endorsement form CA 20 48 or equivalent. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

c. Professional Liability. If this Agreement is the subject of any professional services or work, or if the Consultant engages in any professional services or work adjunct or residual to performing the work under this Agreement, the Consultant shall maintain Professional Liability insurance covering negligent errors and omissions arising out of the

Services performed by the Consultant, or anyone employed by the Consultant, or anyone for whose negligent acts, mistakes, errors and omissions the Consultant is legally liable, with an unimpaired liability insurance limit of $2,000,000 each claim and $2,000,000 annual aggregate. In the event the Professional Liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the Services, and the Consultant shall be required to submit certificates of insurance and a copy of the declaration page(s) of the insurance policies evidencing proper coverage is in effect as required above.

d. Workers' Compensation Insurance. Consultant shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Consultant's employees engaged in the performance of work or services under this Agreement and shall also maintain Employers Liability Insurance of not less than $500,000 for each accident, $500,000 disease for each employee and $1,000,000 disease policy limit.

11.3 Cancellation and Expiration Notice. Insurance required herein shall not expire, be canceled, or materially change without 30 days' prior written notice to the City.

12. Applicable Law; Venue. In the performance of this Agreement, Consultant shall abide by and conform to any and all laws of the United States, State of Arizona and City of Avondale, including but not limited to, federal and state executive orders providing for equal employment and procurement opportunities, the Federal Occupational Safety and Health Act and any other federal or state laws applicable to this Agreement. This Agreement shall be governed by the laws of the State of Arizona and suit pertaining to this Agreement may be brought only in courts in the State of Arizona.

13. Termination; Cancellation.

13.1 For City's Convenience. This Agreement is for the convenience of the City and, as such, may be terminated without cause after receipt by Consultant of written notice by the City. Upon termination for convenience, Consultant shall be paid for all undisputed services performed to the termination date.

13.2 For Cause. This Agreement may be terminated by either party upon 30 days' written notice should the other party fail to substantially perform in accordance with this Agreement's terms, through no fault of the party initiating the termination. In the event of such termination for cause, payment shall be made by the City to the Consultant for the undisputed portion of its fee due as of the termination date.

13.3 Due to Work Stoppage. This Agreement may be terminated by the City upon 30 days' written notice to Consultant in the event that the Services are permanently abandoned. In the event of such termination due to work stoppage, payment shall be made by the City to the Consultant for the undisputed portion of its fee due as of the termination date.

13.4 Conflict of Interest. This Agreement is subject to the provisions of ARIZ. REV. STAT. § 38-511. The City may cancel this Agreement without penalty or further obligations by the City 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 City 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.

13.5 Gratuities. The City may, by written notice to the Consultant, cancel this Agreement if it is found by the City that gratuities, in the form of economic opportunity, future employment, entertainment, gifts or otherwise, were offered or given by the Consultant or any agent or representative of the Consultant to any officer, agent or employee of the City for the purpose of securing this Agreement. In the event this Agreement is cancelled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold from the Consultant an amount equal to 150% of the gratuity.

13.6 Agreement Subject to Appropriation. The provisions of this Agreement for payment of funds by the City shall be effective when funds are appropriated for purposes of this Agreement and are actually available for payment. The City shall be the sole judge and authority in determining the availability of funds under this Agreement and the City shall keep the Consultant fully informed as to the availability of funds for the Agreement. The obligation of the City to make any payment pursuant to this Agreement is a current expense of the City, payable exclusively from such annual appropriations, and is not a general obligation or indebtedness of the City. If the City Council fails to appropriate money sufficient to pay the amounts as set forth in this Agreement during any immediately succeeding fiscal year, this Agreement shall terminate at the end of then-current fiscal year and the City and the Consultant shall be relieved of any subsequent obligation under this Agreement.

14. Miscellaneous.

14.1 Independent Contractor. The Consultant acknowledges and agrees that the Services provided under this Agreement are being provided as an independent contractor, not as an employee or agent of the City. Consultant, its employees and subcontractors are not entitled to workers' compensation benefits from the City. The City does not have the authority to supervise or control the actual work of Consultant, its employees or subcontractors. The Consultant, and not the City, shall determine the time of its performance of the services provided under this Agreement so long as Consultant meets the requirements of its agreed scope of work as set forth in Section 2 above. Consultant is neither prohibited from entering into other contracts nor prohibited from practicing its profession elsewhere. City and Consultant do not intend to nor will they combine business operations under this Agreement.

14.2 Laws and Regulations. The Consultant shall keep fully informed and shall at all times during the performance of its duties under this Agreement ensure that it and any person for whom the Consultant is responsible remains in compliance with all rules, regulations, ordinances, statutes or laws affecting the Services, including the following: (a) existing and future City and County ordinances and regulations, (b) existing and future state and federal laws and (c) existing and future Occupational Safety and Health Administration ("OSHA") standards.

14.3 Amendments. This Agreement may be modified only by a written amendment signed by persons duly authorized to enter into contracts on behalf of the City and the Consultant.

14.4 Provisions Required by Law. Each and every provision of law and any clause required by law to be in the Agreement will be read and enforced as though it were included herein and, if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party, the Agreement will promptly be physically amended to make such insertion or correction.

14.5 Severability. The provisions of this Agreement are severable to the extent that any provision or application held to be invalid by a Court of competent jurisdiction shall not affect any other provision or application of the Agreement which may remain in effect without the invalid provision or application.

14.6 Relationship of the Parties. It is clearly understood that each party will act in its individual capacity and not as an agent, employee, partner, joint venturer, or associate of the other. An employee or agent of one party shall not be deemed or construed to be the employee or agent of the other for any purpose whatsoever. The Consultant is advised that taxes or Social Security payments will not be withheld from any City payments issued hereunder and Consultant agrees to be fully and solely responsible for the payment of such taxes or any other tax applicable to this Agreement.

14.7 Entire Agreement; Interpretation; Parol Evidence. This Agreement represents the entire agreement of the parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Agreement are hereby revoked and superseded by this Agreement. No representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Agreement. This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of, or against the party drafting the Agreement. The parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.

14.8 Assignment. No right or interest in this Agreement shall be assigned by Consultant without prior, written permission of the City signed by the City Manager and no delegation of any duty of Consultant shall be made without prior, written permission of the City signed by the City Manager. Any attempted assignment or delegation by Consultant in violation of this provision shall be a breach of this Agreement by Consultant.

14.9 Subcontracts. No subcontract shall be entered into by the Consultant with any other party to furnish any of the material or services specified herein without the prior written approval of the City. The Consultant is responsible for performance under this Agreement whether or not subcontractors are used.

14.10 Rights and Remedies. No provision in this Agreement shall be construed, expressly or by implication, as waiver by the City of any existing or future right and/or remedy

available by law in the event of any claim of default or breach of this Agreement. The failure of the City to insist upon the strict performance of any term or condition of this Agreement or to exercise or delay the exercise of any right or remedy provided in this Agreement, or by law, or the City's acceptance of and payment for services, shall not release the Consultant from any responsibilities or obligations imposed by this Agreement or by law, and shall not be deemed a waiver of any right of the City to insist upon the strict performance of this Agreement.

14.11 Attorneys' Fees. In the event either party brings any action for any relief, declaratory or otherwise, arising out of this Agreement or on account of any breach or default hereof, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees and reasonable costs and expenses, determined by the court sitting without a jury, which shall be deemed to have accrued on the commencement of such action and shall be enforced whether or not such action is prosecuted through judgment.

14.12 Liens. All materials or services shall be free of all liens and, if the City requests, a formal release of all liens shall be delivered to the City.

14.13 Offset.

a. Offset for Damages. In addition to all other remedies at law or equity, the City may offset from any money due to the Consultant any amounts Consultant owes to the City for damages resulting from breach or deficiencies in performance or breach of any obligation under this Agreement.

b. Offset for Delinquent Fees or Taxes. The City may offset from any money due to the Consultant any amounts Consultant owes to the City for delinquent fees, transaction privilege taxes and property taxes, including any interest or penalties.

14.14 Notices and Requests. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if (a) delivered to the party at the address set forth below, (b) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below, (c) given to a recognized and reputable overnight delivery service, to the address set forth below or (d) delivered by facsimile transmission to the number set forth below:

If to the City: City of Avondale
11465 West Civic Center Drive
Avondale, Arizona 85323
Facsimile: (623) 333-0100
Attn: Charles P. McClendon, City Manager

With copy to: GUST ROSENFELD, P.L.C.
One East Washington Street, Suite 1600
Phoenix, Arizona 85004-2553
Facsimile: (602) 254-4878
Attn: Andrew J. McGuire, Esq.

If to Consultant: Brown & Caldwell, Inc.
201 East Washington Street, Suite 500
Phoenix, Arizona 85004
Facsimile: (602) 567-4001
Attn: Bernard Pettiford

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this subsection. Notices shall be deemed received (a) when delivered to the party, (b) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, (c) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day, or (d) when received by facsimile transmission during the normal business hours of the recipient. If a copy of a notice is also given to a party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

14.15 Confidentiality of Records. The Consultant shall establish and maintain procedures and controls that are acceptable to the City for the purpose of ensuring that information contained in its records or obtained from the City or from others in carrying out its obligations under this Agreement shall not be used or disclosed by it, its agents, officers, or employees, except as required to perform Consultant's duties under this Agreement. Persons requesting such information should be referred to the City. Consultant also agrees that any information pertaining to individual persons shall not be divulged other than to employees or officers of Consultant as needed for the performance of duties under this Agreement.

14.16 Records and Audit Rights. Consultant's and its subcontractor's books, records, correspondence, accounting procedures and practices, and any other supporting evidence relating to this Agreement, including the papers of any Consultant and its subcontractors' employees who perform any work or Services pursuant to this Agreement to ensure that the Consultant and its subcontractors are complying with the warranty under subsection 14.17 below (all the foregoing hereinafter referred to as "Records"), shall be open to inspection and subject to audit and/or reproduction during normal working hours by the City, to the extent necessary to adequately permit (a) evaluation and verification of any invoices, payments or claims based on Consultant's and its subcontractors' actual costs (including direct and indirect costs and overhead allocations) incurred, or units expended directly in the performance of work under this Agreement and (b) evaluation of the Consultant's and its subcontractors' compliance with the Arizona employer sanctions laws referenced in subsection 14.17 below. To the extent necessary for the City to audit Records as set forth in this subsection, Consultant and its subcontractors hereby waive any rights to keep such Records confidential. For the purpose of evaluating or verifying such actual or claimed costs or units expended, the City shall have access to said Records, even if located at its subcontractors' facilities, from the effective date of this Agreement for the duration of the work and until three years after the date of final payment by the City to Consultant pursuant to this Agreement. Consultant and its subcontractors shall provide the City with adequate and appropriate workspace so that the City can conduct audits in compliance with the provisions of this subsection. The City shall give

Consultant or its subcontractors reasonable advance notice of intended audits. Consultant shall require its subcontractors to comply with the provisions of this subsection by insertion of the requirements hereof in any subcontract pursuant to this Agreement.

14.17 E-verify Requirements. To the extent applicable under ARIZ. REV. STAT. § 41-4401, the Consultant and its subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and compliance with the E-verify requirements under ARIZ. REV. STAT. § 23-214(A). Consultant's or its subcontractor's failure to comply with such warranty shall be deemed a material breach of this Agreement and may result in the termination of this Agreement by the City.

14.18 Scrutinized Business Operations. Pursuant to ARIZ. REV. STAT. §§ 35-391.06 and 35-393.06, the Consultant certifies that it does not have scrutinized business operations in Sudan or Iran. For the purpose of this subsection the term "scrutinized business operations" shall have the meanings set forth in ARIZ. REV. STAT. § 35-391 or 35-393, as applicable. If the City determines that the Consultant submitted a false certification, the City may impose remedies as provided by law including terminating this Agreement pursuant to subsection 13.2 above.

14.19 Conflicting Terms. In the event of any inconsistency, conflict or ambiguity among the Agreement, the Scope of Work, the Fee Proposal, the RFQ and the Consultant's SOQ, the documents shall govern in the order listed herein.

14.20 Non-Exclusive Contract. This Agreement is entered into with the understanding and agreement that it is for the sole convenience of the City. The City reserves the right to obtain like goods and services from another source when necessary.

14.21 Cooperative Purchasing. This Agreement shall be for the use of the City. In addition, specific eligible political subdivisions and nonprofit educational or public health institutions may also participate, at their discretion and with the agreement of the awarded Consultant. In order to participate in this Agreement, a political subdivision or nonprofit educational or public health institution must agree to the terms and conditions in the solicitation and the Consultant must be in agreement with the cooperative transaction. Any orders placed to the successful Consultant will be placed by the specific agencies participating in this purchase. Payment for purchases made under this Agreement will be the sole responsibility of each participating agency. The City shall not be responsible for any disputes arising out of transactions made by others.

[Signatures on following page.]

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date and year first set forth above.

"**City**"

CITY OF AVONDALE, an Arizona municipal corporation

_____
Charles P. McClendon, City Manager

ATTEST:

_____
Carmen Martinez, City Clerk

"**Consultant**"

BROWN & CALDWELL, INC., a California corporation

By:_____

Name:_____

Title:_____

(ACKNOWLEDGEMENTS)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

This instrument was acknowledged before me on _____, 2011, by Charles P. McClendon, the City Manager of the CITY OF AVONDALE, an Arizona municipal corporation, on behalf of the City of Avondale.

_____
Notary Public in and for the State of Arizona

My Commission Expires:

_____

STATE OF _____)
) ss.
COUNTY OF _____)

This instrument was acknowledged before me on _____, 2011, by _____ as _____ of BROWN & CALDWELL, INC., a California corporation, on behalf of the corporation.

_____
Notary Public in and for the State of _____

My Commission Expires:

_____

EXHIBIT A
TO
PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
BROWN & CALDWELL, INC.

[RFQ]

See following pages.

REQUEST FOR STATEMENTS OF QUALIFICATIONS FOR FY 2010/2011 PROFESSIONAL CONSULTANTS SELECTION LIST

City of Avondale
11465 West Civic Center Drive
Avondale, Arizona 85323

SOLICITATION INFORMATION AND SELECTION SCHEDULE

Solicitation Number:	**EN 10-057**
Solicitation Title:	**FY 2010/2011 Professional Consultants Selection List**
Release Date:	**March 25, 2010**
Final Date for Inquires and Place to Send Inquiries	**April 5, 2010** Sue McDermott, P.E., City Engineer City of Avondale Engineering Dept. 11465 West Civic Center Drive, Suite 120 Avondale, Arizona 85323 smcdermott@avondale.org
SOQs Due Date, Time and Location:	**April 15, 2010** **3:00 p.m.** (local time, Phoenix, Arizona) City of Avondale 11465 West Civic Center Drive, Suite 200 Avondale, Arizona 85323-6804
Letters to Final Listed Firms:	**June 28, 2010**
City Representatives:	**Sue McDermott** **smcdermott@avondale.org** **623-333-4200** **Loretta Browning** **lbrowning@avondale.org** **623-333-2200**

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I. INTRODUCTION

1. Purpose. The City of Avondale (the "City") is seeking Statements of Qualification ("SOQ") from professional consulting engineering firms ("Vendors") to be considered for a Professional Consultants Selection List aimed at capital improvement projects during the 2010/2011 and 2011/2012 Fiscal Years. Only Vendors capable of providing the requested discipline category of professional services will receive consideration. Qualified Vendors are invited to submit SOQs.

2. Discipline Categories of Projects. During Fiscal Years 2010/2011 and 2011/2012, the City plans to contract approximately twenty (20) projects per Fiscal Year for professional services for specific projects that fall within 16 (sixteen) different discipline categories listed below. The scope of work for these specific projects may include studies, site investigations, planning, preliminary design concepts, and contract document development (preparing detailed plans, schedules, designs, assembly of specifications and reports). Project duties may also involve budget estimating, engineering designs, phasing, recommendations for future infrastructure needs (master plans), improvement district administration and presentations at public meetings. Please note, all projects involving the preparation of design plans and specifications require the design plans and specifications to be sealed by a Professional registered in the State of Arizona.

The Professional Consultants Selection List discipline categories are:

- Water Distribution System – Feasibility studies, wells, distribution systems, pump stations, storage facilities and treatment plants.

- Wastewater Systems – Studies, collection and disposal system designs, treatment plants and lift stations.

- Transportation Engineering – Roadway improvement projects, master plans, transportation planning, traffic calming projects, sidewalks and intersection designs, including roundabouts.

- Traffic Engineering – Speed, volume and classification studies, traffic signal warrant studies, other traffic engineering and traffic control studies (such as All-way STOP warrant studies), pedestrian & bicycle studies, Safe Routes to School plans and studies, school crosswalk studies, traffic signal design, traffic control design such as signing and pavement marking, traffic crash analysis, design of safety improvement projects, including roundabout study, design and analysis, design of bike lane/transit/crosswalk facilities, street lights, and Intelligent Transportation Systems (ITS such as Traffic Operations Center design, variable message signs, fiber optic and conduit design, and Wireless Advanced Traffic Management Systems).

- Surveying - Including topographic surveys, boundary surveys, construction staking, as-built surveys, right-of-way and easement investigation, ALTA and preparation of legal descriptions.

- Hydrology/Hydraulic Projects – Master plans, hydrology studies and designing storm water drainage facilities.

- Plan Review Services - Includes plan review of subdivision plats, residential and commercial developments, construction plans for water, sewer, paving, drainage, street/traffic lights and grading.

- Landscape Architect - Master plans, conceptual planning, site designs, parks and public open spaces, streetscapes, bicycle and pedestrian pathway design, scenery planting and irrigation.

- Hydrogeological Engineering - Provide aquifer impact and well feasibility studies. Ability to provide well abandonment services. Design of wells; provide construction inspection/observation services during the drilling of new or replacement wells.

- GIS Programs - Services to support Geographic Information Systems Programs including: data collection and development, map compilation, transformation and systems integration.

- Geotechnical and Environmental **-** Geotechnical engineering, pavement design, materials sampling and testing, pavement evaluation, design recommendations and specifications. Environmental site assessments, compliance audits, risk evaluations and recommendations.

- Foundation and Structural Design - To include load calculations and recommendations for construction of retaining walls, steel reinforced concrete structures, small buildings, and vehicular and pedestrian bridges.

- Electrical Design and Supervisory Control and Data Acquisition (SCADA) Programming - Provide design and inspection services for electric power supply, control systems and equipment specifications. Design and programming of local SCADA systems, PLC programming, and telemetry.

- Construction Management - Provide Construction Management at Risk (CMAR) and Design Build process management or construction administration and inspection services, such as estimation, bid document preparation, QA/QC services, shop drawing review, and post design services.

- Architect - Planning and new building development, renovation, interior and exterior design and construction management of public building projects.

- Subsurface Utility Investigation - To include various types of investigation methods to verify the horizontal and vertical location of underground utilities using surface geophysical techniques such as Ground Penetrating Radar ("GPR"), electromagnetic, magnetic

or other energy fields, probing and vacuum exploration. Electromagnetic methods include the following: pipe and cable locators, inductive, conductive, active and passive modes), terrain conductivity, ground resistivity techniques, optical methods, and computer-driven algorithms coupled with data collection techniques.

II. STATEMENT OF QUALIFICATIONS REQUIREMENTS

1. Preparation/Submission of SOQ. Vendors are invited to participate in the competitive selection process for the Professional Consultants Selection Lists for Fiscal Year 2010/2011 and 2011/2012 outlined in this RFQ. Responding parties shall review their SOQ submissions to ensure the following requirements are met.

a. Interested parties must submit **one (1) original** and **eight (8) copies** (nine (9) total hardcopy submittals) and one (1) electronic copy of the SOQ.

b. The SOQ shall be submitted with a cover letter with an original ink signature by a person authorized to bind the Vendor. Any erasures, interlineations, or other modifications in the SOQ shall be initialed in original ink by the authorized person signing the SOQ.

c. The SOQ shall be a maximum of 15 pages to address the SOQ criteria (excluding the cover letter, résumés and the Vendor Information Form, but including the materials necessary to address project understanding, general information, organizational chart, photos, tables, graphs, and diagrams). Each page side (maximum 8 1/2" x 11") with criteria information shall be counted. However, one page may be substituted with an 11" x 17" sheet of paper, folded to 8 1/2" x 11", showing a proposed project schedule, a discipline category/staffing matrix, or organizational chart and only having criteria information on one side. The cover letter, cover, back, table of contents and tabs may be used and shall not be included in the page count, unless they include additional project-specific information or SOQ criteria responses. The minimum allowable font for the SOQ is **11 pt**.

d. All Vendors shall (i) examine the entire RFQ, (ii) seek clarification of any item or requirement that may not be clear, (iii) check all responses for accuracy before submitting a SOQ and (iv) submit the entire SOQ by the official Due Date and Time. Negligence in preparing a SOQ confers no right of withdrawal after the SOQ Due Date and Time.

e. All SOQs shall be sealed and clearly marked with the SOQ title and number**, FY 2010/2011 Professional Consultants Selection List (EN 10-057)**, on the lower left hand corner of the sealed mailing envelope. A return address must also appear on the outside of the sealed SOQ. The City is not responsible fore the pre-opening of, post-opening of, or the failure to open, any SOQs not properly addressed or identified.

f. All SOQs shall be directed to the following address: City Clerk, 11465 West Civic Center Drive, Suite 200, Avondale, Arizona 85323, or hand-delivered to the City Clerk's office by the time and date indicated on the cover page of this RFQ.

g. Telegraphic (facsimile), electronic (email) or mailgram SOQs will not be considered.

2. Irregular or Non-responsive SOQ. The City will consider as "irregular" or "non-responsive" and reject any SOQ not prepared and submitted in accordance with this RFQ, or any SOQ lacking sufficient information to enable the City to make a reasonable determination of compliance to the minimum qualifications. Unauthorized conditions, limitations, or provisions shall be cause for rejection.

3. Inquiries. Any question related to the RFQ shall be directed to the City Representative whose name appears on the cover page of this RFQ. Questions shall be submitted in writing by the date indicated on the cover page of this RFQ. Any correspondence related to the RFQ shall refer to the title and number, page and paragraph. However, the Vendor shall not place the RFQ number and title on the outside of any envelope containing questions, because such an envelope may be identified as a sealed SOQ and may not be opened until after the Due Date and Time.

4. Late SOQs. Late SOQs will not be considered, except as provided by the City Procurement Code. A Vendor submitting a late SOQ shall be so notified.

5. Withdrawal of SOQ. At any time prior to the specified Due Date and Time, a Vendor (or designated representative) may withdraw its SOQ. Facsimile, electronic (email) or mailgram SOQ withdrawals will not be considered.

6. Amendment of SOQ. At any time prior to the specified Due Date and Time, a Vendor (or designated representative) may amend its SOQ. Facsimile, electronic (email) or mailgram SOQ amendments will not be considered.

7. Cost of SOQ Preparation. The City does not reimburse the cost of developing, presenting or providing any response to this solicitation. SOQs submitted for consideration should be prepared simply and economically, providing adequate information in a straightforward and concise manner. The Vendor is responsible for all costs incurred in responding to this RFQ. All materials and documents submitted in response to this RFQ become the property of the City and will not be returned.

8. Offer. An SOQ submittal is an offer to contract with the City based upon the terms, conditions and specifications contained in this RFQ and the Vendor's responsive SOQ, unless any of the terms, conditions, or specifications is modified by a written addendum or agreement amendment. Provided, however, that no contractual relationship shall be established until the Vendor has signed, and the City has approved, a professional services agreement between the City and the Vendor in the form included herein.

9. Public Record. All SOQs shall become the property of the City and shall become a matter of public record available for review, subsequent to the award notification, in accordance with the City's Procurement Code.

10. Confidential Information.

a. If a Vendor believes that a SOQ or protest contains information that should be withheld from the public record, a statement advising the City Representative of this fact shall accompany the submission and the information shall be identified.

b. The information identified by the Vendor as confidential shall not be disclosed until the City Representative makes a written determination.

c. The City Representative shall review the statement and information and shall determine in writing whether the information shall be withheld.

d. If the City Representative determines to disclose the information, the City Representative shall inform the Vendor in writing of such determination.

11. Vendor Licensing and Registration. Prior to the award of the Agreement, the successful Vendor shall (a) be licensed with the Arizona Corporation Commission to do business in Arizona and (b) have a completed Request for Vendor Number on file with the City Financial Services Department. The Vendor shall provide licensure information with the SOQ.

12. Certification. By submitting a SOQ, the Vendor certifies:

a. The submission of the SOQ did not involve collusion or other anti-competitive practices.

b. It shall not discriminate against any employee or applicant for employment in violation of Federal Executive Order 11456.

c. It has not given, offered to give, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip favor or service to a City employee, officer or agent in connection with the submitted SOQ. Failure to sign the SOQ, or signing it with a false statement, shall void the submitted SOQ and any resulting Agreement.

d. It (including the firm's employees, representatives, agents, lobbyists, attorneys, and subcontractors) will refrain, under penalty of disqualification, from direct or indirect contact for the purpose of influencing the selection or creating bias in the selection process with any person who may play a part in the selection process, including the Selection Committee, elected officials, the City Manager, Assistant City Managers, Department Heads, and other staff. All contact must be addressed to the City's Procurement Agent, except for questions submitted as set forth in Section 3, Inquiries, above.

e. In addition to reviewing and understanding the submittal requirements, it has reviewed the attached Professional Service Agreement including the Exhibits.

13. Protests. Any Bidder may protest this RFQ issued by the City, the proposed award of an Agreement, or the actual award of an Agreement. All protests will be considered in accordance with the City Procurement Code.

III. STATEMENT OF QUALIFICATIONS FORMAT; SCORING

A Selection Committee composed of representatives from the City will conduct the selection process according to the schedule on the cover page of this RFQ. Upon receipt of an SOQ, each submittal will be reviewed for compliance with the submittal requirements by the Selection Committee. SOQs shall be organized and submitted in the format as outlined below. Failure to conform to the designated format, standards and minimum requirements may result in a determination that the SOQ is non-responsive. Additionally, the Selection Committee will evaluate and award points to each SOQ based upon the evaluation criteria as outlined in this document. Points listed below are the maximum number of points possible for each criteria and not the minimum number that the Selection Committee may award. Up to ten (10) of the highest rated professional consultants from each discipline category will be selected for inclusion on the Professional Consultants Selection shortlist.

These Professional Consultant Selection shortlists will be used to invite Vendors to submit proposals to provide professional services on specific project assignments. The City reserves the right to conduct formal interviews with selected Vendors depending upon the size and complexity of the specific project. The final Professional Consultant Selection List will be used by the City for at least one year and at the discretion of the City Manager for a second consecutive year.

For large or complex projects or for very specialized work, the City may use a separate Request for Proposals or Request for Qualifications process.

All processes will be conducted in accordance with ARIZ. REV. STAT. Title 34.

Section 1: General Factors and Compliance 10 pts

a. One page cover letter as described in Section II, 1(b) addressed to Sue McDermott, City Engineer.

b. Completed Discipline Specialty Check List – Please ONLY check the discipline category(ies) for which you are particularly qualified, fully addressed and desire to be considered.

c. Title sheet with the following information:
   1. Title: Statement of Interest to provide Professional Services for Capital Improvement Projects for the 2010/2011 and 2011/2012 Fiscal Years.
   2. Submitted to: City of Avondale City Clerk
   3. Submittal date: April 15, 2010 (local time, Phoenix, Arizona)

4. Submitted by: Engineering firm or Individual (submitting) include address, contract person and telephone number.

d. Provide a statement regarding the following:

1. Your firm's familiarity and capability of compliance with City's standard insurance requirements and contract documents. A sample copy of the City's Professional Services Agreement is attached hereto. A copy of the City's "Notice of Request for Proposal" which includes standard contract provisions, terms and conditions is available upon request.

2. Your firm's design philosophy and approach to developing sound engineering recommendations and your approach to problem resolution.

e. Vendor Information Form shall be attached as separate appendix and excluded from the page count limitation pursuant to Section II(1)(c).

Section 2: Vendor's relevant experience, availability and capability 50 pts

a. Provide a brief description of the firm including the number and types of personnel who would serve on projects.

b. Provide a list of relevant projects in which the firm had a significant contribution with an emphasis on local experience. Include references and telephone numbers of clients familiar with the projects.

c. Provide a general description of the company that is proposing to provide the required services. Explain the legal organization of the company.

d. Provide identification information of your firm. Include the legal name, address and legal form of the firm (e.g., partnership, corporation, joint venture, sole proprietorship). If a join venture, identify the members of the joint venture and provide all of the information required under this section for each member. If the firm is a wholly owned subsidiary of another company, identify the parent company. Provide the name, address and telephone number of the person to contact concerning the SOQ.

e. Identify the location of the firm's principal office and the local work office, if different.

Section 3: Personnel qualification and pertinent experience 40 pts

a. Provide the firm's general or specific experience pertaining to the Professional Consultant Selection List discipline category(ies) the firm desires to be considered for.

b. Provide a matrix listing all categories within the discipline for which the firm is qualified to provide services and identify the participating staff/key personnel. Include a matrix listing for all subcontractors.

c. Provide certifications, licenses and memberships in professional associations, societies or boards.

d. Provide a résumé for the personnel who will serve in key positions for projects, including specific experience for each person on relevant projects, the number of years the personnel has been with the present firm and the total years of experience. Résumés shall be limited to one (1) page, double-sided per résumé. Résumés shall be attached as an appendix and excluded from the page count limitation pursuant to Section II(1)(c).

Total Possible Points for SOQ Submittal: 100

IV. AWARD OF AGREEMENT

1. Award of Agreement. The selected Vendor from the Professional Consultants Selection List for each specific project will be required to execute the City's standard Professional Services Agreement in a form acceptable to the City Attorney. A sample of the standard agreement is included with this RFQ. If the City is unsuccessful in negotiating an Agreement with the highest-scoring firm, the City may then negotiate with the second, then third, highest-scoring firm until an Agreement is executed. City Council approval may be required. The City reserves the right to terminate the selection process at any time.

2. Waiver; Rejection; Reissuance. Notwithstanding any other provision of this RFQ, the City expressly reserves the right to: (i) waive any immaterial defect or informality, (ii) reject any or all SOQs or portions thereof and (iii) reissue an RFQ.

V. DISCIPLINE SPECIALTY CHECK LIST
FY 2010/2011 PROFESSIONAL CONSULTANTS SELECTION LIST

Name of Firm _____

Address _____

City _____ State _____ Zip _____

Contact Name: _____

Title: _____

Telephone _____ Fax _____

Please check only those discipline categories for which you are particularly qualified, fully addresses, and desired to be considered.

_____ Water Distribution System

_____ Wastewater Systems

_____ Transportation Engineering

_____ Traffic Engineering

_____ Surveying

_____ Hydrology/Hydraulic Projects

_____ Plan Review Services

_____ Landscape Architects

_____ Hydrogeological Engineering

_____ GIS Programs

_____ Geotechnical and Environmental Engineering

_____ Foundations & Structural Design

_____ Electrical & SCADA Programming

_____ Construction Management

_____ Architects

_____ Subsurface Utility Investigation

VI. VENDOR INFORMATION FORM

By sending a Statement of Qualifications, the submitting firm certifies that it has reviewed the administrative information and draft of the Professional Services Agreement's terms and conditions and, if awarded the Agreement, agrees to be bound thereto.

_____	_____
FIRM SUBMITTING SOQ	FEDERAL TAX ID NUMBER
_____	_____
PRINTED NAME AND TITLE	AUTHORIZED SIGNATURE
_____	_____
ADDRESS	TELEPHONE FAX #
_____	_____
CITY STATE ZIP	DATE
WEB SITE: _____	EMAIL ADDRESS: _____

MINORITY/WOMEN-OWNED SMALL BUSINESSES (check appropriate item):

_____ Disadvantaged Business Enterprise (DBE)
_____ Women-Owned Business Enterprise (WBE)
_____ Minority Business Enterprise (MBE)
_____ Small Business Enterprise (SBE)

Has your firm been certified by any jurisdiction in Arizona as a minority or woman owned business enterprise?

If yes, please provide details and documentation of the certification.

REQUEST FOR STATEMENTS OF QUALIFICATIONS
FOR

FY 2010/2011 PROFESSIONAL CONSULTANTS SELECTION LIST

EN-10-057

Addendum No. 1

Date: April 6, 2010

From: Sue McDermott

Subject: Addendum No. 1 to Solicitation No. EN 10-057

Bid Deadline: **April 15, 2010**, 3:00 p.m. local time, Phoenix, Arizona

SCOPE

This Addendum forms a part of the Contract and clarifies, corrects, or modifies the original Request for Qualifications documents prepared by the City of Avondale. Acknowledge receipt of this addendum in the space provided on the attached form. This acknowledgement and addendum must accompany the submitted Statement of Qualifications. Failure to do so may subject the Vendor to disqualification.

This Addendum No. 1 consists of the modification of the RFQ, Section I, Introduction, Paragraph 2, Discipline Categories of Projects and Section II, Statement of Qualifications Requirements, Paragraph (1)(a), Preparation/ Submission of SOQ.

ADDENDUM

1. Page A-1, Section I, Introduction, Paragraph 2, is hereby amended as follows:

   2. Discipline Categories of Projects. During Fiscal Years 2010/2011 and 2011/2012, the City plans to contract approximately twenty (20) projects per Fiscal Year for professional services for specific projects that fall within 16 (sixteen) different discipline categories listed below. The scope of work for these specific projects may include studies, site investigations, planning, preliminary design concepts, and contract document development (preparing detailed plans, schedules, designs, assembly of specifications and reports). Project duties may also involve budget estimating, engineering designs, AND

phasing, recommendations for future infrastructure needs (master plans). ~~improvement district administration and presentations at public meetings.~~ Please note, all projects involving the preparation of design plans and specifications require the design plans and specifications to be sealed by a Professional registered in the State of Arizona.

The Professional Consultants Selection List discipline categories are:

- Water Distribution System – Feasibility studies, wells, distribution systems, pump stations, storage facilities and treatment plants.

- Wastewater Systems – Studies, collection and disposal system designs, treatment plants and lift stations.

- Transportation Engineering – Roadway improvement projects, master plans, transportation planning, traffic calming projects, sidewalks and intersection designs, including roundabouts.

- Traffic Engineering – Speed, volume and classification studies, traffic signal warrant studies, other traffic engineering and traffic control studies (such as All-way STOP warrant studies), pedestrian & bicycle studies, Safe Routes to School plans and studies, school crosswalk studies, traffic signal design, traffic control design such as signing and pavement marking, traffic crash analysis, design of safety improvement projects, including roundabout study, design and analysis, design of bike lane/transit/crosswalk facilities, street lights, and Intelligent Transportation Systems (ITS such as Traffic Operations Center design, variable message signs, fiber optic and conduit design, and Wireless Advanced Traffic Management Systems).

- Surveying - Including topographic surveys, boundary surveys, construction staking, as-built surveys, right-of-way and easement investigation, ALTA and preparation of legal descriptions.

- Hydrology/Hydraulic Projects – Master plans, hydrology studies and designing storm water drainage facilities.

- Plan Review Services - Includes plan review of subdivision plats, residential and commercial developments, construction plans for water, sewer, paving, drainage, street/traffic lights and grading.

- Landscape Architect - Master plans, conceptual planning, site designs, parks and public open spaces, streetscapes, bicycle and pedestrian pathway design, scenery planting and irrigation.

- Hydrogeological Engineering - Provide aquifer impact and well feasibility studies. Ability to provide well abandonment services. Design of wells; provide construction inspection/observation services during the drilling of new or replacement wells.

- GIS Programs - Services to support Geographic Information Systems Programs including: data collection and development, map compilation, transformation and systems integration.

- Geotechnical and Environmental **-** Geotechnical engineering, pavement design, materials sampling and testing, pavement evaluation, design recommendations and specifications. Environmental site assessments, compliance audits, risk evaluations and recommendations.

- Foundation and Structural Design - To include load calculations and recommendations for construction of retaining walls, steel reinforced concrete structures, small buildings, and vehicular and pedestrian bridges.

- Electrical Design and Supervisory Control and Data Acquisition (SCADA) Programming - Provide design and inspection services for electric power supply, control systems and equipment specifications. Design and programming of local SCADA systems, PLC programming, and telemetry.

- Construction Management - Provide Construction Management at Risk (CMAR) and Design Build process management or construction administration and inspection services, such as estimation, bid document preparation, QA/QC services, shop drawing review, and post design services.

- Architect - Planning and new building development, renovation, interior and exterior design and construction management of public building projects.

- Subsurface Utility Investigation - To include various types of investigation methods to verify the horizontal and vertical location of underground utilities using surface geophysical techniques such as Ground Penetrating Radar ("GPR"), electromagnetic, magnetic or other energy fields, probing and vacuum exploration. Electromagnetic methods include the following: pipe and cable locators, inductive, conductive, active and passive modes), terrain conductivity, ground resistivity techniques, optical methods, and computer-driven algorithms coupled with data collection techniques.

2. Page B-1, Section II, Statement of Qualifications Requirements, Paragraph (1)(a) is hereby amended as follows:

1. Preparation/Submission of SOQ. Vendors are invited to participate in the competitive selection process for the Professional Consultants Selection Lists for Fiscal Year 2010/2011 and 2011/2012 outlined in this RFQ. Responding parties shall review their SOQ submissions to ensure the following requirements are met.

a. Interested parties must submit **one (1) original** and **eight (8) copies** (nine (9) total hardcopy submittals) and ~~one (1) electronic copy of the SOQ~~ ONE

ORIGINAL COPY OF THE SOQ ON A CD-ROM (OR ELECTRONIC MEDIA APPROVED BY THE CITY) IN PRINTABLE ADOBE OR MICROSOFT WORD FORMAT (OR OTHER FORMAT APPROVED BY THE CITY). FAILURE TO ADHERE TO THE SUBMITTAL QUANTITY CRITERIA SHALL RESULT IN THE SOQ BEING CONSIDERED NON-RESPONSIVE.

CITY OF AVONDALE
ACKNOWLEDGMENT OF ADDENDA RECEIVED
REQUEST FOR QUALIFICATIONS

FY 2010/2011 PROFESSIONAL CONSULTANTS SELECTION LIST

EN10-057

Addendum No. 1

_____, affirms that ADDENDUM No. 1 has
(Name of Vendor/Designee)
been received and that the information contained in ADDENDUM No. 1 has been incorporated in formulating the Vendor's Offer.

_____, _____2010
Signed Date

_____
Print Name

_____
Title

_____
Company Name

_____
Address

_____
City, State, Zip Code

END OF ADDENDUM No. 1

EXHIBIT B
TO
PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
BROWN & CALDWELL, INC.

[Consultant's SOQ]

See following pages.

Suite 500, 201 East Washington Street
Phoenix, Arizona 85004

Tel: (602) 567-4000
Fax: (602) 567-4001

April 16, 2008

BROWN AND CALDWELL

Charles Andrews, P.E., Senior Project Manager
City of Avondale Engineering Department
11465 West Civic Center Drive, Suite 120
Avondale, Arizona 85323

08-15-061121.019

Subject: Submission of Qualifications for FY 2008/2009
Professional Consultants Selection List

Dear Mr. Andrews:

Brown and Caldwell is pleased to present its qualifications to the City of Avondale for the Professional Consultants Selection List. We are a multi-discipline environmental consulting firm that can fulfill all of your permitting, engineering, construction management, and operations needs. We have been providing water and wastewater treatment and conveyance services, hydrogeological engineering, electrical (including SCADA), and construction management services to our municipal clients in Arizona for over 30 years.

We propose a full service team of experienced professionals for the disciplines outlined on the Discipline Speciality Checklist. Selecting Brown and Caldwell for your projects provides you with the assurance we will apply the same high quality standards and technical knowledge we utilize to complete all of our projects on-time and within budget.

We look forward to helping you tackle your challenges and appreciate the opportunity you have presented Brown and Caldwell. Please call us at (602) 567-4000 if you have any questions or to discuss our qualifications in greater detail.

Very truly yours,
BROWN AND CALDWELL

Michael L. Roeder
Senior Vice President

Randy D. Tirpak
Construction Manager

V. DISCIPLINE SPECIALTY CHECK LIST
FY 2008/2009 PROFESSIONAL CONSULTANTS SELECTION LIST

Name of Firm Brown and Caldwell

Address 201 East Washington St., Suite 500

City Phoenix State AZ Zip 85004

Contact Name: Michael L. Roeder

Title: Sr. Vice President

Telephone 602-567-4000 Fax 602-567-4001

Please check only those discipline categories for which you are particularly qualified, fully addresses, and desired to be considered.

X Water Distribution System

X Wastewater Systems

____ Transportation Engineering

____ Traffic Engineering

____ Surveying

____ Hydrology/Hydraulic Projects

____ Plan Review Services

____ Landscape Architects

X Hydrogeological Engineering

____ GIS Programs

____ Geotechnical and Environmental Engineering

____ Foundations & Structural Design

X Electrical & SCADA Programming

X Construction Management

____ Architects

____ Improvement District Administration

TITLE PAGE

Statement of Interest to Provide Professional Services for Capital Improvement Projects for the 2008/2009 and 2009/2010 Fiscal Years

Submitted To:

City of Avondale City Clerk
Charles Andrews, P.E., Senior Project Manager
City of Avondale Engineering Department
11465 West Civic Center Drive, Suite 120
Avondale, Arizona 85323

Submittal Date:

April 16, 2008, 3 PM (local time, Phoenix, Arizona)

Submitted By:

Brown and Caldwell
201 East Washington Street, Suite 500
Phoenix, Arizona 85004
Michael L. Roeder, Sr. Vice President
602.567.4000

Insurance Requirements and Contract Documents

Brown and Caldwell (BC) has reviewed the City of Avondale's (City) insurance requirements and contract documents included in this notice of Request for Proposal. It is our intent to comply with these requirements upon award of any project.

Design Philosophy and Approach

Our design philosophy and approach to developing sound engineering and problem resolution is based on our 60 years of specific experience in the full service delivery of water and wastewater projects. Our design standards and specifications are based on this experience and best practices. We will utilize the most appropriate and local project team customized for each project with the City. Staff assignments will be maintained for the duration of each project to ensure continuity. Dedicated and committed oversight by senior management and senior technical experts will help to ensure that our projects are delivered on time, on budget, and are reliable and operable over the facility's life.

BC will begin each project by meeting with City staff to define the project objectives, budget, and schedule. These key elements will drive our development of an internal Project Management Plan (PMP). This PMP provides a roadmap for completing the project on-time, within budget, and to the City's satisfaction. The PMP identifies budget and cost control, staffing and resource needs, schedule, and quality control requirements.

Schedule. Our schedule management techniques and experienced staff are key to our record of on-time project completion. Schedule control is initiated at the outset of the project and is used by the project manager to ensure the project, as well as all of its component tasks, are delivered on-time.

Budgeting. A key element of our cost control measures is tied closely to achieving the agreed and understood scope of work. Our project tracking system provides weekly updates on all project cost and resource information and allows us to measure project progress against project costs. This frequent information check allows flexibility to make timely adjustments in the project scope, or implement management changes.

Quality Assurance/Quality Control (QA/QC). BC requires every project to build well-defined QA/QC into every phase of the project as part of our Project Delivery System (PDS), which is an advanced QA/QC system covering all phases of a project including procurement, negotiation, execution, and closeout and follow-up. The focus of this system is meeting our clients' critical project success factors, which often involve issues beyond the technical scope of services and can change over the course of a project.

Our project team includes in-house specialists in design, construction, operations and maintenance (O&M), who will be involved in the project from start to finish. BC developed all of our project solutions with long-term operability, reliability, and maintainability as core requirements. Our philosophy is to always keep the present and future needs of the City's staff in mind. BC's experienced construction management staff will be involved in the design process to ensure constructability and eliminate any factors up front that may cause schedule or cost issues.

Our approach to problem resolution is to first look ahead at all times in order to avoid problems in the first place. If problems occur, we will approach them in a calm, structured, and open-minded way to first determine the root cause of the problem. Keeping our clients fully informed throughout the project, and listening and utilizing their ideas and knowledge, are keys to successful problem resolution. We champion the interests of our clients, but also respect the positions of all involved stakeholders to ensure a solution that is fair and equitable and ultimately leads to project success.

City of Avondale

FY 2008/2009

PROFESSIONAL CONSULTANTS SELECTION LIST
SECTION 2: VENDOR'S RELEVANT EXPERIENCE, AVAILABILITY, & CAPABILITY

Firm Description

BC is an environmental engineering, consulting, and construction management firm offering a wide range of services on water, wastewater, and infrastructure engineering projects. Our nationally recognized consulting firm has a 60-year history of delivering innovative, economical solutions to challenges encountered by public and private clients.

In Arizona, our staff mix is a perfect fit for the City's Consultant List, consisting of engineering professionals, hydrogeologists, geologists, operators, permitting specialists, and construction managers to support a wide array of your needs. The office is fully automated with the latest computer technology, software, and AutoCAD capabilities.

List of Relevant Projects

Project Name, Client, & Location	Brief Description	Client Reference
Well N, City of Goodyear, AZ	Prime contractor for a design-build project, to convert an agricultural well into a potable water well.	Jerry Postema 632.932.3010
Bullard Water Campus, City of Goodyear, AZ	Led three design-build teams that delivered new potable water sources and treatment projects.	Shawn Bradford 623.882.512
Various Well Projects, City of Chandler, AZ	Provided hydrogeological and engineering design services for new potable water wells.	John Knudson 480.782.3590
Adaman Water Model, City of Goodyear, AZ	Provided full range of water resources technical and regulatory support.	Dave Iwanski 623.932.3010
Well Investigations, Design, and Installation, City of Phoenix, AZ	Provided engineering and geological services for water supply wells for numerous water providers.	Andy Brown 602.495.7683
91st Avenue Support System Upgrades, City of Phoenix, AZ	Provided engineering services required for upgrading specific areas to meet current Federal and City Code requirements.	Paul Kinshella 602.534.9839
Paradise Valley PRV Booster Station, City of Phoenix, AZ	Provided planning, design, construction phase services, start-up and commissioning of 40 mgd booster station.	Mike Kasem 602.256.4271
Buckeye Water and Wastewater Master Plans, Town of Buckeye, AZ	Integrated water resources master plan including water and wastewater infrastructures.	Ryan Nielsen, P.E. 623.349.6802

Legal Information

Since 1947, BC has provided water and wastewater planning, design, and construction management services to municipal, private and government agencies across the United States. BC is a California corporation, incorporated in 1958. Our professionals began supporting Arizona clients in 1978. Currently, our Arizona staff is nearly 200 strong, and is supported by a national company of nearly 1,600.

Contact Person:

Michael L. Roeder
Sr. Vice President
201 E. Washington St., Suite 500
Phoenix, AZ 85004
602.567.4000

Principal Office Location

A major benefit of choosing BC is that all of the work associated with this project effort will be managed and completed through BC's local office at 201 East Washington Street, Suite 500, in downtown Phoenix, Arizona. In addition, all proposed team members are located at BC's Phoenix office.

SECTION 3: PERSONNEL QUALIFICATIONS & PERTINENT EXPERIENCE

Firm's Qualifications Per Consultant Selection List Categories

Each sub-section below briefly describes our firm's capabilities per category, including a table of relevant project experience for each category. This discussion is followed by Table 3.6 which summarizes our key personnel's registrations and/or certifications and professional memberships, and matches their capabilities to each of the proposed categories, as requested.

Water Distribution Systems

BC has a strong reputation for delivering reliable water treatment, production, transmission and distribution systems that serve critical community needs. Many of our projects include conventional and advanced water treatment such as membrane technologies, as well as pilot and full-scale testing and design of treatment systems to address specific contaminants. Our in-house experts are experienced in all phases of development including the permitting, investigation, evaluation, design, installation, and operation of potable water wells, well-head treatment, storage tanks, and distribution systems. Table 3.1 demonstrates a sample of our water distribution system experience.

Table 3.1 BC's Water Distribution System Experience

Project Name, Client, Location	Brief Description
Pump Stations, Wells, & Pipelines	
Clearwater Farms, City of Phoenix, AZ	Design of a 6.5 mgd booster station and operations building, 1.25 mg partially buried reinforced concrete reservoir, gas chlorination system, surge tanks and generator.
Cave Creek Road Water Facilities Project, City of Phoenix, AZ	Three-month fast-tracked design of four potable water pumping stations and one reclaimed water pumping station.
Paradise Valley PRV Booster Station, City of Phoenix, AZ	Final design of a 50 mgd booster station, and two PRV stations (40 mgd and 16 mgd) within the 24th Street WTP site.
Surprise Farms, City of Surprise, AZ	Design of 3 - 1,200 foot, 600 to 1,000 gpm production wells, including hydrogeological investigation, drilling coordination, design and construction management.
Various Well Projects, City of Goodyear, AZ	Evaluated existing wells and infrastructure for: equipment salvage and/or reuse; conversion from agricultural to potable use; future production and transmission infrastructure within the City's water supply plan. Completed work via design/build.
Various Well Projects, City of Chandler, AZ	On-call annual contract designing production wells including hydrogeological investigation, drilling coordination and design.
Peoria Sports Complex Water Production Facility, City of Peoria, AZ	Designed production well, booster station, and storage reservoir facility. Constructed two, 1-million gallons steel storage reservoirs. Installed 5,200 feet of 12-inch ductile iron transmission line.
Water Treatment Plants	
Reverse Osmosis (RO) Evaluation & Design, City of Goodyear, AZ	Performed multiple reverse osmosis projects, including wellhead RO evaluation, temporary and permanent 2.5 mgd RO installation, and plans and specifications for a system providing 4 mgd of RO blended with 6 mgd of groundwater.
24th Street WTP Solids Handling Facility, City of Phoenix, AZ	Designed and constructed a facility to process solids and residual streams, including construction management, distribution control system programming, and facility commissioning.
24th Street WTP Chlorination Modification Evaluation, City of Phoenix, AZ	Reviewed the existing filter chlorination system and made recommendations for improvement to reduce system headloss pressure and distribution problems.

Wastewater Systems

One of BC's greatest strengths is in serving the needs of wastewater system owners and operators by delivering a level of technical skill and long-term perspective rarely found in our industry. As a leader in wastewater technology, we understand the challenges faced by owners in resolving complex treatment issues, stringent discharge requirements, and increasing demands on collection facilities. We have successfully studied, sited, permitted, designed, and provided construction management and inspection for numerous new treatment plants and improved design and operation of existing plants resulting in cost-effective solutions for our clients. We also have more than 25 years of experience in manhole and sewer investigation, pipeline and lift station rehabilitation design and condition assessments in Arizona, including projects for the cities of Scottsdale, Phoenix, Tempe, Mesa, and Winslow. In all cases, BC has applied the best-proven technologies to meet the needs of the owner. Table 3.2 illustrates a sample of our wastewater systems projects.

Table 3.2 BC's Wastewater System Experience

Project Name, Client, Location	Brief Description
Pipelines	
North Prescott Regional Force Main Design, City of Prescott, AZ	Performed condition assessment of the existing 14-inch pipeline under Phase I. BC is currently completing Phase II, the design of a replacement gravity pipeline in the existing force main trench.
CCTV Inspection Services, PCRWMD, AZ	Performed CCTV inspection services of the collection system to include 250,000 linear feet of less than 15-inch diameter sewers for the initial year, renewable for up to four additional one year periods.
Unlined Concrete Sewer Condition Assessment and Rehabilitation Program, City of Phoenix, AZ	Evaluated the condition of 200,000 feet of unlined concrete sewers from 24- to 90-inch diameter. Investigation and design services for the rehabilitation of seven critical sewer pipeline projects, including over 21,000 linear feet of unlined concrete pipelines with sizes ranging from 27- to 72-inches in diameter.
Plants	
Hilltop WWTP Upgrade & Expansion, City of Kingman, AZ	Design of a plant upgrade and expansion, including evaluation of existing wetlands for incorporation into upgraded plant, population and wastewater flow projections, and water reclamation recommendations.
Roger Road WWTP, PCRWMD, AZ	Developed a plan, including contingency plans, for improving solids thickening and digestion. Designed the conversion of a sludge storage tank to a high rate digester to add capacity to allow digester maintenance to commence.
Neely Road WRF, Town of Gilbert, AZ	Expansion and addition of process systems to increase the capacity of the existing oxidation ditch biological nutrient reduction (BNR) plant from 8.5 mgd to 11 mgd average daily flow, with peak hourly flow of 27.5 mgd.
91st Avenue WWTP Solids Thickening Facility, City of Phoenix, AZ	Designed and constructed a new centrifuge thickening facility for primary and waste activated sludge (WAS). Designed building and support systems to accommodate four additional centrifuges for ultimate plant build-out.
Southeast WRP Expansion, City of Mesa, AZ	Designed a 4 mgd addition and conversion to a biological nutrient reduction process to meet changing effluent quality requirements.
Tolleson WWTP, City of Tolleson, AZ	Over the past 27 years, improvements have included: 9.2 mgd plant expansion and process upgrades, additional plant expansion, trickling filter media replacement, effluent quality upgrade, chlorination facility upgrade.

Hydrogeological Engineering

BC's hydrologists have earned the unprecedented endorsement of our clients by meeting their increasing demands for reliable, high quality water supplies, while simultaneously preserving the integrity and quality of surface and subsurface water resources. By completing over 1,000 successful water-related projects, our expertise literally encompasses the entire field of water resources. Our hydrologists have extensive experience with data collection, evaluation and interpretation methodologies as well as numerical and analytical modeling techniques. Our accurate and defensible hydrogeologic investigations are often stand-alone studies, or form the critical investigative foundation for our cost-effective and innovative permitting and remediation approaches. Designing a well requires a coordinated effort to completely understand the aquifer characteristics, engineering requirements, operational needs and construction limitations. BC offers a complete team to understand and anticipate all of these needs from our extensive staff of hydrogeologists, mechanical and civil engineers, operations specialists, and construction managers. Table 3.3 represents a sample of our hydrogeological engineering projects.

Table 3.3 BC's Hydrogeological Engineering Experience

Project Description	Well Name, Owner	Well Feasibility Study (Exploratory Boring)	Well Impact Analysis	Well Design and Installation	Well Abandonment (Existing Well)
Replacement Wells	Roosevelt Well City of Chandler	✓	N/A	✓	✓
	Pecos Plaza Well City of Chandler	✓	N/A	✓	✓
	Cooper Chandler Well City of Chandler	✓	N/A	✓	✓
	Gilbert Road Well City of Chandler	✓	N/A	✓	✓
	Well 27B City of Scottsdale		N/A	✓	✓
	Well 41 City of Scottsdale		N/A	✓	✓
	Mountain Vista Ranch Well City of Surprise		N/A	✓	✓
	Well 4C: Confidential Client		N/A	✓	✓
New Well Installations	Golden Lane Well City of Chandler	✓	✓	✓	N/A
	Lindsay Road Well City of Chandler	✓		✓	N/A
	Well 287 City of Phoenix		✓	✓	N/A
	Well 288 City of Phoenix		✓	✓	N/A
	Well 289 City of Phoenix		✓	✓	N/A
	Well 296 City of Phoenix	✓		✓	N/A
	Well 115 City of Scottsdale		✓	✓	N/A
	Well 141 City of Scottsdale	✓	✓	✓	N/A
	Well 123 City of Scottsdale	✓	✓	✓	N/A
	Sun Village Well No. 2 Confidential Client	✓	✓	✓	N/A
	Sun Village Well No. 5 Confidential Client		✓	✓	N/A
	Traditions Well No. 3 Confidential Client		✓	✓	N/A

Electrical Design and Supervisory Control and Data Acquisition (SCADA) Programming

Power distribution, lighting, fire alarm systems, emergency and standby power systems, and power reliability studies are some of the areas of expertise BC possesses in the field of electrical engineering. Over the past seven years, our electrical engineers have provided reliable, safe, and cost-effective electrical designs at over 50 water treatment and distribution facilities, and wastewater treatment plants. Within the Phoenix office, we also have extensive SCADA design, implementation, and programming capabilities for both standard programmable logic controller (PLC) and distributed control systems. In each of these facilities our team of control systems engineers has successfully addressed the need for instrumentation and control integration of SCADA and distributed control systems. A sample of our electrical design and SCADA experience is shown in Table 3.4.

Table 3.4 BC's Electrical Design and SCADA Experience

Project Name, Client, & Location	Description
North East Booster Station, City of Avondale, AZ	Provided start-up assistance for the new RTU to monitor and control the new booster station. Provided programming to relay site information between the central control station or human machine interface (HMI), on-site Operator Interface Terminal (OIT) and on-site SRP RTU. Developed HMI and OIT screen descriptions, programmed the Modicon 386 PLC and Magelis OIT.
Arc Flash Hazard Analysis and Engineering Services, City of Tempe, AZ	Provided coordination, electrical engineering and field services at 43 remote sites and 3 plants. Updated existing electrical single-line diagrams (SLD) to match current installation of the power distribution system; updated electrical equipment with identification labeling to meet arc flash requirements and equipment tagging; updated Maintenance Program; trained staff for safe switching operating procedures.
Instrumentation and Control Inspection and Testing Service, City of Phoenix, AZ	Performed arc flash investigation and study for several collection and distribution remote facilities. Facilitated City workshop meetings to develop direction, scope and budget for the overall arc flash project. Enforced City standards on projects.
SCADA Security Upgrades, City of Peoria, AZ	Performed design-build to upgrade instrumentation for improved security at 35 remote water facilities. Developed security monitoring (door alarms, chlorine residual analyzers, flow metering) and electrical and SCADA equipment upgrades.
91st Avenue WWTP Support System Upgrades and Upgrade and Expansion, City of Phoenix, AZ	Designed I&C expansion hardware and integrated the field devices, analyzers, and instruments of these processes as an extension to the existing Plant Distributed Control System (DCS). Developed, programmed, and configured application control logic and configured graphic displays for the appropriate level of operator monitoring and control consistent with the City's control standards. Oversaw acceptance testing of this equipment, performed commissioning services, managed vendor training, provided system training and updated the City's Information Access System (IAS) for these upgrades. Replaced headworks local control panel with DCS compatible panel.
Cave Creek Road Water Facilities, City of Phoenix, AZ	Generated the application program for Reclaimed Water Booster Pump Station No. 7 RTU to communicate with the Cave Creek WTP via single mode fiber optic cable for data logging and display and for supervisory control download. Validated the application control functions of the potable and reclaimed water system control strategy.

Construction Management

BC's construction capabilities involve bid assistance, construction oversight, facility inspection, training, start-up and commissioning, and contractor management for a wide variety of municipal and private facilities. In order to answer the needs of alternative project delivery methods, we have structured our Construction Services Team to oversee and manage all construction delivery methods including typical design-bid-build, design-build, construction manager at risk (CMAR), and job order contracting (JOC). We have built our organization with the goal of providing comprehensive services to our clients during the entire project. We have the organization, people, and systems to provide the construction management services required for our clients' individual needs. Our team approach is extremely effective in maximizing each team member's expertise and productivity. Table 3.5 illustrates a sample of BC's construction management experience.

Table 3.5 BC's Construction Management Experience

Project Name, Client, Location	Construction Cost	Services				
		Construction Management	Inspection	Operations	Start-Up	Training
Well No. 12, City of Tempe, AZ	$450K	✓	✓	✓	✓	✓
Agua Fria Wells 4.3 and 4.4, Confidential Client, AZ	$750K	✓	✓	✓	✓	
Expansion Reservoir and Booster Pumps, Carefree Partners, Arizona Traditions, AZ	$1M	✓	✓	✓	✓	
Williams and Jomax Booster Stations, City of Peoria, AZ	$2.2M	✓	✓	✓	✓	✓
Deem Hills Booster Station, City of Phoenix, AZ	$3M	✓	✓	✓	✓	✓
Sonoran Mountain Ranch Booster Stations, Element Homes/City of Peoria, AZ	$5M	✓	✓	✓	✓	✓
Tolleson WWTP Effluent Quality Upgrades, City of Tolleson, AZ	$5M	✓	✓	✓	✓	✓
24th Street WTP Chemical Modifications, City of Phoenix, AZ	$6.4M	✓	✓	✓	✓	✓
91st Avenue WWTP Solids Thickening, City of Phoenix, AZ	$23M	✓	✓	✓	✓	✓
Southeast Water Reclamation Plant, City of Mesa, AZ	$24M	✓	✓	✓	✓	✓
Cave Creek Water Production Facilities, City of Phoenix, AZ	$34M	✓	✓	✓	✓	✓
Unlined Concrete Sewer Rehabilitation/Replacement, City of Phoenix/SROG, AZ	$50M	✓	✓			
Developer Project Oversight, City of Phoenix, AZ	$12.5M	✓	✓	✓	✓	✓

Team Qualifications

BC provides a local, full service team of experienced professional and technical people that offer a complete range of in-house services from the initial water resource planning through construction and start-up services. This complete, full-service project team will provide "one stop" shopping for services which greatly reduces the coordination efforts and overall project time. Our team is comprised of seasoned experts specializing in the fields of water distribution and wastewater systems, hydrogeological engineering, electrical design and SCADA, and construction management.

Table 3.6 BC's Key Personnel Qualifications

Key Personnel Name, Title, Registrations and/or Certifications	Professional Memberships	Categories of Work				
		Water Distribution Systems	Wastewater Systems	Hydrogeological Engineering	Electrical Design & SCADA	Construction Management
Ron Ablin, P.E. **VP, Infrastructure** PE #27807, AZ	American Public Works Association Water Environment Federation Arizona Water Pollution and Control Association	✓	✓			
Michael Bostic, R.G. **Supervising Geologist/ Hydrogeologist** RG #35021, AZ	Arizona Hydrological Society			✓		
Brent Cain **Hydrologist** EVS Training				✓		
Ken Chandler, P.E. **Managing Engineer** PE #36697, AZ CSE #35940, AZ	Instrument Society of America International Association of Electrical Inspectors				✓	
Steve Davidson, P.E. **Supervising Engineer** PE #81508, AZ	American Society of Heating, Refrigerating and Air Conditioning Engineers Water Environment Federation	✓	✓			
Brandon Erndt **Controls Systems Manager**	Institute for Electrical and Electronics Engineers Instrumentation, Systems and Automation Society Chandler-Gilbert Community College Automated Manufacturing System Technical Advisory Council				✓	✓
Jim Fordyce **Supervising Engineer**	International Association of Electrical Inspectors Instrumentation, Systems and Automation Society				✓	
Andy Fuchs **Electrical Inspector** GE Relay School Cummins Power Generation School Estimatic Course Illuminating Engineering Society School					✓	✓

Table 6 Continued - BC's Key Personnel Qualifications

Key Personnel Name, Title, Registrations and/or Certifications	Professional Memberships	Categories of Work				
		Water Distribution Systems	Wastewater Systems	Hydrogeological Engineering	Electrical Design & SCADA	Construction Management
Jeff Littell **Principal Geologist** Mine Safety and Health Act OSHA 40-Hour Hazardous Waste Operations and Emergency Response	Arizona Hydrological Society Association for Environmental Health and Sciences Association of State and Territorial Solid Waste Management Officials Association of Environmental Professionals National Groundwater Association			✓		
Randy Mills **I&C Inspector** Journeyman Wireman I.B.E.W. Local 640 Residential Wireman, I.B.E.W. Local 640	Instrumentation, Systems, and Automation Society International Brotherhood of Electrical Workers Local 640				✓	✓
Gary Newman, P.E. **VP Wastewater** PE #37552, AZ	Water Environment Federation	✓	✓			
Mark Nicholls, R.G. **Groundwater Resources Manager** RG # 39869, AZ				✓		
Hugh Pace, P.E. **Chief Electrical Engineer** PE #20244, AZ IBEW Licensed Journeyman Electrician & Electrical Supervisor Control System Engineer, #10060, OR	Industrial Computing Society Institute of Electrical and Electronic Engineers Instrument Society of America International Association of Electrical Inspectors International Brotherhood of Electrical Workers Local 191				✓	
Jim Page **Construction Inspector** Mechanical Journeyman Gas Fitter Cross-Connection Control General Tester – ASSETT and AWWA Plumbing Journeyman					✓	✓
Mark Robinson, P.E. **Associate Principal Engineer** PE #35172, AZ	American Water Works Association Water Environment Federation Arizona Water and Pollution Control Association Toastmasters International	✓	✓			

Table 6 Continued - BC's Key Personnel Qualifications

Key Personnel Name, Title, Registrations and/or Certifications	Professional Memberships	Categories of Work				
		Water Distribution Systems	Wastewater Systems	Hydrogeological Engineering	Electrical Design & SCADA	Construction Management
Karen Schwab, R.G. **Principal Hydrogeologist** RG #33268, AZ OSHA Mine Safety and Health Administration (MSHA) HazMat Supervisor	Member of the Society for Mining, Metallurgy, and Exploration Arizona Hydrological Society			✓		
Jarrell Southall **Supervising Scientist** OSHA Hazardous Waste Operations/Emergency Response Training MSHA Newly Employed Experienced Miner Confined Space Entry Supervisor Health and Safety	Arizona Chamber of Commerce Environmental Committee Arizona Association of Industries Science and Environmental Committee			✓		
Harold Thomas, Jr. **Water Resources Practice Leader** Water Resources Planning	City of Phoenix Water and Wastewater Rate Advisory Committee, Past Chair American Membrane Technology Association American Society of Civil Engineers American Water Works Association Arizona Water Pollution Control Association Water Reuse Association Western Coalition of Arid States WESTMARC, WESTCAPS, CASS	✓	✓	✓		
Randy Tirpak **Construction Manager**						✓
Craig Tweed **Construction Manager**						✓

Experience Summary

Ron Ablin has 18 years of experience as a project engineer and project manager in the study, design, and construction of municipal projects. His experience includes a variety of projects in water, wastewater, and hydraulics.

Education

B.S., Civil Engineering, Pennsylvania State University, 1989

Registration

Professional Engineer 27807, Arizona, 1994

Professional Engineer 14135, Nevada, 1999

Experience

18 years

Joined Firm

1997

Relevant Experience

- *Biosolids Classification and Marketability Analysis, Phoenix, Arizona*
- *Multiple Interceptor Designs, Mesa, Scottsdale, Chandler, and Tempe, Arizona*
- *Wastewater Collection System Model, Phoenix, Arizona*

Pyramid Peak Water Treatment Plant Transmission Lines/Jomax Booster Station Design, City of Peoria, Arizona

Project Manager. Designing an in-line booster pump station, 7.5 miles of 30-inch diameter transmission main, and an in-line pressure reducing/pump back station for the City of Peoria. This project will provide treated surface water from the Pyramid Peak Water Treatment Plant (WTP) to Pressure Zones 3 and 4 in a rapidly growing area in northern Peoria. The in-line pump station will be designed with an initial capacity of 6 million gallons per day (mgd) under average day conditions with the capability of providing 9 mgd under peak conditions. In addition, the site will be equipped to efficiently allow for future expansion up to an ultimate capacity of 18 mgd. The station will be designed to operate without the benefit of storage under the initial conditions by utilizing variable frequency drive pumps. The facility includes booster pumps, surge tank, SCADA, and other associated features. Construction period services, start-up, training, and related operational services are included in the Project.

Public Supply Wells 287, 288, 289, 290, 291, 292, 293, and 294, City of Phoenix, Arizona

Project Manager. Responsible for the design of eight large public supply wells in North Phoenix, Arizona.

Salt River Project Well Outfitting, City of Chandler, Arizona

Project Manager. Fast-tracked preparation of construction documents for outfitting three new Salt River Project (SRP) production wells to produce water for the City of Chandler. The project included the installation of new supply and distribution water lines, tablet chlorination, backup generators, system control and integration, and extensive coordination with the work being conducted concurrently by SRP.

Cave Creek Road Facilities Booster Pump Stations, City of Phoenix, Arizona

Project Manager. Three-month fast-tracked design of four potable water pumping stations and one reclaimed water pumping station for the City of Phoenix. The project consisted of high capacity, variable speed, in-line booster pumps to deliver water through multiple pressure zones and pressure reduction stations to allow alternative gravity flow operation from the upper to lower zones within the City of Phoenix. The booster pump stations have an ultimate capacity ranging from 16 to 60 mgd; estimated construction cost was $14.5 million.

Cave Creek Road Facilities Construction and Program Management, City of Phoenix, Arizona

Project Manager. Construction management for the Cave Creek Road Facilities Pump Stations and program management for an estimated $47 million in construction that includes seven large diameter pipeline projects to connect the pump stations. This effort included acting as the City's representative to coordinate and oversee the project development for eight projects awarded to six separate contractors.

Water Plant 5/Well 4C, Citizens Water Resources, Sun City, Arizona

Project Manager. Preparation of construction documents to outfit an existing well, including submersible pump, gas chlorinations, electrical and instrumentation controls, discharge piping, and associated mechanical features. A field investigation was performed to evaluate the condition of the existing well casing, which ultimately required repair in three locations. Mechanical equipment, including the pumps, was salvaged from an out-of-service well site and reused at Well 4C.

Wells 6 and 7 at the Village at Surprise, Citizens Water Resources, Surprise, Arizona

Project Manager. Preparation of construction documents for two new potable well facilities for a new residential development in Surprise, Arizona. Each facility included a new deep well submersible pump, hydropnuematic tank, standby generator, SCADA control, perimeter wall, and associated mechanical features.

Sports Complex Well, Reservoir, and Booster Station, City of Peoria, Arizona

Project Manager. Fast-track design and construction of a 1,000-gallons per minute (gpm) production well, two 1-million gallon storage tanks, on-site chlorine disinfection, a 1,700-gpm booster pump station, SCADA, and one mile of transmission main. The project included a complete site analysis including well siting and impact, hydrogeology, and well impact and spacing. The facility was designed to meet the additional potable water and fire flow requirements.

Rancho Santa Fe Reservoir and Booster Pump Station, City of Avondale, Arizona

Project Manager. Responsible for the development of a new water production facility for the City of Avondale. Project included the renovation of three existing irrigation wells for potable water use and the construction of a 1-mg reservoir and 4,000-gpm pump station to meet the City's increasing water demands.

Chlorine Residual Study, City of Mesa, Arizona

Project Engineer. Prepared a water quality model for the City of Mesa to determine chlorine residual in the City's distribution system. The water quality model was used to determine the areas of low residual in the distribution system and the best methods for maintaining adequate chlorine residual.

Experience Summary

Michael Bostic has practiced geology and hydrogeology for 26 years in the Midwest and southwest United States. He has participated in projects in Arizona, which included the hydrogeologic characterization of mining facilities; exploration for groundwater resources; recharge siting investigations; the design and installation of water supply wells and ASR wells; and the evaluation of fractured ore deposits for in-situ mining applications.

As a geologist in the petroleum industry from 1978 to 1990, Mr. Bostic supervised oil exploration, development, and productions projects. He continually works with well service specialists in the industry to apply state-of-the-art techniques for drilling, completion, and well evaluation projects.

His experience includes well drilling and completion, well testing, packer testing, interpretation of cased and open hole geophysical logs, drillstem test data, reservoir stimulation including acidizing and fracturing techniques, and production well and ASR well design.

Education

B.S., Geology, West Virginia University

Registration

Registered Geologist, No. 35021, Arizona, 2000

Experience

26 years

Joined Firm

1994

Tramonto Recharge Facility, City of Phoenix, Arizona

Project Manager. Provided hydrogeological services for a feasibility study, permitting, design, installation, and testing of a vadose zone recharge facility for the City of Phoenix. The facility consists of three vadose zone recharge wells and a monitoring well. The facility was constructed to recharge treated CAP water. A full-scale Constructed Underground Storage Facility (USF) and Water Storage (WS) permit was obtained from the ADWR.

Aquifer Storage and Recovery (ASR) Wells, City of Chandler, Arizona

Project Manager. Conducted a program involving the drilling, geophysical logging and packer testing of seven (7) exploratory borings for the purpose of siting ASR wells in Chandler, Arizona. Three sites were evaluated with a minimum of two borings drilled at each site, spaced to characterize the lateral continuity or discontinuity of coarse-grained intervals. Temporary test wells were installed in selected borings to conduct injection tests and spinner flow meter surveys to identify zones of recharge. Zonal groundwater samples were collected from each boring to assess ambient water quality conditions. The information was used to characterize hydrogeologic conditions at each site, differentiate hydrologic units and determine the feasibility of installing ASR wells and the ASR well design.

Recharge Feasibility Assessment, Central Arizona Water Conservation District (CAWCD), Queen Creek, Arizona

Project Hydrogeologist. Providing technical oversight for a project to evaluate the potential use of a former gravel pit for a spreading basin recharge facility. The field investigation included a drilling program with shallow (20 to 50 feet deep), intermediate (approximately 150 feet deep), and deep (560 feet) borings; groundwater sampling; split-spoon sampling for sieve analysis and laboratory permeability tests; and single-ring infiltrometer testing.

Public Supply Wells, City of Scottsdale Wells 123 and 141, Scottsdale, Arizona

Project Manager. Responsible for the design, installation, and testing of a 1,260-foot deep, 18-inch diameter and a 1,490-foot deep, 16-inch diameter public supply well for the City of Scottsdale. Prepared well spacing/well impact studies, developed technical specifications, and provided bidding services. Coordinated contractor activities, supervised field tasks (drilling, logging, well installation, testing, and development), analyzed aquifer test and spinner flowmeter data, and provided a recommended pump setting depth and discharge rate for each well.

Public Supply Well, City of Phoenix Well 296, Phoenix, Arizona

Project Manager. Responsible for the design, installation, and testing of a 1,450-foot deep, 18-inch diameter public supply well for the City of Phoenix. Developed technical specifications and conducted pre-bid and pre-construction meetings. Coordinated contractor activities, supervised field tasks, and analyzed aquifer test and spinner flowmeter data and provided a recommended pump setting depth and discharge rate for the well.

Public Supply Well, City of Phoenix Well 297, Phoenix, Arizona

Project Manager. Responsible for the design, installation, and testing of a public supply well for the City of Phoenix. The project involves preparation of a well spacing/well impact study, development of technical specifications and provided bidding services, coordinating contractor activities, supervise field tasks (drilling, logging, well installation, testing and development), and analyze aquifer test and spinner flowmeter data and provide a recommended pump setting depth and discharge rate for the well.

Public Supply Wells, City of Phoenix Wells 287, 288, and 289, Phoenix, Arizona

Project Hydrogeologist. Responsible for the design, installation, and testing of three (1,500 to 1,600-foot deep, 18-inch diameter) public supply wells in north Phoenix, Arizona. Coordinated contractor activities, prepared lithologic logs and analyzed geophysical logs and sieve analysis of cuttings from pilot borings. Collected and analyzed zonal groundwater samples. Based on these data, prepared a well design for each of the public supply wells.

Tumbleweed Park Recharge Facility, City of Chandler, Arizona

Project Hydrogeologist. Developed technical specifications and provided technical oversight for a program involving the drilling and geophysical logging of an exploratory boring for the purpose of designing an ASR well. Based on the exploratory boring analysis, developed the ASR well design and technical specifications for well drilling, installation and testing operations.

R. BRENT CAIN

Experience Summary

Mr. Brent Cain has over 9 years of experience in hydrology with an emphasis on groundwater flow modeling, groundwater resource investigations, aquifer testing, contaminant/solute fate and transport, well installation, GIS applications, and field and modeling project management.

Education

Candidate for Ph.D., Hydrology and Water Resources, University of Arizona, 2002

B.S., Geology, Furman University, South Carolina, 1994

Experience

9 years

Joined Firm

2000

Town of Buckeye, Arizona, Hassayampa Sub-basin Hydrologic Study and Numerical Model

Modeler. Ongoing project. Developing conceptual and numerical groundwater flow model to address future development, water supply, and assured water supply certification in a newly developed basin. Results from the study will be adopted and used by the Arizona Department of Water Resources (ADWR) for future hydrologic assessments of the western Phoenix Active Management Area.

City of Chandler, Arizona, Alamosa Well Diagnostic Model

Lead Modeler. Developed three-dimensional, conceptual and numerical groundwater flow model to address migration of industrial recharge water to potential municipal production well locations.

City of Chandler, Arizona, Lindsay Road Diagnostic Model

Lead Modeler. Ongoing Project. Developing three-dimensional, conceptual and numerical groundwater flow model to address the impact of municipal well pumping in a confined, multi-aquifer system. Coupling groundwater model with the use of advanced, analytical well solutions to assess hydraulic properties of local and regional confining units. Aquifer testing and modeling methodology has been approved by the Arizona Department of Water Resources (ADWR).

Town of Oro Valley Water Utility, Arizona, Assured Water Supply Certification

Lead Modeler. Developed conceptual and numerical groundwater flow model to address assured water supply certification, expansion of well field, and regional groundwater pumping issues. This analysis has been subsequently approved by the Arizona Department of Water Resources (ADWR).

Town of Oro Valley Water Utility, Arizona, Groundwater Action Plan

Lead Modeler. Refined conceptual and numerical groundwater flow model to address well field expansion, siting of new wells, drought sensitivity, pumping interferences, and current status of aquifer reserves and hydraulic properties.

Town of Oro Valley Water Utility, Arizona, Oro Valley Sub-basin Drought Sensitivity Study and Well Field Assessment

Lead Modeler. Ongoing project. Refining conceptual and numerical groundwater flow model to address effects of extended drought conditions,

magnitude of basin recharge, siting of future well locations, and impact of well field pumping using analytical well solutions.

City of Scottsdale, Arizona, Regional Groundwater Flow Model
Modeler. Refined an outdated, three dimensional numerical groundwater model for the Scottsdale basin. Developed conceptual groundwater model for the basin digitally using GIS. Incorporated multiple modeling efforts from various entities into the final model.

City of Bisbee, Arizona, Hydrologic Modeling of Reclaimed Water
Lead Modeler. Developed numerical model to simulate flow, infiltration, and evaporation of reclaimed water discharged into an ephemeral, desert wash. Integrated field and literature derived data into the conceptual model of the study area using GIS.

Town of Oro Valley Water Utility, Arizona, Water Supply Well E-8
Staff Geologist. Provided well construction and management services for a water supply well for the Town of Oro Valley Water Utility, Arizona. Conducted well impact/spacing analyses and aquifer testing.

Town of Oro Valley Water Utility, Arizona, Water Supply Wells E-5 and E-6
Staff Geologist. Provided well construction and management services for two water supply wells for the Town of Oro Valley Water Utility, Arizona. Other work included conducting well impact/spacing analyses and test pumping.

Carson City Utility Department, Nevada, Sunset Park and Fuji Park Water Supply Wells
Staff Geologist. Provided well construction and management services for two water supply wells for the Carson City Utility Department, Arizona. Other work included interpretation of site lithologies, analysis of geophysical logs, refinement of well designs, supervision of well development and aquifer testing analyses.

Arizona Department of Environmental Quality, City of Willcox Site Remediation
Lead Modeler. Conducted regional hydrology study, developed conceptual and numerical groundwater model for basin and sites, and interpreted multi-phase flow conditions.

Arizona Department of Environmental Quality, Rock Springs Site Remediation
Staff Hydrologist/Lead Modeler. Designed and conducted aquifer tests and developed numerical groundwater and mass transport model to simulate remedial options.

KENNETH W. CHANDLER, P.E.

Experience Summary

Ken Chandler has nearly ten years of experience designing electrical and instrumentation and control (I&C) systems for water and wastewater projects. Designs include workshops, design reports, retrofit and modification investigations, control descriptions, maintenance-of-plant-operations planning to minimize or eliminate process outages, product selection, and specifications. Design drawings include process and instrumentation diagrams (P&IDs), 480 volt load summaries, panel schedules, single line and control single line diagrams, plans, and schematics. Associated construction services include submittal review, inspection, startup assistance, and troubleshooting. Previous experience included 15 years in I&C product and system selection, application, detailed design, submittals, procurement, configuration, PLC and SCADA programming, start-up, and training with a local water/wastewater control systems integrator.

Education

B.S., Electronics Engineering Technology, Devry, 1980

Registration

Professional Electrical Engineer No. 18032, Nevada, 2006

Professional Electrical Engineer No. 36697, Arizona, 2001

Professional Control Systems Engineer No. 35940, Arizona, 2001

Experience

24 years

Joined Firm

1998

Relevant Expertise

- *Electrical Design*
- *I&C Design*
- *PLC and SCADA System Design*
- *Construction Inspection*
- *Process Startup and Troubleshooting*
- *Asset Management Assessments*
- *Design and startup of small to large wastewater treatment plant projects ranging from less than 10 MGD to over 150 MGD.*
- *Design and startup of solids handling facilities focusing on sludge thickening and dewatering, and anaerobic digestion.*
- *Design and startup of small to large potable water pump stations.*

Instrumentation and Control Inspection and Testing Service, City of Phoenix, Arizona.

Instrumentation and Controls Technical Advisor. Performed in this capacity since July 2006 at the Union Hills Water Treatment Plant and the Cave Creek Water Reclamation Facility. Responsibilities at the plants have included technical oversight for design review, inspection services, testing services and support for electrical, instrumentation and control design and construction projects as well as job order contracts (JOC) projects to verify compliance with the City's established instrumentation and controls standards.

Remote Facilities SCADA/Security Enhancements Phase 1 & 2, City of Peoria, Arizona

Technical Advisor. Two year project includes physical site security improvements, upgrading of the programming language for 37 remote facility Remote Telemetry Unit (RTU), creation of operations, Programmable Logic Controller (PLC) and SCADA Human Machine Interface (HMI) standards, reprogramming of all remote facility RTU's and central SCADA server to meet new standards.

Greenfield/South Water Reclamation Plant Phase II Expansion, City of Mesa, Arizona

Lead I&C Designer. Solids processes include: A two-stage hydrogen sulfide odor scrubber including fans, pumps, and continuous chemical metering pump control. Anaerobic digesters, sludge thickening and dewatering centrifuges, related polymer feed systems, and sludge pumps. Boilers and candlestick flares. Designed electrical and I&C, including Modicon Quantum PLC SCADA. This was a Construction Manager at Risk project.

P2-90 WWTP Secondary Treatment Upgrade, Orange County Sanitation District (OCSD), California

Instrumentation and Controls QA/QC Engineer. Provided I&C QA/QC review for the 60 mgd expansion of an existing facility.

91st Avenue WWTP Unified Plant (UP05) Expansion Program, City of Phoenix, Arizona

Lead Electrical and I&C Engineer. Expansion of existing headworks, grit handling facilities, and DCS. Preliminary Treatment processes include: Addition of Bar Screen, motorized gates, grit removal system, and grit washer. Designed electrical and I&C, and planned maintenance-of-plant-operations to minimize or workaround process outages. This is a Construction Manager at Risk project.

91st Avenue WWTP Solids Thickening Facilities, City of Phoenix, Arizona

Electrical and I&C Engineer. Processes include: A two-stage hydrogen sulfide odor scrubber including fans, pumps, and continuous chemical metering pump control. Sludge thickening centrifuges and related polymer feed systems, waste-activated sludge, and thickened sludge pumps. Designed electrical and I&C, programmed existing GE/Opto22 DCS, inspected construction, and assisted with process startup.

91st Avenue WWTP Support Systems Upgrade, City of Phoenix, Arizona

Electrical and I&C Engineer. Replaced equipment for compliance with Class I Division 1 and 2 Group D hazardous environments per NFPA 820. Process includes: Pump motors and feeders, raceways, and instrumentation for 16 anaerobic digesters. Designed electrical and I&C, and inspected construction.

91st Avenue WWTP Upgrade and Expansion, City of Phoenix, Arizona

Electrical and I&C Engineer. Processes included the following: A two-stage hydrogen sulfide odor scrubber including a fan, pumps, and continuous chemical metering pump control. Methanol storage and pumping system includes six chemical metering pumps. Ferric chloride metering pumps were added to existing headworks process. Designed electrical and instrumentation, programmed existing GE DCS, inspected construction, and assisted with process startup.

Tolleson WWTP Solids Handling Improvements, City of Tolleson, Arizona

Lead I&C Engineer. Design in process. Process include primary sludge pump replacement, rotary drum thickeners, anaerobic digester heating and mixing replacement, waste gas flare incineration, sludge belt filter press and related polymer feed systems and sludge pumps, and carbon tower odor control. Designed I&C and expansion of existing Allen-Bradley PLC5 system.

Experience Summary

Steve Davidson has over 34 years of experience designing, operating, and constructing environmental control systems for industrial and municipal facilities. He serves as a senior odor control expert, and has been involved in over 100 odor control and air emissions projects, in various capacities. He has detailed and extensive experience in air emission control, sulfide and odor control chemistry, wastewater treatment, HVAC and energy conservation, and air handling systems. Mr. Davidson served on the WEF Volatile Organic Compounds (VOCs) Task Force.

Education

M.B.A., University of Colorado, 1974

B.S., Chemical Engineering, University of Colorado, 1972

Registration

Professional Engineer No. 81508, Arizona, 1997

Professional Engineer 14997, Colorado, 1977

Training/Certification

Qualified Environmental Professional (QEP), Institute of Professional Environmental Practice

Experience

34 years

Joined Firm

1982

City of Tolleson WWTP Odor Evaluation, Tolleson, Arizona

Project Manager. Responsible for a Plant-wide odor evaluation to address increasing odor complaints arising from encroachment of residential areas near the Plant. Work consisted of winter and summer air and gas phase sampling throughout the facility, and air dispersion modeling. The work included a comprehensive analysis of odor control options, including chemical, air phase, and process changes to reduce sulfide and odor production. Costs of various options were developed to enable budgeting and phasing of projects.

Roger Road Headworks Enclosure and Odor Control Evaluation, Pima County, Tucson, Arizona.

Project Manager. Responsible for the conceptual design study of a new structure to enclose an existing outdoor headworks at the Roger Rd. Wastewater Treatment Plant. The evaluation included an analysis of building enclosure options and development of four odor control technology options. Work included a detailed analysis of electrical upgrades and construction staging while maintaining operation. The analysis also included detailed costing of alternatives and life cycle cost analysis of each odor control option.

Southern Ave. Interceptor Odor Control Study and Conceptual Treatment Design, Phoenix, Arizona

Project Manager. Conducted a comprehensive evaluation of odor and sulfide conditions along a 15-mile length of the Southern Avenue Interceptor. The project included a comprehensive odor and wastewater characterization, sewer headspace pressure analysis, analysis and testing of chemical sulfide controls, testing foul extraction of the sewer headspace, evaluation of foul air treatment alternatives, and conceptual design of odor abatement stations.

91st Avenue Wastewater Treatment Plant (WWTP) Odor Control Facilities, Phoenix, Arizona

Project Manager. Responsible for the design of $10 million of foul air containment and treatment facilities at the 190-mgd 91st Avenue WWTP. Project includes upstream chemical treatment evaluation and chemical addition facilities, 60,000 square feet of new tank and channel cover systems in the WWTP headworks processes, and treatment through two dual stage scrubbers. Systems also include a new two-stage scrubber handling highly

concentrated (up to 500 ppm H_2S) from the Plant's Solids Handling Facility.

Southeast Water Reclamation Plant (SEWRP) Odor Control Systems, Mesa, Arizona

Project Engineer. Responsible for the evaluation and design of odor control measures for the SEWRP, which is housed in the center of the Superstition Springs Golf Course. Primary sedimentation basins and both aeration basins are covered and the foul air is treated in multistage odor scrubbers. Covered secondary clarifiers are ventilated to an activated carbon odor adsorber. Ferrous chloride addition system was designed to pre-treat sludge returned to the Baseline Road Interceptor sewer line.

Randolph Park Water Reclamation Facility Odor Control Systems, Pima County, Tucson, Arizona

Project Engineer. Responsible for the evaluation and design of odor control systems at the Randolph Park Water Reclamation Facility (WRF), and associated influent pumping station. The facility is a 3-mgd membrane treatment facility that provides A+ reuse water for Randolph Park Golf Course and other Pima County facilities. Being located in the center of Tucson, this project required extremely effective odor control to be achieved with very limited space. Two, packaged multistage scrubbers are utilized to insure the Plant and lift station are odor free.

Greenfield Water Reclamation Plant, Phase 2 Expansion, Solids Treatment Processes, City of Mesa, Arizona

Odor System and HVAC Design Manager. Responsible for the design and implementation of the solids handling odor control systems. Project included a new, 40,000 cfm, two stage wet chemical scrubber system and chemical handling facility for centrifuge and sludge handling equipment odor control. NFPA classification analyses were developed in this work. HVAC design included multiple make-up air systems for the solids building, digester galleries, and boiler facility; and new air conditioning and air filtration systems for new control centers and electrical rooms.

Littleton/Englewood Wastewater Treatment Plant Upgrade, Colorado

Odor and HVAC Systems Design Manager. Over the past 15 years, completed all odor and HVAC system designs for 3 major plant upgrades. Significant project elements include foul air collection and treatment involving all major process areas using chemical wet scrubbers (2 systems), trickling filter ventilation with headworks foul air, foul air conveyance from off-site interceptor siphons to the plant odor systems, and two nitrifying trickling filters treating DAFT and solids handling facility foul air. All systems underwent extensive evaluation and testing after completion, and were the basis for technical papers authored by Mr. Davidson.

Experience Summary

James Fordyce has 20 years of experience in designing, inspecting, estimating and supervising electrical construction projects, installing and wiring electrical equipment, and preparing submittals, change orders, and shop drawings for various private and municipal projects.

Education

B.S, Electrical Engineering, Kennedy-Western University

Experience

20 years

Joined Firm

2000

Instrumentation and Control Inspection and Testing Service, City of Phoenix, Arizona.

Project Manager/Project Designer. Performed in this capacity since July 2004 at the Union Hills Water Treatment Plant and the Cave Creek Water Reclamation Facility. Responsibilities at the plants have included design review, inspection services, testing services and support for electrical, instrumentation and control design and construction projects as well as job order contracts (JOC) projects to verify compliance with the City's established instrumentation and controls standards.

Provides troubleshooting, design and engineering services to the plant's electrical, instrumentation and control staff on initiated tasks to provide engineered solutions to problems encountered in the daily operation of the facilities.

Program Management Arc Flash Analysis and Engineering Services, City of Phoenix, Arizona.

Project Manager. Project involves the management of seven consulting firms to perform arc flash analysis and engineering services at seven wastewater and water treatment plants, all remote collection facilities and all remote distribution facilities. Engineering services include condition assessment of electrical distribution equipment and the evaluation of existing grounding systems.

Responibilities include the generation of the initial study to create the project and the creation of stadardized procedures, document and engineering tools to be used by all participants in the project. These were created in workshops with COP staff to make the project more efficient and to establish baselines to manage and evaluate performance during the project. Mr. Fordyce will manage BC staff to provide management all aspects of the project tasks to include field research/data collection, load calculations of all power distribution equipment, condition assessment of all power distribution equipment, the development of the required short circuit analysis, protective device coordination studies, arc flash analysis, required labeling of the equipment and the evaluation and testing of the existing facility grounding systems.

Additional tasks include QA/QC of the deliverables, coordination of project tasks with COP facilities and staff, scheduling of tasks and facilities and review of tea, progress to evaluate earned value of the 12 months $10,000,000 project.

Remote Facilities SCADA/Security Enhancements Phase 1 & 2, City of Peoria, Arizona

Project Manager. Two year project includes physical site security improvements, upgrading of the programming language for 37 remote facility Remote Telemetry Unit (RTU), creation of operations, Programmable Logic Controller (PLC) and SCADA Human Machine Interface (HMI) standards, reprogramming of all remote facility RTU's and central SCADA server to meet new standards.

Various Plants, City of Phoenix, Arizona

Electrical I&C Designer. Performed as the primary electrical/ instrumentations & control designer on the following projects: Reach 11 Reclaimed Water Main Remote Chlorination, 24th Street Water Treatment Plant (WTP) Chemical Systems Modifications, Tramonto Recharge Facilities, Well 296.

Inspector. Performed as electrical, instrumentation & control inspector on the following projects: 24th Street WTP Solids Handling Facility, I-17 Corridor Infrastructure Improvements, SROG East Economy Parking Odor Control System, Reach 11 Reclaimed Water Main Remote Chlorination, 24th Street WTP Chemical Systems Modifications, Tramonto Recharge Facilities.

Project Manager. Instrumentation and Controls Inspection and Testing Services, Union Hills WTP, Cave Creek Water Reclamation Facility. Project includes the development and enforcement of electrical, instrumentation and design standards for the City of Phoenix.

P2-90 WWTP Secondary Treatment Upgrade, Orange County Sanitation District (OCSD), California

Instrumentation and Controls Designer. Provided I&C design support for the 60 mgd expansion of an existing facility.

City of Mesa, Mesa, Arizona

Electical Designer/Inspector. Performed as the primary electrical/ instrumentations & control designer and EI&C construction inspector on the following projects: Alma School/Guadalupe Sewage Lift Station, Lindsay Road BPS Switchgear Improvements, Star Valley Sewage Lift Station, Hermosa Vista Sewage Lift Station, 101 and Baseline Interceptor.

SCADA Maintenance and Support

Project Manager. Annual contract to provide on call programming and design services as well as coordinate and manage the electrical subcontractor services.

Electrical Designer. Performed as the primary electrical/ instrumentations & control designer on the following projects: Greenway WTP Secondary Security Upgrades. Project included evaluation of central plant access management system, adding closed circuit television (CCTV) cameras, adding motorized gates and controlled personnel gates, integrating existing cameras and security equipment.

Experience Summary

Andrew Fuchs is an accomplished engineer and project manager with 32 years of experience in industrial and utility projects. Mr. Fuchs has proven leadership, communication and organizational skills in project management, electrical engineering and design, substation design, relay protection and coordination, start-up and commissioning, and calculation programming. As Project Manager, Mr. Fuchs has effectively taken over projects in trouble and commended by the client for project performance.

Education

B.S., Industrial Technology, Southern Illinois University, 1971

Electrical Engineering, University of Houston

Electrical Technology, San Jacinto College

Petroleum Technology, Oklahoma State University

Relay Protection and Coordination, University of Idaho

Power Systems Analysis, Arizona State University

Training and Certification

Project Management Institute, 2000e40-501 Applied Framework

GE Relay School, Malven, Pennsylvania

Cummins Power Generation School, Minneapolis, Minnesota

Estimatic Corporation, Estimating Course, Chicago, Illinois

Illuminating Engineering Society School, Houston, Texas

Private Pilot, Instrument Pilot, Multi-engine and Commercial Ratings

Scuba Certified, Open Water and Rescue Diver

Experience

32 years

Joined Firm

2001

Water and Wastewater Treatment Projects

Greenfield Road Water Reclamation Facility, Town of Gilbert, City of Mesa and Queen Creek. Field Services

Support of field engineering efforts and inspection services for wastewater reclamation facility.

24th Street Water Treatment Plant Solids Handling Facility City of Phoenix, Arizona

Field Services. Support of field engineering efforts and inspection services for water treatment projects.

Neely Wastewater Reclamation Facility, Town of Gilbert, Arizona

Field Services. Support of field engineering efforts and inspection services for wastewater reclamation facility.

Odor Control System, Sub-Regional Operating Group Sewer Relocation, City of Phoenix, Arizona

Field Services. Support of field engineering effort and inspection services for odor control unit.

Pacific Gas and Electric Harquahala Well No. 1

Field Services. Support of field engineering effort, inspection services, and start-up of deep well water supply for the Harquahala Power Station.

Performed technical and constructability review, and estimating of electrical and instrumentation design on the following projects:

- 24TH Street Treatment Plant Chemical Systems, City of Phoenix
- Fabens 1.2 MGD Wastewater Treatment Plant, City of El Paso
- Fabens Water Supply System, City of El Paso
- Bustamante Wastewater Treatment Digester Expansion, City of El Paso
- Gold Canyon Ranch Wastewater Treatment Plant and Quintero Golf Course Water Supply
- Neely Wastewater Reclamation Facility, Town of Gilbert

Diamond Engineering

Electrical Project Coordinator. Project management and conceptual design of wastewater treatment, water treatment, lift stations and standby generation facilities. Research of green energy projects.

Utility, Nuclear and Petrochemical Projects

Three Phase Engineering

Project Engineer. Design of utility and emergency backup systems for two Motorola facilities and SRP.

TOR Engineering

Senior Electrical Engineer. Proposal, estimating, and design of industrial, commercial, residential, and institutional facilities. Engineering and project management support for the Citizen Energy Services distribution system upgrade. Replacement of bad order U/G cable for Salt River Project. Developed marketing program to diversify TOR Engineering's profile and client base.

Stone and Webster Engineering Corporation

Senior Manager. Managed electrical engineering group developing the engineering team from eight engineers to over fifty engineers and managers. Project Manager for DCS retrofit project, crude oil pump stations and the conversion of an airport bulk storage facility from 50 to 60 Hertz. Organized power station modifications of relaying schemes, terminations and instrumentation.

William Brothers Engineering Company

Senior Electrical Engineer. Interfaced with client, international lending agencies, contractor and national power company to ensure a quality electrical installation and scheduled project completion. Developed and administered a training course to the Client's personnel. Lead engineer for the design of a gas/oil recovery platform with total responsibility for electrical design and specifications.

Brown and Root, Lummus, Fisk Electric

Design Engineer and Electrician. Comprehensive design and installation for an olefin and PVC plant, copper smelter, and hospital.

Experience Summary

Jeff Littell has 13 years of experience and in-depth knowledge in environmental regulatory compliance, strategic environmental management and hydrogeology. He also has experience negotiating with state environmental agencies in Arizona, Iowa, Kansas, Missouri, Nebraska and Oklahoma and the U.S. Environmental Protection Agency (USEPA), Region IX. Mr. Littell has personally conducted and overseen a regulatory program that prepared and evaluated numerous environmental investigative and remedial activities for technically and legally complex contaminated sites. He specializes in federal and state Superfund programs, Resource Conservation and Recovery Act (RCRA) and leaking underground storage tank (LUST) investigative and remedial activities, and has also conducted a number of Aquifer Protection Permitting and National/Arizona Pollution Discharge Elimination System permitting activities. Mr. Littell has performed regulatory program development for the State of Arizona and the USEPA, including preparing, overseeing and training staff in environmental regulations. He has served as the State of Arizona's hazardous waste pre-remedial program manager, at which time he developed the regulatory program's quality assurance program plan and oversaw the development of the Water Quality Assurance Revolving Fund (WQARF or state Superfund) Eligibility and Evaluation model (similar to the federal Superfund Hazardous Ranking System).

Education

B.S. Geology, Kansas State University, 1994

Registration

8- Hour Mine Safety and Health Act certificate

OSHA 40-Hour Hazardous Waste Operations and Emergency Response Certificate

Experience

13 years

Joined Firm

2005

Confidential Client, Maricopa County, Arizona

Senior Regulatory Expert. Assisted client negotiate with the Arizona Department of Environmental Quality (ADEQ) and develop a workable agreement under RCRA, following allegations of releases of hazardous waste at client's facility. Mr. Littell also assisted the client with permitting and compliance concerns under several regulatory jurisdictions. Working closely with facility environmental and safety personnel, periodically evaluated facility operations and provided recommendations to help the facility comply with regulations pertaining to hazardous waste management, air quality, water quality, wastewater discharge, stormwater discharge, hazardous materials reporting and workplace safety.

City of Phoenix, Arizona

Principal-in-Charge. Responsible for ensuring that all necessary technical and administrative resources are in place while also serving as project team's liaison to the City. This project calls for continuing, on-call consulting services for environmental site assessments (ESAs) and biological surveys.

Three Way Maintenance Yard, Arizona Department of Transportation (ADOT), Clifton, Arizona

Project Director. Supervised the project team conducting environmental assessment of hydraulic lift assemblies and assessing environmental impact to surface and subsurface soils. Future involvement at the site includes decommissioning activities, with follow-up soil sampling to ascertain whether a release to surface or subsurface soils has occurred.

Safford Signing & Striping Office & Storage, Arizona Department of Transportation (ADOT), Safford, Arizona

Project Director. Supervised the project team conducting an environmental assessment of a dismantled hydraulic lift assembly's remaining aboveground storage tank and associated piping.

Valencia Power Plant, Citizens Energy (now Tucson Electric Power), Nogales, Arizona

Project Manager. Conducted site characterization activities (including soil and groundwater sampling) for releases of CVOCs, petroleum hydrocarbons and other compounds at the Valencia Power Plant in Nogales. The site is currently being managed under the ADEQ Voluntary Remediation Program.

St. John Mission, Gila River Indian Community, Maricopa County, Arizona

Principal Scientist. Provided technical oversight of a Brownfields facility. Completed the characterization of petroleum contaminated soil and groundwater resulting from an underground storage tank release at the St. John Mission. Mr. Littell developed the remedial action plan, which was approved by USEPA's offices of Underground Storage Tanks and Quality Assurance. Upon completion of the public comment period, the remediation system involving application of bioventing and biosparging will be implemented.

Confidential Client, Goodyear, Arizona

Project Manager. Managed a legally and technically complex multi-tenant commercial/industrial facility located within the Phoenix-Goodyear Airport South National Priorities List site in Goodyear. As part of the client's due diligence in acquiring the facility, responsible for conducting Phase I and II ESAs. Currently preparing comprehensive Operations and Maintenance (O&M) Management Plans for on-site water and wastewater treatment plants; performing monthly assessments of treatment system O&M activities; preparing a stormwater pollution prevention plan; providing compliance and operational issue assistance; performing assessments of tenant-related environmental procedures; completing a lead-based paint assessment and best management practices (BMP) plan; preparing a BMP plan for asbestos containing material; assessing transformers containing polychlorinated biphenyls; and abandoning a domestic water supply well.

Wastewater Treatment Plant, Arizona Army National Guard, Marana, Arizona

Regulatory Liaison. Providing regulatory review and program negotiating support for construction of a wastewater treatment plant at the Silver Bell Army Heliport in Marana. The project requires preparation of an Aquifer Protection Permit, individual Arizona Pollutant Discharge Elimination System permit and a request for amendment to the Central Arizona Association of Governments 2008 Areawide Water Quality management Plan.

Experience Summary

Randy Mills is an EI&C Inspector responsible for providing Electrical and I&C inspection services. He has over 20 years of experience in electrical construction methods, installation and maintenance, and in PLC and HMI programming. He has over 10 years of experience in instrumentation and controls installation, repair and maintenance, fire alarm installation, programming, testing and maintenance, project start up, and construction management. Projects involved semiconductor manufacturer facilities, waste water facilities, water production facilities, water reclamation facilities, and various industrial and commercial construction projects. Experienced in Construction Management, I&C and electrical installation methods, and troubleshooting and maintenance of various electrical and controls systems.

Training/Certifications

Journeyman Wireman, I.B.E.W. Local 640 Apprenticeship Training Program Phoenix, Arizona

Grade 1 Water Treatment Plant Operator

Phoenix, Arizona

Residential Wireman, 1983-1985 I.B.E.W. Local 640 Apprenticeship Training Program Phoenix, Arizona

Experience

20 years

Joined Firm

2006

Relevant Expertise

- *Phoenix I&C standards*
- *Instrumentation and controls troubleshooting and optimization*

City of Phoenix Union Hills Water Treatment Plant & Cave Creek Water Reclamation Plant Design and Construction Support, City of Phoenix, Arizona

EI&C Inspector. Duties include support for all I&C inspections, system start up and commissioning, and documentation for maintenance and control of proper commissioning. Involvement with recommendations to the City for process control monitoring and implementation. This includes all instrumentation and controls new installation, modification, and maintenance. Also includes the requirement to read Process and Instrumentation Diagram (P&ID) drawings, electrical drawings, submittals, request for information documents, specifications, and the ability to work with contractors to make sure their installation is acceptable per code and to the customer's specifications.

City of Phoenix all Water Plant Facilities, City of Phoenix, Arizona

I&C Specialist Lead. Duties included creation, implementation, and assignment of periodic maintenance records to field technicians. Also required to assist in trouble shooting, recommendation, and assistance to I&C techs in all six of the water facilities plants. One of these plants was a water reclamation facility. Systems worked on included chemical delivery systems for the process, various models of turbidimeters, pH analyzers, CL2 analyzers, flow meters, pressure transmitters, motorized valves/gates, chlorine gas monitoring systems, Hydrogen Sulfide (H^2S) toxic gas monitoring systems, scrubbers, scales, and sample stations.

ON Semiconductor, Phoenix, Arizona

I & C Technician. Responsible for calibrating and maintaining all of the instrumentation equipment in RODI and water treatment plant. There were flow meters, pH meters, Oxidation Reduction Potential (ORP) meters, Total Dissolved Solids (TDS) meters, Hach CL17 units for Clorine, pressure transmitters, level controllers, TOC Analyzers, as well as air driven actuators and valves to name most of the instrumentation in the field. Responsible for programming programmable logic controller (PLC) 5/80's, PLC 5/60's, Slick 500's and Supervisory Control and Data Acquisition (SCADA) system which is an Intellution software package; Fix 32. This was

an Edwards IRC 3 system with a software package at the front end for interfacing with the hardware in the field.

ON Semiconductor, Phoenix, Arizona

Project Manager. Responsible for the scheduling, budgeting and risk management with all projects. Projects were various in size; as simple as re-arranging an office cubicle or very complex projects in which Mr. Mills did a complete remodel of a Data Center for ON Semiconductor while it remained in operation. This project was just under a million dollars for the overall cost. Projects range from hundreds of dollars to millions of dollars. During this time, Mr. Mills was utilized as an I&C tech.

ON Semiconductor, Phoenix, Arizona

Facilities Electrician. Maintained all electrical equipment for the site to include but not limited to, scrubbers, Air Handlers, Chillers, Pumps, Cooling towers, general lighting and power, and all the high voltage gear from 14,700 kilovolt (kV) down to 120 volt (V) power panels. Performed maintenance of equipment and responded to emergencies when needed regarding any electrical outage. Responsible for the coordination of all manpower, and contractors brought on site to assist in the effort.

ON Semiconductor (Motorola), Phoenix, Arizona

Facilities Project Manager/I & C Tech/Electrician. Responsible for the maintenance of all equipment including chillers, scrubbers, air handlers, and all of the high voltage and low voltage electrical distribution equipment. Responsible for all budgeting, scheduling and risk management issues. Responsible for taking care of all the instrumentation equipment and field wiring between the equipment and RIO racks, as well as wiring from the RIO racks to the PLC.

City of Tempe South Water Plant, City of Tempe, Arizona

EI&C Inspector. Duties included doing investigative field work to collect all the information required to draw a complete one-line drawing of the facility. This included all pertinent information such as wire size, fuse size, amp ratings of buckets or breakers, description of loads, fed from descriptions, buss ratings, kilovoltampere (KVa) ratings, and provide cross-sectional hand drawings of gear.

City of Tempe all water plant sites, Tempe, Arizona

EI&C Inspector. Duties were to coordinate with facilities staff, contractor, and engineers to collect all the required data from electrical equipment to complete a coordination study and Arc Flash study on the electrical system at several sites.

City of Goodyear Water Distribution Sites, Goodyear, Arizona

EI&C Inspector. Responsible for providing electrical inspection services for several distribution sites being modified or installed new. Duties included inspection of all electrical and instrumentation installations to ensure installation was to code and per customers specifications. Sites under construction included well sites, booster pump stations, resevoir sites, and a reverse osmosis site with chemical treatment.

Experience Summary

Gary Newman is a managing engineer with 29 years of professional experience focusing primarily on the design and construction management of wastewater treatment facilities. He has evaluated, designed, and managed small to large wastewater treatment plant projects ranging from less than 5 to over 150 mgd.

Education

M.S., Civil-Environmental Engineering, Utah State University, 1979

B.S., Environmental Resources Engineering, Humboldt State University, 1977

Registration

Professional Engineer No. 41465 Colorado, 2007

Professional Engineer No.016856, Nevada, 2005

Professional Engineer No. 37552, Arizona, 2002

Professional Engineer No. 0027997, Washington, 1991

Professional Engineer No. 53660, Texas, 1983

Professional Engineer No. 033389, California, 1982

Experience

30 years

Joined Firm

1978

Relevant Expertise

- *Design and management of wastewater treatment plants ranging from less than 10 MGD to over 150 MGD.*
- *Design of solids handling facilities focusing on mechanical, thickening and dewatering, and anaerobic digestion.*
- *Evaluated and designed thermophilic digestion for large wastewater treatment facilities.*

91st Avenue Wastewater Treatment Plant, City of Phoenix, Unified Plant Expansion 2005 (UP05)

Project Manager. Mr. Newman was BC's project manager for the design preliminary treatment facility expansion at this 230 mgd wastewater treatment plant. Design included addition of a new raw sewage bar screen, a new grit removal tank, new grit dewatering equipment, and associated channels, piping, and controls. Included in the project was working closely with the Construction Manager at Risk contractor during design to resolve awkward construction sequencing constraints imposed by the existing facility configuration and the need to maintain flow through the plant during the UP05 construction. Mr. Newman coordinated the work of mechanical, structural, electrical and instrumentation and control engineers in the development of design drawings and specifications.

Tolleson WWTP Solids Treatment Upgrades, Tolleson, Arizona

Principal-in-Charge. Provided technical direction and oversight to the evaluation of all solids treatment systems at this 17 mgd secondary treatment plant. Project needs were to upgrade solids thickening, digestion and dewatering to ensure reliable compliance with Class B biosolids. Also, as part of the planning process, a "pathway" to achieve Class A biosiolids in the future was defined. Finally, both solids treatment and liquid treatment process units were evaluated with respect to odor producing potential, and recommendations made to add or improve odor control at the WWTP. After thorough evaluation of all processes, including solids production from the liquid treatment processes, recommendations were made including implementing co-thickening dissolved air flotation thickeners, rehabilitating existing digesters for process reliability and added capacity, adding a second belt press for dewatering (including enclosing in a building), and up-grades to utility systems throughout the WWTP. Construction costs were estimated for the recommended plan.

Roger Road Wastewater Treatment Plant, Biosolids Treatment Improvements, Tucson, Arizona

Technical Lead. Mr. Newman directed the design of a new gravity belt thickener (GBT) and conversion of an existing sludge holding tank to a primary anaerobic digester. The Roger Road WWTP has been constrained by inadequate sludge treatment capacity for many years; these constraints have jeopardized the plant's ability to reliably treat wastewater and meet discharge permit effluent quality. The GBT and digester conversion were developed to be relatively low cost improvements, that could be implemented quickly to improve the plant's reliability. Mr. Newman

directed the design and assisted in orchestrating input from the PCWMD operations and engineering staff throughout design and construction.

Pima County Wastewater Management Department (PCWMD), Regional Optimization Master Plan

Peer Reviewer. Mr. Newman was selected by PCWMD to be a peer reviewer of a regional wastewater master plan being developed by another consultant. The plan, which defined over $500 million in wastewater treatment and conveyance improvements, was developed under a fast-track schedule to meet regulatory requirements. As a Peer Reviewer, Mr. Newman reviewed draft materials prepared by the prime consultant, and participated in workshops with PCWMD staff, stakeholders from other agencies and the prime consultant team. Following each workshop, Mr. Newman contributed to a follow-up letter with specific comments and suggestions aimed at improving the sustainability of the conclusions and recommendations of the study team.

Solids Treatment and Energy Recovery Evaluation, Nogales International WWTP, Nogales, Arizona

Project Manager. Performed feasibility study to evaluate adding anaerobic digestion and digester gas fueled co-generation at this 14 mgd WWTP which planned for upgrade. As a subconsultant to APSES, BC prepared a conceptual design of an anaerobic digestion process, to treat solids generated from the upgraded treatment plant, generate gas and treat the gas to a quality suitable as a fuel for internal combustion engines. The study estimated that about 375 KW could be generated at this facility if implemented; more could be generated if food waste from municipal solid waste collections were emulsified and fed to the digestion process. Capital costs and operating costs were estimated and provided to APSES for input into their cost model. Proposed facilities were designed to a conceptual level of detail as a basis upon which to base cost estimates.

Fort Tuthill County Park Wastewater Management Feasibility Study and Preliminary Design, Coconino County, Arizona

As **project manager**, Mr. Newman directed the evaluation of alternatives for managing wastewater generated by this regional park, as well as the adjacent recreation area. Alternatives considered included constructing a new sewer to convey wastewater to the City of Flagstaff, and construction of a new wastewater treatment plant to be located within the Park to treat wastewater and produce reclaimed water for use by the Park and other County owned facilities. Though the wastewater treatment plant option was more expensive, the County elected to proceed with the new treatment plant option in order to provide a reliable source of reclaimed water for Park use. A preliminary design of the new wastewater treatment plant was completed which recommended sequencing batch reactors to produce Class A wastewater and to accommodate the widely varying wastewater production rates between summer (peak) and winter seasons. As part of the predesign, the Park's 60+ year old wastewater collection system was inspected using closed circuit TV, and was found to be in need of significant and widespread repair.

Experience Summary

Mr. Nicholls has practiced hydrogeology for ten years in the southwestern U.S. In this time he has supervised the drilling, testing, and installation of water supply wells, monitor wells, and test wells. His responsibilities have included drafting specifications, administering bidding, management of field staff, and well design. He has supervised, planned, conducted and contributed to groundwater hydrochemical and aquifer characterization studies in support of Recharge Site Evaluation, Well Siting, Spring Development, Mine Permitting, Mine Permit Compliance Monitoring, Pre-Construction Baseline Monitoring, Groundwater Contamination Litigation, Power Plant Siting and Basin Characterization in Utah, Nevada, California, and Arizona. .

Education

B.S., Geology, Brigham Young University, 1995

M.S., Hydrogeology, Brigham Young University, 1998

Registration

Registered Geologist - Arizona #39869

Professional Geologist- California #7530

Certified Hydrogeologist- California #835

Experience

10 years

Joined Firm

2006

Public Water Supply Wells, Morongo Band of Mission Indians, Cabazon North Well and Cabazon South Well, Cabazon, California

Project Manager. Responsible for drafting technical specifications, administering the bidding process, evaluating contractor qualifications, contractor oversight scheduling, well design, filter pack selection, staff scheduling for drilling and construction oversight, development, aquifer testing and startup of two 18-inch diameter, COR-TEN cased, stainless steel screened, production wells completed to depths of 800 and 1,300 feet and capable of producing 3,000 and 1,800 gpm, respectively. Mr. Nicholls sited the Cabazon South Well; the Bands Engineer sited the Cabazon North Well.

Public Water Supply Well No. 23, City of Avondale, Arizona

Staff Hydrogeologist. Responsible for preparing drilling specifications, preparation and submittal of Notice of Intent to drill or deepen a well (NOI), service area well, and replacement well permit applications to the Arizona Department of Water Resources, contractor oversight and staffing during drilling, development and aquifer testing.

Public Water Supply Well No. 16, City of Avondale, Arizona

Staff Hydrogeologist. Responsible for preparing drilling specifications, preparation and submittal of Notice of Intent to drill or deepen a well (NOI), service area well, and replacement well permit applications to Arizona Department of Water Resources, contractor oversight during drilling, development, aquifer testing, and responsible for aquifer test set up and instrumentation.

Dietz Crane Water Supply Well, City of El Mirage, Arizona

Senior Hydrogeologist. Responsible for troubleshooting and revising a problematic well design prepared by another consultant, advising the contractor regarding methods to build the well to meet the objectives of the original design while meeting the requirements of the new design, and contractor oversight during well construction.

Well Assessment and Abandonment, Glenarm Farms, Avondale, Arizona

Senior Hydrogeologist. Responsible for locating and evaluating the condition of two disused water supply wells located in the Glenarm Farms subdivision, Avondale Arizona. Once the wells were located, Mr. Nicholls assessed their

condition based on the results of down-hole video and made recommendations for their abandonment. Responsible for submitting Notices of Intent to abandon to the Arizona Department of Water Resources for both wells, and contractor oversight during abandonment activities.

Monitor Well Installation, SR-85 Landfill Site, Buckeye, Arizona
Task Lead. Responsible for contractor oversight during drilling, construction and development of four, 5-inch diameter, pvc cased water level monitoring wells constructed at depths between 300 and 400 feet. These wells were drilled as compliance monitoring points for the then under construction SR-85 landfill.

Observation Well Abandonment and Installation, BNSF Railyard, Winslow, Arizona
Project Manager. This project involved the periodic assessment of existing monitor wells, the abandonment of excess monitor wells, and the drilling and construction of new monitor wells as needed. Mr. Nicholls responsibilities included assessment of monitor well condition and monitor well utility relative to the overall site remediation objectives. When new monitor wells were required, Mr. Nicholls was responsible for observation well siting, monitor well design, soliciting bids and selecting contractors, and supervising on-site field staff.

Application for Analysis of Assured Water Supply, Confidential Land Development Client, Buckeye, Arizona.
Project Manager. Responsible for writing and submittal of a Proposal for Hydrologic Study, and the subsequent Hydrologic Study in support of an Application for Analysis of Assured Water Supply to the Arizona Department of Water Resources on behalf of a client developing a master planned community in the Buckeye area. The objective of the hydrologic study was to determine the physical, legal, and continuous availability of groundwater as defined under Arizona state law. This analysis was performed using existing published and unpublished data, and state well records.

Transition Zone Recharge Study Phase I; Mojave Water Agency, Apple Valley, California.
Senior Hydrogeologist. The objective of phase I of this project was to identify the potential demand and market for artificial recharge in the Mojave River Basin. This objective was met by projecting growth in water demand and changes in water supply over a period of 30 years. The difference between growth water in demand and declining water supply defined the market for artificial recharge. Recharge source waters were to include State Water Project water and reclaimed water. Mr. Nicholls was responsible for gathering the population growth data and water supply data required to make the 30 year projections. He was also responsible for making the 30 year population and water supply projections, creating a basin scale water budget, and analyzing historical hydrograph data to identify long term groundwater elevation trends.

Experience Summary

Hugh Pace has over 30 years of experience in power distribution systems engineering, instrumentation and control systems design, and Supervisory Control and Data Acquisition (SCADA) system design for municipal water, wastewater, and industrial projects. Mr. Pace is registered as a power system engineer and a control system engineer. He has managed project design teams and supervised project construction, inspection, and startup. Designs included process systems for centrifuge, UV disinfection systems, membrane bioreactor systems, odor control system for many projects.

Mr. Pace's work included harmonic mitigation on projects with ultraviolet disinfection systems and variable frequency drives, the two main sources of harmonic frequencies in power distribution systems that manifest heat and disrupt electronic equipment with multiple frequencies in that manifest voltage harmonics and current harmonics. Mr. Pace provided Quality Control electrical and instrumentation (EI) design reviews for eight Brown and Caldwell water, wastewater, and reclaimed water projects. He has provided Value Engineering for treatment plant designs performed by other Consulting Engineering firms. He participated in a Construability Review and a Value Engineering Workshop for the Peoria, AZ Butler WRF and Lift Station.

Education

M.S. Telecommunication Management, Keller Graduate School of Management, 2000

M.S. Project Management Keller Graduate School of Management, 1997

B.S., Electrical Engineering, University of Washington, 1970

Greenfield Road Water Reclamation Plant, City of Mesa, Arizona

Project Electrical Engineer. Designed electrical systems for the solids handling portion of the new regional Greenfield Road (South) plant.

Features: 15kV power distribution system, fiber optic cable system for control, fire, telephone, electrical equipment data monitoring, and paging systems. Facility included six standby generators for the major plant facility. A Contractor at Risk project. Design included digester complex, solids building with 6 centrifuges, odor control system, and chemical systems.

Town of Gilbert, Gilbert, Arizona

Project Engineer. Designed the electrical systems for the Water Reclamation Reservoir and Booster Pump Station that accepts Gilbert's portion of the reclaimed water from the Tri-Cities regional lift station. A Contractor at Risk project.

City of Phoenix, 24th Street Water Treatment Plant's Paradise Valley Booster Pump Station and Two Pressure Reducing Stations

Features: Five-1000 horsepower 4000 Vac 1200 RPM pump motors and future induction generator included in the electrical equipment. Links to the Water SCADA System and to the WTP

City of Phoenix, 91st Avenue Wastewater Treatment Plant (WWTP), Phoenix, Arizona

Project Electrical Engineer. Recent Projects: Upgrade and Expansion, Minor Mods, Digester Area Code Compliance, Solids Handling Facility Electrical Investigation, Solids Thickening Facility including Odor, Polymer, DAFTs, Digester Control Buildings, EPRI-Reuse Pump Stations-2 & 3, and Multi-Phase Digestion. Upgraded portions of the plant's 5 KV power

Registration

IBEW Licensed Journeyman Electrician & Electrical Supervisor

Professional Electrical Engineer No. 62069 Florida, 2004

Professional Electrical Engineer No. 20244, Arizona,1986

Professional Electrical Engineer No. E014059, California, 1996

Professional Electrical Engineer No. 5105, Idaho, 1985

Professional Electrical Engineer No. 108921 Tennessee, 2003

Professional Electrical Engineer No. 08405 EE/P, Nevada, 1989

Professional Electrical Engineer and Professional Control System Engineer No. 10060, Oregon, 1979

Professional Electrical Engineer No. 67483, Texas, 1990

Professional Electrical Engineer No. 06612-0927-8, Utah, 1986

Professional Electrical Engineer No. 001751, Washington, 1978

Training

Current MNSH safety training certificate for mine location work

Graduate Certification in Project Management

Graduate Certification in Telecommunications Management

Experience

30 years

Joined Firm

1996

Relevant Expertise

- *91st Ave. WWTP power distribution*
- *NFPA 820*
- *JOC experience*
- *Startup – Testing*
- *Electrical troubleshooting*
- *City I&C standards*

distribution system in Aux3G Building. Changed field instruments. Added fiber optic systems, patch panels, RTUs, Remote I/O cabinets.

Plant expansion projects: performed electrical, control, and instrumentation design for the headworks additions, aeration basins, final sedimentation basins, and return activated sludge/waste activated sludge (RAS/WAS) pumping stations, refurbished Blower Building 2, Digesters, chlorine facility scrubber system and emergency generator.

City of Phoenix, Cave Creek Road Facilities, Cave Creek, Arizona

Project Electrical Engineer. Project included booster pump stations for water and reclaimed water, radio telemetry for water system, and 10 miles of single-mode fiber-optic cable system for reclaimed water system. Included 5KV VFDs and 480 VAC VFDs for pump motor drives. Union Hill Water Treatment Plant finished water reservoir provided the source of potable water for Zones 6, 7, and 8 and required four new zone 5E 600-horsepower, 5-kV pump motors.

At the booster pump stations in Zones 6, 7, and 8, both potable water and reclaimed water pumping was planned, and at Zone 7, two pump stations had been designed and were being built. A tablet type chlorinator was included at booster pump station 7 to increase the chlorine residual, as required.

City of Phoenix, 91st Avenue Water Treatment Plant Phoenix, Arizona

Project Electrical Engineer. Project included plant expansion to solids handling facility, chemical facilities, headworks area, and new odor control facilities.

City of Phoenix, 24th Street Water Treatment Plant, Chemical System Modifications, Phoenix, Arizona

Project Electrical Engineer. Chemical System Revisions to the water plant's chemical storage and delivery equipment including installing a Plant Control System Operator Station expansion to the Chemical Building. Added ultra-sonic level to the filter basins. Changed the 46" influent insertion flowmeter to a magnetic flow meter.

Dewatering and solids handling facilities project for the water treatment plant that treats Central Arizona Project (CAP) canal water. Design includes a new double-ended main switchgear with tie-breaker and motor control centers with tie-breakers to provide operation flexibility and backup. The treatment basins, polymer system, and sludge dewatering building include centrifuges create solids that are transported away from the facility.

The solids handling system includes stand-alone control system hardware that integrates into the Plant Control Center PC based control system that converted Intellution Software to Wonderware Software and converted OPTO 22 remote I/O devices to Modicon's Quantum PLCs. Cutler Hammer Westinghouse-type IMPACC system is provided to monitor the electrical distribution system equipment and provide graphic displays for the electrical parameters, such as power used and peak power.

Experience Summary

James Page has 33 years of construction inspection experience, including experience on schools, office buildings, chemical plants, refineries, breweries, nuclear power houses, fossil fuel power houses, water treatment facilities, housing tracts, paper mills, and steel mills. His outstanding qualities include reliability, innovation, teamwork, and "can do" attitude and has been a formidable asset to providing construction efforts at the 91st Avenue WWTP.

Training/Certification

Mechanical Journeyman, City of Phoenix

Gas Fitter, City of Phoenix

Cross-Connection Control General Tester – ASSETT and AWWA

Plumbing Journeyman, City of Phoenix

Experience

33 years

Joined Firm

2000

Relevant Expertise

- *91st Ave. WWTP experience*
- *Piping inspections*
- *HVAC inspections*
- *Construction management and oversight*
- *System start-up and testing*
- *Building and safety code*
- *ARC FLASH Training in compliance with 29 CFR 1910 Subpart S and NFC 70E*

91st Avenue WWTP Solids Thickening Facility Project, Tolleson, Arizona

Mechanical Inspector and Assistant Construction Manager. Responsible for oversight of the mechanical installations and assisting with construction administration. The work included a new centrifuge building, a new odor control facility, an addition to the electrical building, along with DAFT building and polymer building upgrades.

91st Avenue WWTP Upgrade and Expansion Project, Tolleson, Arizona

Inspector. Responsible for oversight of the mechanical installations. The work included the design of new grit removal equipment, a new methanol storage facility, and the expansion of the plant's solids facilities. Specifically, one, 3-million gallon digester, two dewatering centrifuges, and two thickening centrifuges were added.

91st Avenue WWTP Support Systems Upgrades Project, Tolleson, Arizona

Inspector. Responsible for oversight of the mechanical installations for improvements to the plant to comply with NFPA 820 requirements. Specific areas of the plant evaluated include the digester tunnels, digester control buildings, digesters and associated support facilities.

South Water Reclamation Plant (SWRP), Mesa, Arizona

Inspector. Responsible for oversight of the mechanical installations. The work included modifications to the existing primary clarifiers , headworks, and odor control facilities. The new construction included grit facilities, secondary clarifiers, aeration basins, blower building, tertiary filters, UV disinfection channels, effluent pumping, solids handling, boiler facilities, and digester complex.

South East Water Reclamation Plant (SEWRP), Mesa, Arizona

Inspector. Responsible for oversight of the mechanical and structural installations. The new construction was primarily a new grit removal and sludge transfer pumping facility. SEWRP being an existing facility required keeping the plant in operation throughout the construction period.

Paradise Valley Booster Pump Station (PVBPS), Phoenix, Arizona

Inspector. Responsible for oversight of the mechanical installations. The new construction was primarily four 1000 horse power booster pumps and a PRV (Pressure Reducing Valve) station.

Stetson Valley Booster Pump Station, Phoenix, Arizona
Inspector. Responsible for oversight of the mechanical installations. This developer project, currently under construction, includes five new booster pumps, a chlorination system, and two hydropneumatic tanks.

Alamosa Well #1, Chandler, Arizona
Inspector. Responsible for oversight of the mechanical and structural installations. This new well and 1,200 feet of associated piping is currently under construction.

Dechoirination Bulk Storage and Feed Facility, Tolleson, Arizona
Inspector. Responsible for oversight of the mechanical and structural installations. This project on an existing site replaced an existing dechlorination storage and feed facility, the construction of a new biosolids holding area, and the installation of a new water main to the site.

Tolleson WWTP Effluent Quality Upgrade Project, City of Tolleson, Arizona
Construction Manager. Responsible for overseeing construction services for effluent quality upgrades to the Tolleson WWTP. The work includes modifications to the trickling filters, the aeration basins, and the secondary clarifiers.

Experience Summary

Mark Robinson has over 15 years of experience in the design and construction of wastewater, water, municipal swimming pool, and fountain systems. His roles have varied progressively from task leader to senior project manager. As a senior project manager, Mr. Robinson has been responsible for managing and directing the evaluations, design, and construction services of various projects. He has extensive experience in water system engineering design, mechanical system evaluations, operations and maintenance, and training activities.

Education

B.S., Civil Engineering, University of Missouri, 1997

B.S., Mechanical Engineering Technology, Lake Superior State University, 1991

Certificate in Computer Drafting, Lake Superior State University, 1991

Registration

Professional Engineer, #35172, Arizona, 2000

Professional Engineer, #68213, California, 2005

Professional Engineer, #32781, Louisiana, 2006

Experience

15 years

Joined Firm

1998

Relevant Expertise

- *Design and management of wastewater treatment plants from less than 1 mgd to 200 mgd.*
- *Design lead for 91st Avenue WWTP SSU, Upgrade and Expansion, and STF projects.*
- *Extensive expansion in delivering complete responsiveness to clients.*

Fred Hervey Water Reclamation Plant – 3rd Train Addition, El Paso Water Utilities, El Paso, Texas

Project Manager. Coordinated the design team and delivered a successful project to the client. Project included an addition of a complete third treatment process train with bar screens, grit removal, pumping stations, aeration basins, denitrification basins, second stage clarifiers, sand filtration, and carbon and methanol chemical feed systems for the 20 mgd facility.

91st Avenue WWTP, Support Systems Upgrade, City of Phoenix, Arizona

Project Engineer. Responsible for designing the modifications to the Plant's digester heating and gas management systems. The modifications included relocation of the gas handling equipment and piping from the main boiler rooms to comply with National Fire Prevention Association (NFPA) 820, relocation of two 500 horsepower (hp) and appurtenances to Boiler Building No. 2, conversion of the digester hot water system to a primary/secondary heat loop system. Boiler Building No. 2, is a 7,200 square feet (sf) structure that will house three (2 existing and 1 future) 500 hp boilers, primary hot water loop pumps, boiler secondary loop pumps, gas boosters and the associated electrical equipment. At Boiler Building No. 1, gas boosters and associated piping were relocated to a new 473 sf gas booster room constructed adjacent to the existing building, and the boiler hot water piping was reconfigured to for the a boiler secondary loop system.

91st Avenue WWTP Upgrade and Expansion, City of Phoenix, Arizona

Project Engineer. Responsible for designing the methanol addition facilities, the dissolved air flotation unit evaluation/rehabilitation, and the plant support system upgrades. The methanol addition facility included two 19,200-gallon internal floating roof storage tanks, and a secondary containment system, with flammable vapor and fire detection systems. Dosing methanol was completed with six metering pumps and a dilution system feeding to 12 feed points via 14,000 linear feet (lf) of piping. The dissolved air flotation unit evaluation/rehabilitation included field testing of the units, and designing upgrades to improve performance of solids flotation, polymer addition, and float removal. The plant support systems upgrade included the reuse water system, the potable water system, and the high-pressure air system. The reuse water system improvements included

the addition of automatic backwashing strainers to the reuse water pump stations. Extensive piping network upgrades were completed for both the reuse water and potable water systems. An instrument air drying system and a compressor relocation comprised the high-pressure air system upgrade.

91st Avenue WWTP Solids Handling Facility Minor Modifications, City of Phoenix, Arizona

Project Engineer. Responsible for the design of a bulk ferric chloride storage and feed system. System included a 17,200-gallon bulk storage tank and secondary containment system. An automatic metering pump system was designed to operate in conjunction with existing plant facilities.

24th Street Water Treatment Plant, Paradise Valley Booster/Pressure Relief Valve Station Improvements, City of Phoenix, Arizona

Project Manager. Responsible for management, direction and coordination of the project team, including several subconsultants. Project included 45 million gallons per day (mgd) replacement booster pump station and a 25- and 15-mgd pressure reducing valve stations. The booster pump station is utilized to move water up three-hydraulic zones at a boost pressure of 180 psi. All stations were designed to be integrated into the existing 140-mgd treatment plant site. Additional work involved the preliminary design and provision for two hydrogenerating turbines.

24th Street Water Treatment Plant, Chemical System Modification, City of Phoenix, Arizona

Project Manager/Engineer. Responsible for shared project management, sole, and portions of the design team. Responsible for the concept and theory of the implementation of the City of Phoenix's Regulatory Compliance Excellence Program as developed for the plant. Design responsibilities included the sulfuric acid, caustic soda, alum, hydrofluosilic acid, and filter aid polymer bulk storage and feed systems and their associated processes. Feed systems utilized hydraulic eductors to pump the chemicals. Other involvement included permitting and construction phase engineering management.

Tolleson WWTP Solids Handling Facility Improvements, City of Tolleson, Arizona

Project Manager. Responsible for managing the solids handling facility improvements which includes the development of a solids stream master plan, the rehabilitation of four digesters, the addition of sludge DAF thickeners, and odor control study and master plan and the local limits plan update.

Greenfield Water Reclamation Plant, Phase II Expansion, City of Mesa, Arizona

Project Advisor. Responsible for advising and directing the project engineers for the solids stream digester gas handling and digester heating systems. These systems included a boiler/building complex, totally enclosed gas flares and sludge heat exchange. An initial evaluation of a digester gas cogeneration system was also performed.

Experience Summary

Ms. Karen Schwab has 16 years of field and project management experience in hydrogeologic investigations and environmental permitting. Her hydrogeologic investigations experience includes groundwater quality evaluations (background versus impacted); conducting water resources investigations; oversight of production and monitor well installation, construction, and testing; conducting well impact analyses; and preparing and implementing site-specific soil and groundwater sampling and monitoring plans. Her Environmental permitting experience includes preparation of applications for and amendments to Arizona Aquifer Protection Permits (APPs), Federal and Arizona National Pollutant Discharge Elimination System (NPDES) permits, and Industrial Reuse Permits. In addition, Ms. Schwab also has a broad range of knowledge of state and federal water and environmental regulations.

Education

M.S. Geology, Arizona State University, 1990

B.S. Geology, Mesa State College, 1986

Registrations

Registered Geologist, Arizona No. 33268

40-hour OSHA certified

24-hour Mine Safety and Health Administration (MSHA) Certification

8-hour HazMat Supervisor Training

Experience

16 years

Joined Firm

2005

Historic Gibson Mine Closure, Globe, Arizona

Principal Hydrogeologist. Responsibilities included compiling historic information and preparing site-specific closure plan for soil excavation/remediation activities at the historic Gibson copper mine, near Globe. Closure Plan was required to meet regulatory requirements of the Arizona Department of Environmental Quality (ADEQ) Aquifer Protection Program, Water Quality Improvement (WQIG) Program, and federal National Pollution Discharge Elimination System (NPDES) program. Closure plan was approved in record short time with minimal agency comments. Also prepared NPDES Notice of Intent for General Permit for Construction Activities and associated Storm Water Pollution Prevention Plan (SWPPP) for remediation activities.

Florence Copper In-Situ Mine, Site Investigation Plan

Principal Hydrogeologist. Responsible for compiling and evaluating 7 years of groundwater analytical data from 40 monitor wells associated with the former BHP Florence Copper In-Situ Mine. Wrote and prepared the Site Investigation Plan to demonstrate to ADEQ Aquifer Protection Program no impact to the groundwater from mining activities. The current owners of the Florence Copper In-Situ Mine are seeking Clean Closure of the site.

Phelps Dodge Clarkdale Tailing Impoundment, Clarkdale, Arizona

Project Manager/Senior Hydrogeologist. Responsible for writing and preparing application for a Significant Amendment to Phelps Dodge's existing APP for approval by the ADEQ Aquifer Protection Program. Application for Significant Amendment required an evaluation and discussion of 7 years of surface water and groundwater data to demonstrate no impacts to groundwater or surface water. Also responsible for coordinating and conducting quarterly surface water and groundwater sampling; compiling groundwater and surface water monitoring information for quarterly reports to ADEQ Aquifer Protection Program.

BHP Copper San Manuel Mine, San Manuel, Arizona

Senior Hydrogeologist. Responsibilities include preparing an Application for Abandonment and Environmental Report to abandon a segment of the San Manuel railroad. Preparation of the Environmental Report consisted of

compiling existing information on land use, land ownership, historic freight service, and assessing potential impacts on air, noise, water, and biological resources. Project required coordination and meetings with several regulatory agencies, including Bureau of Land Management (BLM; Tucson Field Office), Arizona Game and Fish, and U.S. Fish and Wildlife Service.

ADEQ Vulture Mill WQARF Site, Wickenburg, Arizona

Senior Hydrogeologist. Site consisted of approximately 170,000 tons of tailing material processed from the historic Vulture Mine and placed on private land. ADEQ required excavation/soil remediation of site. As Senior Hydrogeologist, responsibilities included oversight of drilling, construction, development, and testing of on-site production well; also wrote final Well Completion Report.

Gila River Indian Community, Maricopa County, Arizona

Project Manager/Senior Hydrogeologist. Project consisted of researching, formulating, and writing groundwater protection ordinances for Gila River Indian Community. Groundwater regulations and standards from Arizona, New Mexico, and Nevada were compiled and used for comparison.

Vidler Recharge Facility, Harquahala Valley, Arizona

Senior Hydrogeologist. Responsibilities included compiling and evaluating water quantity and quality data, estimating evaporation loss and infiltration rates, preparing quarterly and annual water reports required by the Arizona Department of Water Resources (ADWR) and ADEQ; also responsible for coordinating and oversight of monitor well installation. This project required knowledge of the ADWR underground storage facility statues and rules.

Arizona Department of Environmental Quality, Aquifer Protection Program, Mining Unit, Phoenix, Arizona

Hydrologist III. Responsible for assisting mining clients in obtaining Arizona Aquifer Protection permits. Pertinent experience included evaluating, reviewing, and approving complex hydrologic and geologic data in permit applications; project management; coordinating and conducting site-specific groundwater, surface water, and waste rock sampling efforts. Initiated and conducted a stable isotope groundwater investigation at an active open pit copper mine and presented the results at Society of Mining and Engineering convention.

Arizona Department of Environmental Quality, Site Assessment Hydrology Unit, Phoenix, Arizona

Hydrologist III. Responsibilities included planning, conducting, and managing several Preliminary Assessments and Site Inspections of industrial sites under the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) program. Coordinated and conducted site investigations for potential hazardous substance(s) releases to the environment, developed and implemented site-specific groundwater, soil, soil-gas, and indoor air sample plans, compiled and interpreted hydrologic data and water quality data. Operated van-mounted hydraulic probe (Geoprobe) for collecting shallow, subsurface soil samples.

Experience Summary

Jarrell Southall has more than 38 years experience in solving a wide range of environmental management problems. A pioneer in resource-conservative approaches to environmental regulation, Mr. Southall is using his skills and experience in regulatory programs and in the application of innovative technologies to develop cost-effective solutions for a wide range of problems facing government and industry.

Education

B.S., Mathematics/Chemistry, Henderson State University, Arkansas, 1963

Graduate studies in chemistry at the University of Arkansas, Graduate Institute of Technology, Little Rock, Arkansas

Training / Certification

40-Hour OSHA Hazardous Waste Operations/Emergency Response Training

8-Hour MSHA Newly Employed Experienced Miner

Confined Space Entry Training

Supervisor Health and Safety Training

Experience

38 years

Joined Firm

1995

BHP Copper, Inc., Superior, Arizona

Project Manager. Managed a program for collecting soil samples in a residential area of Superior, Arizona and for evaluating the human health risks associated with metals detected in the soil.

Confidential Client, Confidential Location

Project Manager. Managed the development of a remediation action plan and cost estimates for a large smelter site.

Confidential Client, Confidential Location

Technical Advisor. Provided technical advice related to the decommissioning of a metals processing facility, assisted in the evaluation of environmental conditions and practices at the site, and assisted in the preparation of a report documenting the decommissioning process.

Merrill Mining, Florence, Arizona

Technical Advisor. Providing technical advice related to the proposed closure of an in-situ mining facility.

Confidential Client, Confidential Locations

Technical Advisor. Assisted a law firm with the evaluation of potential environmental liabilities associated with active and inactive facilities in the eastern United States.

M&B Capital Group, L.L.C., Tempe, Arizona

Technical Advisor. Assisted in the development of the City of Tempe's McClintock/Rio Salado Brownfield Redevelopment project and initiated the development of a petition for deleting the 200-acre project area from the Indian Bend Wash Superfund site.

BHP Copper, San Manuel, Arizona

Project Manager. Managed the design of a database to facilitate the review of several hundred operations and wastestreams.

Confidential Client, Confidential Location

Technical Advisor. Assisted in the evaluation of remedial options and the development of related cost estimates for a mine and mineral processing facility located in the northeastern United States

BHP Copper, San Manuel, Arizona

Project Manager. Managed the development of a work plan for the closure of a large mining complex involving open pit, underground, mining, heap leach, and in-situ operations.

BHP Copper, San Manuel, Arizona
Technical Reviewer. Assisted in geochemical investigations to enhance in-situ leaching operations and edited final report of those investigations.

BHP Copper Mine/Town of Superior, Superior, Arizona
Project Manager. Managed voluntary characterization, remediation and risk assessment activities for property that BHP Copper was transferring to the Town of Superior for use as an industrial park.

Permitting Projects

IMCO Recycling Inc., Irving, Texas
Project Manager. Managed hydrogeologic investigation required to permit an IMCO secondary aluminum processing facility located in Goodyear, Arizona.

Crystal Pass Cement Company, LLC, Multiple Locations in Nevada
Project Manager. Assisted client with the evaluation of environmental costs associated with the proposed acquisition and expansion of an existing cement plant in Nevada. Also advised client on costs of complying with permitting and Environmental Impact Statement requirements at four sites in southern and central Nevada that were being considered for the construction of a large cement plant.

Merrill Mining, Florence, Arizona
Project Manager. Managed the transfer of all environmental permits for an in-situ copper mine from BHP Copper to Merrill Mining.

Generating Company, LLC, Harquahala, Arizona
Project Manager. Managed project to develop an Aquifer Protection Permit for a 1,000 MW gas-fired power plant.

BHP Copper, Florence, Arizona
Project Manager. Managed project to develop Aquifer Protection Permit and Underground Injection Control (Class III) Permit applications for client's proposed in-situ copper mining and solvent extraction/electrowinning facility Supervised the operation of the project's groundwater sampling program for purposes of hydrogeological characterization and the establishment of Alert Levels and Aquifer Quality Limits. Managed the development and demonstration of BADCT for the proposed facility including the process area, tanks, pipelines, process impoundments, a stormwater impoundment and an enhanced evaporation system involving 13 impoundments.

Experience Summary

Harold Thomas has extensive experience in planning, negotiation, and issue management; environmental management and lobbying; power and water system operation, maintenance, and engineering. Mr. Thomas has directed regional planning activities for public and private utilities. Manages staff and cross-functional teams in the operation and maintenance of a public water system and in water-related strategic and tactical planning of a water and power utility. Mr. Thomas has been responsible for working with city, state, and federal officials to resolve issues of mutual concern. He has many specific strengths including management, engineering, planning and budgeting, negotiations, issues management, and strategic thinking.

Education

B.S., Chemical Engineering, Arizona State University, 1986

Training/Certification

Arizona Water Law, Environmental Regulations, and Pollution Control Measures

Experience

28

Joined Firm

2002

City of Goodyear, Goodyear, Arizona

Principal in Charge. Provided oversight and managed client relationships to address client concerns over the sustainability of current and planned ground water pumping in the Adaman water service area. The analysis evaluated potential ground water level declines, movement of areas with poor water quality, and land subsidence.

Town of Buckeye, Buckeye, Arizona

Project Director. Provided oversight and managed client relationships for a coalition of land owners, the Town and the Arizona Department of Water Resources to conduct the Lower Hassayampa Sub-Basin hydrologic study and develop a ground water model to assess development potential.

City of Mesa, Mesa, Arizona

Executive Director. Directed a multi-year regional water resource and infrastructure planning process for the East Valley Water Forum (EVWF).

Sub-Regional Operating Group (SROG), Phoenix, Arizona

Project Manager. Currently under contract with the City of Phoenix to manage a multi-year regional water and wastewater salinity management study for Central Arizona Salinity Study (CASS).

WESTCAPS, Phoenix, Arizona

Director. Currently under contract to direct a multi-year regional water resource and infrastructure planning process for the West Valley CAP subcontractors (WESTCAPS).

Paradise Valley Water Company, Scottsdale, Arizona

Operations Manager. Directed the development, management, and operation of plant and personnel engaged in the production, treatment, and distribution of potable water.

Salt River Project, Phoenix, Arizona

Manager/Supervisor. Directed development of business strategy and policy; and resolved issues between SRP, it's major water customers, and governmental agencies.

Salt River Project, Phoenix, Arizona

Engineer. Developed and implemented water quality and hazardous waste management programs. Performed financial analysis and monitored capital

expenditures for electrical system upgrades. Worked with electrical engineering groups to budget and schedule major construction jobs.

Management

- Programmed the efficient and reliable operation and maintenance of potable water, power plant, and fuel storage facilities
- Managed the start-up, operation and maintenance of a state-of-art stripping facility to remove volatile organics from groundwater
- Prepared and managed operations and maintenance budgets, capital improvement budgets, and tactical forecasts
- Directed and developed engineering staff and operational personnel
- Analyzed state and federal legislation for potential impacts and developed coalitions and strategies for addressing concerns
- Led various forums and task forces with cities and other agencies to resolve issues of mutual concern in the areas of water supply, water quality, and reclaimed water reuse
- Developed a process for assessing new business opportunities

Environmental Management

- Worked with western interests to develop positions on the re-authorization of the Clean Water Act
- Member of the State of Arizona Maryvale Cancer Cluster Study Technical Review Committee
- Member of the State of Arizona Groundwater Cleanup Task Force
- Analyzed and developed strategy on the re-authorization of the Clean Water Act, critical habitat designation of the Lower Colorado River Basin, Southern Arizona Water Quality Study, Coastal Zone Management Act, USEPA action against the Imperial Irrigation District, and implementation of USBR's new strategic direction
- Developed and implemented a corporate-wide hazardous waste management program
- Developed an open channel water system emergency response plan
- Conducted property environmental site assessments
- Evaluated funding mechanisms for financing groundwater remediation programs
- Evaluated opportunities and impediments for reclaimed water reuse in Maricopa County
- Performed studies of ground and surface water quality

Experience Summary

Mr. Tirpak has 35 years of experience in construction services and administration on street improvement projects, sanitary sewer systems, sewage treatment plants and Improvement Districts. Randy focused 20 years of his career as Improvement District Specialist where he provided Project Management on Improvement Districts from resolution-of-intention through final-assessment, including modifications.

His experience also involved providing the method of assessments, preliminary assessments, meeting and receiving input from property owners and assessment modifications to Improvement Districts in Chandler, Glendale, Peoria, Kingman, Apache County and Coconino County.

Construction services and administration experience includes street improvement projects in Glendale, Peoria, and Phoenix; sanitary sewer systems and sewage treatment plants in Bisbee, Kingman, Superior, and Surprise; and Improvement Districts for the Cities of Chandler, Peoria, and Glendale. His experience also includes preliminary improvement district assessments in Chandler and Apache County; final assessments for improvement districts in Glendale and Peoria; numerous assessment modifications in Gilbert, Chandler, and Peoria; and a water storage system for the Southwest Conference of the United Methodist Church.

Education

Civil Engineering Studies, Lakeland College, Ohio

Experience

35 years

Joined Firm

2007

Airpark Improvement District No.86, Germann Road, Chandler, Arizona

Project Manager responsible for Construction Services. Assisted in preliminary and final plans, cost estimates, preliminary and final assessments, legal descriptions, and property ownership lists. Project features include 1.25 miles of full four-lane paving improvements including curb, gutter and sidewalks, 2.2 miles of sanitary sewers, retention basins, street lights, irrigation system relocations, landscaped median, waterlines, storm drains. Services included design survey, drainage study, design, and improvement district administration.

Improvement District 46, Chandler, Arizona

Project Manager responsible for Construction Services. The project consisted of 5 1/2 miles of major arterial roadway and one mile of industrial collector roadway. The major items of work were full paving which included curbs, gutters, medians, and sidewalks; sanitary sewers; waterlines and stormwater retention; landscaping of parkways and medians; dry utilities conduit for electric, telephone, and cable TV; signing, striping, traffic study, signalization, and street lights; and right-of-way acquisition and dedication. This project resulted in a Benefit Study for assessment purposes as ordered by an Arizona Superior Court. Performed the Benefit Study, which covered the entire western part of Chandler and resulted in our project being completed and the method of assessment established for the west half of Chandler.

Beardsley Road Water Production Facility, Peoria, Arizona

Project Manager responsible for Construction Services. innovative design included use of a low profile reservoir with a cathodic protection system to mitigate corrosion on the interior surfaces of the reservoir, a precast concrete building with air conditioning to house variable frequency drives

and other electrical equipment, and a decorative security wall utilizing offset alignments and earth mounding blend with the adjacent City park and surrounding residential neighborhoods. This project included design and full construction services for 1,S00-gpm well, million gallon welded steel water storage reservoir, 3,500-gpm booster station, utilizing four vertical turbine "can-type" variable speed pumps, 5,000-gallon hydropneumatic tank, supervisory control and date acquisition system, flow monitoring system and chlorination station.

Kingman Hualapai Foothill Estates Improvement District, Kingman, Arizona
Project Manager responsible for Construction services. The project included 5 miles of residential street paving and drainage improvements.

Kachina Village Improvement District, Coconino County, Arizona
Project Manager responsible for Construction Services. The project included 3.5 miles of residential street and drainage improvements.

Mule Gulch Wastewater Treatment Plan Improvement District, Bisbee, Arizona
Project Manager responsible for Construction Services. The project included primary and secondary sedimentation tanks, trickling filter and digester, and new chlorine contact tanks.

Arizona City Sanitary District, Arizona City, Arizona
Project Manager responsible For District representation in regards to plan review as submitted by developers, operations assistance for the wastewater treatment system and overall sanitary district engineering responsibilities.

Kyrerie Water Booster Station, Tempe, Arizona
Project Manager for the development of a design concept report and prepared design documents for upgrades to an existing water booster station located on the Kyrene Water Reclamation Facility site at 511 West Guadalupe Road and for pipeline improvements in the distribution system to create the boundaries for a new pressure zone. The modified booster station serves a southwest section of the City. The concept study resulted in the preparation of detailed drawings and specifications for upgrading the existing booster station including instrumentation and control equipment, electrical power distribution equipment, and six check valve stations located at strategic sites in the distribution system to create boundaries for the new pressure zone. The modified booster station equipment consists of six horizontally mounted split case type pumps driven by totally enclosed fan cooled electric motors. Three of the pumps are capable of delivering 2100 gpm against a total pumping head of 98 feet. The other three pumps are capable of delivering 3500 gpm against a total pumping head of 98 feet. The smaller pumps are driven by 75 horsepower motors. The larger pumps are driven by 125 horsepower motors. The maximum speed of the motors is approximately 1800 RPM. The three 75 horsepower motors are equipped with variable frequency drives -(VFD1s). The normal operation of the booster pumps is controlled by a remote terminal unit (RTU) receiving system pressure signals from a remote location in the distribution system.

Experience Summary

Craig Tweed has 21 years of design, construction, construction management, and inspection experience. He has significant experience in directing, supervising, and coordinating the activities of design engineers, field engineers, superintendents, owner personnel, and outside agencies.

Education

B.S., Construction Engineering Technology, Texas Tech University, 1986

Experience

21 years

Joined Firm

2000

Light Rail Wet Utility Relocation Lines Sections 1 through 4 and maintanence and storage facility

Construction Manager / Project Manager: Project consists of approximately 19 lane miles of construction of new light rail alignment along existing City of Phoenix right of way and new Maintenance and Storage Facility locate on South 48th Street. Project is broken into five separate construction contracts and managed by five separate METRO construction teams. Brown and Caldwell utilized a single team to coordinate between the five contracts to maintain integrity and uniformity of design and construction throughout the project and to verify construction complies with current COP construction requirements. Responsibilities include oversight of relocation of water and sanitary sewer along the new Light Rail alignment as describe below:

- Review of preliminary and final design documents to insure compliance with existing City standards, operability of system design and constructability of design
- Development and implementation of new City standards applicable specifically to Light Rail Construction
- Quality assurance inspection of water and sewer installations
- Review and evaluation of numerous design changes to include both redesign, implementation and negotiation of changes
- Review and management of contract cost to verify contractor's billing matches actual work completed
- Coordination with COP WSD crews to provide standard services in a streamlined manner in order to expedite the construction. The services included valve operation to de-energize portions of system to allow connection of new construction to existing facilities, emergency repairs, meter installations, hot taps of both water and sanitary sewer, video inspection of sanitary sewer,
- Development of process to allow real time acceptance of new portions of water distribution system and providing COP WSD real-time as-built information by implementing the partial interim approval process.
- Provided coordination with COP Fire Department to establish protocols for notification of Fire Department by contractor of construction activities related to water and fire protection.
- Implemented GIS valve exercise and shutdown program where all valves along the Light Rail alignment are verified to operating correctly,

asset information is documented and any inoperable valves are replaced prior to construction to minimize impact to the contractor's schedule.

- Provided valve operation services for distribution mains 12" and smaller to increase support of COP WSD valve crews facilitate contractor requested shutdowns.

48th Street Water and Sewer Relocations for Light Rail

Project Manager: Project consisted of increasing capacity of water distribution system and sanitary sewer system on 48th street Between Washington and Jackson to accommodate additional future requirements for Light Rail Maintanence and Storage Facility. Project was design and manged by METRO. Brown and Caldwell provided quality assurance oversight and coordination with COP WSD to enforce COP construction standards. Duties included review of design documents for compliance with applicable city standards, quality assurance inspection to ensure compliance with plans and specifications, review and management of all design changes associated with water and sewer. Coordination with COP personnel to schedule required services.

Paradise Valley PRV 1-R5

Project Manager: Project consists of installation of new 16" pressure reducing valves between existing zones. The project is being constructed under City of Phoenix Job Order Contracting Process. Duties include supervision, oversite and training of new Construction Manager, review and maintenance of budget, negotiation of original budget and all contract changes.

Paradise Valley Booster Station –PRV 2A-R12

Project Manager: Project consisted of installation of four new 1000-hp high-pressure vertical turbine water booster pumps, 16" PRV system, surge system, SCADA control system and decommissioning of the existing booster station without disruption is pumping capability. Duties include supervision, oversite and training of new Construction Manager, review and maintenance of budget, negotiation of original budget and all contract changes.

24th Street Chemical System Modifications

Construction Manager: Project consisted of installation of new 66" and 48" plant water line and reservoir wier / junction box converting existng reservoir into a clear well to improve detention time prior to introduction to distribution, new chemical delivery systems at an extisting water treatment plant. New chemical feed systems were installed, includeing aluminum sulfate, sufuric acid, sodium hydroxide, polymer hydroflousilicic acid and gaseous chlorine feed systems were installed, tested and commissioned without impacting normal plant operations. Responsibilities include review and control of all project documentation, supervision and coordination of construction, testing, startup and commissioning activities. Management and implementation of required contract modifications, including negotiations of additional time and cost.

EXHIBIT C
TO
PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
BROWN & CALDWELL, INC.

[Scope of Work]

See following pages.

Brown AND Caldwell

Scope of Work

City of Avondale
Electrical System Power Study

September 29, 2010

Project Overview

This scope is to provide electrical engineering services to the City of Avondale (City) to perform studies required to meet the requirements of Arc Flash hazards based on the National Fire Protection Association-70E, the Institute of Electrical and Electronic Engineers-1584 and the National Electrical Code (NEC). Brown and Caldwell (BC) will evaluate the Electrical Distribution System (EDS) at the sites identified in Table 1-1 and provide Arc Flash hazard labeling per the NEC.

Table 1-1. Project Locations

Number	Sites	Address	Description
1	Whyman Lift Station	1010 S Dysart Rd	Lift Station
2	Fulton Lift Station	13501 W Verde Ln	Lift Station
3	Donatela Lift Station	2100 N 120th Dr	Lift Station
4	10th Street Lift Station	1477 N Eliseo C Felix Jr Way	Lift Station
5	Littleton Lift Station	1431 S 107th Dr	Lift Station
6	4th Street Lift Station	395 S Lower Buckeye Rd	Lift Station
7	Central Lift Station	1410 N Central Ave	Lift Station
8	Lawrence Lift Station	201 E Lawrence Blvd	Lift Station
9	Riley Lift Station	809 E Riley Dr	Lift Station
10	Friendship Park	12325 W McDowell Rd	Lift Station
11	Water Reclamation Facility	4800 S. Dysart Road	Treatment Plant
12	Rancho Santa Fe Booster Station	12550 W McDowell Rd	Booster
13	Northeast Booster Station		Booster
14	Del Rio Reservior and Booster		Well and Booster
12	Northside Well 6 and Booster Station		Well and Booster
13	Well 8 and Booster Station	1940 N 99th Ave	Well and Booster
14	Well 7	4125 N El Mirage Rd	Well
15	Well 8A	1940 N 99th Ave	Well
16	Well 10		Well
17	Well 11		Well
18	Well 12		Well
19	Well 18	13081 W McDowell Rd	Well
20	Well 16	12551 W McDowell Rd	Well

Table 1-1. Project Locations (Cont'd)

Number	Sites	Address	Description
21	Well 17		Well
22	Coldwater Well 15	12533 W Van Buren St	Well
23	Agua Fria Well 1		Well
24	Well 19		Well
25	Well 20		Well
26	Well 21		Well
27	Well 23		Well

The project described herein contains the following components:

- Data Collection
- EDS Modeling
- Short Circuit Analysis
- Arc Flash Hazard Analysis
- Protective Device Coordination
- Condition Assessment
- Training/Support.

Requirements from the City

BC will require the following items/task from the City to assist in the scope of this project:

- Provide a single point of contact for BC to interface with during the extent of the project to assure the proper coordination of the work performed
- Provide time to escort the BC employees as necessary
- Provide available single line diagrams. Any changes from single line diagrams provided by City resulting in additional work will be billed on a time and materials basis as out-of-scope work.

Assumptions and Exclusions

- BC will not adjust any breaker setting. Setting changes are to be performed by a licensed electrician.
- BC will not develop or provide updated CAD drawings under this scope.
- BC will not provide a copy of the SKM System Analysis, PowerTools (SKM) software used during this project.

Phases and Tasks

Phase 100 Project Management

BC will perform overall project management, project tracking, report the progress of the project and provide monthly invoicing through the use of a computer based project management system, which includes all major activities of the scope of services. BC will update the design schedule monthly and include the updated schedule in the monthly invoicing.

Phase 200 Site Visits

Electrical systems power studies require a model of the EDS. Developing this model requires detailed data collection. Upon completion of the Arc Flash analysis, labels shall be created and installed on each piece of distribution equipment. The labels shall include hazard level and the Personal Protective Equipment (PPE) necessary to work on equipment when energized.

Task 201 Data Collection

Objectives: BC will collect the data required to develop a model of the EDS for the sites identified in Table 1-1.

Activities: BC will visit each site and conduct field verification of existing EDS beginning with the utility transformer available fault current, down through 4160V electrical equipment, 480V electrical equipment, motors greater than 5 horsepower, and power feeder circuits including the load disconnecting means. Field verification will not be conducted on equipment, lighting circuits or branch feeder circuits at voltages equal to or less than 240 volts and less than 400A load. This equipment shall be labeled per the NEC Article 110.16 (as required).

The following is representative of the information to be gathered:

- For medium voltage and higher sites (4160VAC and higher), BC will contact the utility for available fault currents at the service entrance sections
- For low voltage sites (480VAC and lower), the available fault current information will be taken from the tables provided by the utility
- Power Source Type: Voltage and Ampacity
- Disconnecting Means: Type, Voltage and Ampacity
- Load Type: Voltage and Ampacity
- Cable Type: Size and Length
- Raceway: Type and Size.

Deliverables: Collected data shall be typed and documented using BC standard spreadsheet templates. The data sheets shall be included in the report.

Task 202 Labeling

Objectives: At the completion of the arc flash hazard analysis, BC will label electrical distribution equipment with arc flash labels per NEC Article 110.16. The arc flash labels shall include the arc flash hazard analysis results including incident energy levels, hazard boundaries, and appropriate PPE requirements.

Phase 300 Office Engineering

After gathering the data a model will be developed of the EDS. The model shall be used to conduct short circuit analysis, perform protective device coordination, and arc flash analysis. Recommendations shall be developed and submitted to the City along with arc flash warning labels.

Assumptions: The model will be based on single line diagrams provided by the City and information gathered during the data collection task.

Input From The City: City will provide as-built single line diagrams and a naming convention for equipment nametags.

Task 301 EDS Modeling

Objectives: BC shall develop EDS models for each of the sites listed in Table 1.1.

Activities:

- Develop a software model for each site
- The models shall be prepared using the current version of SKM software
- The model shall be represented as a single line diagram and be representative of the information collected from the site
- After making a reasonable attempt to locate equipment datasheets, BC will notify the City of equipment where product information may be difficult to locate or identified as no longer available.

Deliverables:

- SKM developed single line diagrams shall be provided in the report. The single line diagrams shall be based on as found conditions at the sites and will contain the following information at a minimum:
  - Available fault information
  - Incident energy levels
  - PPE Category
  - Equipment name tags
- SKM printout of existing breaker settings shall be provided in the report.

Task 302 Short Circuit Analysis:

Objectives: BC shall conduct a short circuit analysis to determine if the system components interrupting capacities is sufficient to protect the components during a fault.

Activities:

- Obtain utility information, perform short circuit analysis , review output information, and identify areas where equipment ratings are not sufficient.
- Where applicable, prepare recommendations for correcting.
- For locations with generators, perform short circuit analysis for generator, review output information, and identify areas where equipment ratings are not sufficient for the fault levels available.

Deliverables: The following SKM developed reports will be provided in the report:

- Device Evaluation Comprehensive Report for utility and where applicable for generator.

Task 303 Arc Flash Hazard Analysis:

Objectives: BC will conduct an arc flash hazard analysis of the EDS. The study will determine the incident energy levels for equipment and the proper PPE required to safely work on or around the equipment while energized bussing is exposed. Arc Flash warning labels shall be created and include information from the analysis.

Activities:

- Perform arc flash hazard analysis based on utility contribution
- Review output information
- Identify areas where equipment required PPE ratings are greater than or equal to Category 3
- For locations with generators, perform an arc flash hazard analysis based on generator contribution, review output information, and identify areas where equipment required PPE ratings are greater than or equal to Category 3.

Deliverables: The following SKM developed reports will be provided in the report:

- Arc Flash Evaluation Report based on existing conditions for utility and where applicable for generator
- Arc Flash Evaluation Report based on recommendations for utility and where applicable for generator.

Task 304 Protective Device Coordination Study:

Objectives: BC shall conduct a protective device coordination study. The study will provide settings for improving system coordination. Where applicable, the recommended settings will be chosen to help reduce the PPE Category requirements for personnel working on energized equipment. By focusing on personnel safety maximum system coordination may not be obtained.

Activities:

- Prepare appropriate Time Current Curves (TCC) for EDS
- Adjust protective devices settings to improve system coordination
- Perform an arc flash analysis and compare new output with existing condition output
- Where appropriate, prepare recommendations for changing settings
- Where a generator exists, verify that the system is coordinated with the generator, if not provide recommendations for coordination.

Deliverables: Recommendations for breaker setting changes will be included in the report

- The following SKM developed TCC will be provided in the report:
  - TCC based on existing conditions
  - TCC based on recommendations.

Task 305 Condition Assessment:

Objectives: BC will compile adverse conditions and recommendation within the report into a condition assessment report.

Deliverables: Four copies of the Condition Assessment report will be provided separate from the Electrical System Power Study Phase I Report.

Phase 400 Training/Support

BC will provide a 6 hour training course for City staff. Training will discuss the information in the report and labels. Training will be performed by Engineer and Project Manager.

Final Deliverables

The following final deliverables will be provided to the City:

- Electrical Systems Power Study Report
  - Four bound paper copies in a three-ring binder
  - One CD with PDF of Report
- Condition Assessment Report
  - Four bound paper copies in a three-ring binder
  - One CD with PDF of Report
- City approved SKM generated arc flash labels
  - One label will be provided per electrical distribution equipment
- ANSI standard Arc Flash Warning labels shall be provided for equipment with incident energy levels less than 4 calories/cm^2 and/or required per NEC 110.16
- One CD will be provided per site with SKM files generated using the SKM software.

Compensation

Compensation shall be on a Time and Material basis per Exhibit B with a not to exceed amount of $141,086. Although items are estimated by phases, Brown and Caldwell may transfer funds between tasks as project developments require.

Schedule

The work will commence once City provides a written Notice to Proceed and will be completed within 180 working days of that date.

EXHIBIT D
TO
PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE CITY OF AVONDALE
AND
BROWN & CALDWELL, INC.

[Fee Proposal]

See following page.

Fee Schedule

Avondale, City of (AZ) -- Electrical System Power Study

Phase	Phase Description	Pettiford, Bernard S	Qualls, Shawntel	Campbell, Eric P	Mills, Randy J	Foote, Franklin R	Warnet, Caren J	Erndt, Brandon F	Rosco, Douglas T	Wollert, Sandra J	Tirpak, Randy D	Moraca, Tracy H	Total Labor Hours	Total Labor Effort	Company Vehicles	Total Unit Pricing Effort	Total Expense Effort	Total Effort
		PM	PA															
		$153.00	$94.00	$174.00	$153.00	$113.00	$94.00	$174.00	$174.00	$113.00	$180.00	$180.00						
100	**Collections**	73	5	10	35	58	10	2	2	1	2	2	**200**	**27,757**	500	**500**	**500**	**28,257**
200	**Water Reclamation**	118	5	8	80	120	16	2	0	0	2	2	**353**	**48,288**	0	**0**	**0**	**48,288**
300	**Water Production Sites**	170	5	18	80	158	18	2	0	1	2	2	**456**	**62,579**	0	**0**	**0**	**62,579**
400	**Training**	6	0	6	0	0	0	0	0	0	0	0	**12**	**1,962**	0	**0**	**0**	**1,962**
	GRAND TOTAL	**367**	**15**	**42**	**195**	**336**	**44**	**6**	**2**	**2**	**6**	**6**	**1,021**	**140,586**	**500**	**500**	**500**	**141,086**

Hours and Dollars are rounded to nearest whole number. To display decimals, change the format of the cells.

CITY COUNCIL REPORT

SUBJECT:
Second Amendment to Software Support Agreement - Infor Global Solutions (Michigan), Inc.

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Wayne Janis, PE, Public Works Director, (623) 333-4444

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council approve the second amendment to the software services agreement with Infor Global Solutions (Michigan), Inc., for Enterprise Asset Management (EAM) annual technical support services not to exceed $40,317.92, and authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

BACKGROUND:

Infor's Enterprise Asset Management (EAM) application is currently being used by the Public Works and Engineering Departments for tracking assets and work orders. EAM is a web-based application. An internet browser, such as Microsoft's Internet Explorer but proprietary to this application, is used by City staff to login to the City of Avondale's EAM application and data.

DISCUSSION:

The proposed amendment to the software services agreement is for annual technical support services. These services include 24-hour a day, seven-day a week, telephone and online assistance for technical, application, and customer service issues. The support services also include application updates, patches, and service packs.

The annual support services cost is based on 17 concurrent licenses, three mobile named seats, and one GIS module. The 17 concurrent licenses allow up to 17 users to log into EAM at one time. The three mobile licenses allow three named mobile users to login to EAM, and the GIS module provides users the ability to view asset locations on a map.

BUDGETARY IMPACT:

Funding for the proposed amendment to the software services agreement with Infor is as follows: $16,000.00 from 503-9210-00-7085 (Wastewater Administration), $16,317.92 from 501-9110-00-7085 (Water Administration), and $8,000.00 from 201-5925-00-6310 (Traffic Engineering).

RECOMMENDATION:

Staff recommends the City Council approve the second amendment to software services agreement with Infor Global Solutions (Michigan), Inc., for Enterprise Asset Management (EAM) annual technical support services not to exceed $40,317.92 and authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- Second Amendment

SECOND AMENDMENT
TO
SOFTWARE SUPPORT AGREEMENT
BETWEEN
INFOR GLOBAL SOLUTIONS (MICHIGAN), INC.
AND
THE CITY OF AVONDALE

THIS SECOND AMENDMENT (the "Second Amendment") is made as of January 3, 2011, between the City of Avondale, an Arizona municipal corporation (the "Licensee") and Infor Global Solutions (Michigan), Inc., a Michigan corporation ("Infor").

RECITALS

A. The Parties entered into that certain Software Support Agreement effective October 15, 2009, as amended by that certain First Amendment to the Software Support Agreement, License Agreement and Order Form effective October 15, 2009 (collectively, the Support Agreement, License Agreement, Order Form and First Amendment thereto, are referred to hereinafter as the "Support Agreement"). All of the capitalized terms not otherwise defined in this Second Amendment have the same respective meanings as contained in the Support Agreement.

B. Licensee has determined that it is necessary to continue Support ("Continued Support"), extend the term of Support under the Support Agreement and authorize additional compensation.

C. Licensee and Infor desire to amend the Support Agreement to provide for Continued Support, extend the term of Support and the Support Agreement, and authorize additional compensation.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing 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 is hereby acknowledged, Licensee and Infor hereby agree to amend the Support Agreement as follows:

1. Term of Contract. The term of Continued Support and the Support Agreement shall be extended from January 3, 2011, until November 17, 2011.

2. Scope of Services. Infor shall perform Continued Support as listed on Invoice No. P – 35573 – 00D1, attached hereto as Exhibit 1, and incorporated herein by reference.

3. Compensation. Licensee shall pay Infor the total aggregate amount of $40,317.92 for the Continued Support as more particularly set forth on Invoice No. P – 35573 – 00D1, attached hereto as Exhibit 1, rendered under the terms of the Continued Support under the Support Agreement and this Second Amendment.

4. Agreement Subject to Appropriation. This Second Amendment is subject to the provisions or ARIZ. REV. STAT. § 42-17106. The provisions of this Second Amendment for payment of funds by the Licensee shall be effective when funds are appropriated for purposes of this Second Amendment and are actually available for payment. The Licensee shall be the sole judge and authority in determining the availability of funds under this Second Amendment and the Licensee shall keep Infor fully informed as to the availability of funds for the Second Amendment. The obligation of the Licensee to make any payment pursuant to this Second Amendment is a current expense of the Licensee, payable exclusively from such annual appropriations, and is not a general obligation or indebtedness of the Licensee. If the Licensee's City Council fails to appropriate money sufficient to pay the amounts as set forth in this Second Amendment during any immediately succeeding fiscal year, this Second Amendment shall terminate at the end of then-current fiscal year and the Licensee and Infor shall be relieved of any subsequent obligation under this Second Amendment.

5. Non-Default. By executing this Second Amendment, Infor affirmatively asserts that to the best of Infor's senior management's knowledge, Licensee is not currently in default, nor has been in default at any time prior to this Second Amendment, under any of the terms or conditions of the Agreement.

6. Effect of Second Amendment. In all other respects, the Support Agreement is affirmed and ratified and, except as expressly modified herein, all terms and conditions of the Support Agreement shall remain in full force and effect.

7. Conflict of Interest. This Second Amendment and the Support Agreement may be cancelled pursuant to ARIZ. REV. STAT. § 38-511.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date and year first set forth above.

"Licensee"

CITY OF AVONDALE, an Arizona municipal corporation

_____
Charles P. McClendon, City Manager

ATTEST:

_____
Carmen Martinez, City Clerk

"Infor"

INFOR GLOBAL SOLUTIONS (MICHIGAN), INC., a Michigan corporation

By: _____

Name: _____

Title: _____

(ACKNOWLEDGEMENTS)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

This instrument was acknowledged before me on _____, 2011, by Charles P. McClendon, the City Manager of the CITY OF AVONDALE, an Arizona municipal corporation, on behalf of the City of Avondale.

_____
Notary Public in and for the State of Arizona

My Commission Expires:

_____

STATE OF _____)
) ss.
COUNTY OF _____)

This instrument was acknowledged before me on _____, 20___, by _____ as _____ of INFOR GLOBAL SOLUTIONS (MICHIGAN), INC., a Michigan corporation, on behalf of the corporation.

_____
Notary Public in and for the State of _____

My Commission Expires:

_____

EXHIBIT 1
TO
SECOND AMENDMENT
TO
SOFTWARE SUPPORT AGREEMENT
BETWEEN
INFOR GLOBAL SOLUTIONS (MICHIGAN), INC.
AND
THE CITY OF AVONDALE

[Invoice No. P – 35573 – 00D1]

See following pages.

Billing Office	Invoice No	Invoice Date	Due Date
00D1	P - 35573-00D1	25 Oct 2010	Due Upon Receipt D1GM01000

Invoice

Bill to: City of Avondale
399 E Lower Buckeye Road
AVONDALE AZ 85323
USA
Attn : Kevin Hinderleider

Deliver to: City of Avondale
399 E Lower Buckeye Road
AVONDALE AZ 85323
USA
Attn : Kevin Hinderleider

Customer No.	Tax Reg. No.	Customer PO No.	Currency	Contract Information
93332			USD	Maintenance Renewal

Deliverable	Quantity	Rate	Amount
Infor EAM Enterprise Edition GIS Module Maintenance (18 Nov 2010 - 17 Nov 2011)	1.00	3,858.89	3,858.89
Infor EAM Enterprise Edition Maintenance (18 Nov 2010 - 17 Nov 2011)	1.00	13,337.75	13,337.75
Infor EAM Enterprise Edition Maintenance (18 Nov 2010 - 17 Nov 2011)	1.00	19,056.26	19,056.26
Infor EAM Enterprise Edition Mobile Maintenance (18 Nov 2010 - 17 Nov 2011)	1.00	761.54	761.54
TAX(Type RE - AZ)	1.00	3,303.48	3,303.48

For renewal questions, please contact Kelly Bergfalk, Support Account Manager
Phone: +1 (864) 757-9352
Email: Kelly.Bergfalk@infor.com

Remit to:

Infor Global Solutions (Michigan), Inc.
NW5421
PO Box 1450
Minneapolis MN 55485-5421
USA
Cash.Applications@Infor.com
Wire to: WELLS FARGO BANK, NA
ABA#: 121000248
Account # 4121023287

Please pay invoice by due date to avoid interruptions in support.

Net	Tax	Total
37,014.44	3,303.48	40,317.92

Payment Terms: See due date

Special Instructions: For questions, please contact Infor.Collections@infor.com at 678-319-8350 or email Infor.Collections@infor.com

Invoice Total USD 40,317.92

How can you adopt Infor's latest technology innovations with the fastest speed and lowest risk? www.infor.com/FLEX

CITY COUNCIL REPORT

SUBJECT:
Resolution 2949-111 - Supporting a Grant Application to the ADOH for the Owner-Occupied Home Rehabilitation Program

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Gina Montes, Neighborhood and Family Services Director (623) 333-2727

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that City Council adopt a resolution authorizing the submission of a $300,000 State Housing Fund (SHF), HOME Investment Partnership program grant application to the Arizona Department of Housing (ADOH) to provide additional funding to the existing City of Avondale Owner Occupied Home Rehabilitation Program. ADOH requires City Council authorization of all grant applications.

BACKGROUND:

City Council authorized the Consolidated Plan in April of 2010 which contained as a strategy the preservation of the City's existing single-family housing stock. City Council approved a contract on July 5, 2010 with F.S.L. Home Improvements Inc. (FSL) to operate the single-family housing rehabilitation program to include both Substantial Home Rehabilitation and Emergency Repair projects over the next three years. Substantial Home Rehabilitation is funded with HOME funds and a high demand and need for the Substantial Home Rehabilitation program coupled with excellent productivity from FSL will expend the Substantial Rehabilitation funds quickly. State Housing Fund is the only other currently available source of funds that can be used for Substantial Repair. These funds will be necessary to keep the program operational on a continuous year-around basis. The contract with FSL can be amended to add the additional funds.

DISCUSSION:

Success in obtaining the $300,000 grant depends largely upon the ability of Avondale to demonstrate a demand for the program as well as the capacity to successfully spend the grant. It is expected that sufficient demand can be demonstrated both by the volume of persons that inquire about home repairs through the Neighborhood and Family Service Department (NFSD); an average of five clients per week inquire, the waiting list for substantial home repairs and the large quantity of housing in poor condition in Avondale's low-income neighborhoods. It is expected the capacity can be demonstrated by the performance of the current programs and FSL to date. To date, twelve homes have received substantial repairs and two others are currently in process. Until the rehabilitation program was created in 2007, Neighborhood and Family Services Department had very limited resources to assist distressed low-income homeowners with cooling and heating repairs, dangerous electrical wiring, leaking roofs, plumbing repairs and other health and safety needs. The Substantial Home Rehabilitation program is a vital part of the services that are necessary in Avondale's low-income neighborhoods. If Avondale is successful in obtaining the SHF grant it is expected that the funds will be available by the end of March 2011.

BUDGETARY IMPACT:

No City of Avondale funding is necessary from grant or general fund resources.

RECOMMENDATION:

Staff recommends that the City Council adopt a resolution authorizing the submission of a $300,000 State Housing Fund (SHF) grant application to the Arizona Department of Housing (ADOH) to provide additional funding for the existing City of Avondale Owner-Occupied Substantial Home Rehabilitation Program and approving the Avondale Owner Occupied Home Rehabilitation Policies and Procedures.

ATTACHMENTS:

Click to download

- Owner Occupied Home Repair Policies
- Resolution 2949-111

AVONDALE OWNER-OCCUPIED HOME REHABILITATION PROGRAM POLICIES AND PROCEDURES
(State Housing Fund)

1. The Program Design/Goals/Objectives:
The City of Avondale (City) Neighborhood and Family Services Department (NFSD) has been operating an Owner-Occupied Home Rehabilitation Program (Program) since May of 2007. The Program was established in response to the prevalence of substandard housing conditions in Avondale's low-income neighborhoods, many of which present imminent threats to the health and safety of the occupants. The Program is available only to low-income owner-occupied households in Avondale whose homes have one or more hazardous conditions that threaten the health and safety of the occupants. The maximum investment per unit for rehabilitation is $50,000 and the minimum investment is $1,000. In the case that full replacement of a mobile/manufactured home is necessary; the maximum investment is $75,000. Funding for home rehabilitation is provided in the form of a forgivable loan to the homeowner. The NFSD is housed in the Avondale Community Center which is located in the Old Town Neighborhood, the largest low-income neighborhood in Avondale. The NFSD is a one-stop-shop for low-income residents providing services which include the Community Assistance Program, the Weatherization Program, the Emergency Food Box Program and Code Enforcement.

2. Marketing and Advertising Method:
The NFSD receives a steady stream of applications for the Program through referrals from staff working in the various NFSD program areas. Numerous referrals are also received by residents who have been previously assisted or who have seen program information which is available at various locations throughout the City. NFSD staff disseminates written information in English and Spanish during numerous community events in which NFSD staff participates. The Program is also marketed on the City web site and other available media. All written materials provide information regarding fair housing, language assistance and handicapped accessibility.

3. Staffing/The Administrative Structure:
The Owner-Occupied Home Repair Program is operated by the City of Avondale's Neighborhood and Family Services Department, Housing Division. Administration of the Program is the responsibility of the Community Development Block Grant (CDBG) Program Manager under the general direction of the Neighborhood and Family Services Director. Application intake and qualification is conducted by the Housing Program Coordinator. The City of Avondale will enter into a sub-recipient contract through a Request for Proposal process to identify a qualified Rehabilitation Service Provider to operate the Home Rehabilitation Program in partnership with the current program.

4. Application and Wait List procedures:
Candidates complete an application and provide income eligibility documentation, proof of ownership and insurance. Program staff will visually verify original

documents and copies will be obtained for the program file. Income eligibility is determined following the U.S. Department of Housing and Urban Development (HUD) Section 8 guidelines based on household income. Eligible beneficiaries' household income will not exceed 80% of the Area Median Income Limits as determined by HUD. A limited title search will be performed to ensure that the property is free of restrictions or encumbrances that unduly restrict the good and marketable nature of the ownership interest, such as liens and non-owner-occupants named on the deed.

If necessary, a formal waiting list will be maintained. All eligible applicants will be placed on this list in the order in which the application was received. When necessary, staff will prioritize immediate health and safety hazards.

5. Housing Counseling and Homeownership Maintenance Education:
The Rehabilitation Specialist will educate each homeowner as to the proper use of newly repaired or installed equipment and provide home maintenance educational information to homeowners.

6. Method of determining scope of work:
After program eligibility has been documented and verified, the Rehabilitation Specialist will inspect the property to determine the repairs needed. The Rehabilitation Specialist will inspect each property for issues regarding Housing Quality Standards (HQS) and/or building code violations and will meet with homeowner to discuss their needs. Based on the inspection, a cost-estimate and scope of work will be developed according to Universal Building Code or local code and be reviewed with the homeowner. The scope of work shall address the required repairs that affect the safety and habitability of the home. A focus on improving the overall energy efficiency and sustainability of the home will serve as a guide in the development of the scope of work. Examples of repairs shall include roofing, heating and cooling, plumbing, electrical and accessibility issues. Upon approval of the Scope of Work, a public bid package will be created.

7. Bid Process:
Each bid is publicly advertised in the Dodge Report. A list of eligible contractors is maintained by program staff and licenses, insurance and the debarment list are checked prior to award. Only contractors attending the pre-construction/bid conference are allowed to bid on the project. Contractors seeking to be considered eligible to bid any of the projects are required to complete a contractor application and provide the following: a copy of the Arizona Registrar of Contractors license, liability and workers compensation insurances prior to submitting bids. Procurement procedures are as follows: Bids estimated to exceed $5,000.00 must be hand delivered or mailed by the contractor to the Program office in a sealed envelope with the name of the project and bid opening date on the front. All bids shall be opened at the time of the bid opening. Bids are reviewed with the homeowner and awarded to the lowest, responsive bidder. Every effort is made to obtain a minimum of three bids per project.

Since timeliness of the project completion is critical to the success of the program, bids may be awarded based on the lowest responsive bid as well as the contractor's overall ability to complete the project on time. Bid amounts and award letters are sent to all contractors after bid opening and award.

8. Construction Inspection Process:
The Rehabilitation Specialist monitors construction throughout the process and will perform a final inspection to ensure that work performed meets HQS and local building code and that all required code inspections have been completed. A final walk-through is done with the homeowner at which time the homeowner will be asked to sign off on a project completion certificate indicating that work was performed to homeowner's satisfaction and that all warranty documentation has been provided.

9. Method of Determining before and after Rehabilitation Value:
The Rehabilitation Specialist obtains a property valuation based on comparable homes and home sales data in the area. This amount is used to determine the before rehabilitation value of the home. Once the bid is awarded, the rehabilitation cost is added to the before value of the home and compared to the current Federal Housing Administration 203 (b) limits to ensure that the after rehab value does not exceed this limit. The final after rehab value is determined once the project is completed and the total investment amount is added to the before rehab value.

10. Loan Servicing Policy/Procedures Including Lien Releases:
The assistance is provided to the homeowner in the form of a forgivable loan for a set period of affordability based on the amount of investment. Forgivable loans are non-interest bearing and require no payments provided the homeowner maintains ownership of the home and the home remains their primary residence. The principle is reduced relative to the amount of time the owner lives in and owns the home on a monthly basis. The lien is secured through a Promissory Note and Deed of Trust recorded against the assisted property. The City is named the beneficiary on these documents. Loan forgiveness is conditioned upon the homeowner complying with the terms of the Deed of Trust.

11. Construction Lien Releases:
Each performing contractor signs a lien release upon completion of project and prior to receiving final payment. A copy is maintained in the client file.

12. Program Income:
In the event that program staff acquires any recaptured or repayment of assisted amounts from the beneficiaries it will be documented in the bi-monthly report in a current contract period or a notification to the Arizona Department of Housing will be sent. The notification to the Arizona Department of Housing will have the recaptured or repayment amount information attached along with a repayment check.

13. Temporary Relocation Policy:
Program staff will offer temporary relocation to homeowners as needed. All relocation costs shall be covered as part of the total maximum repair cost per unit.

14. Lead Based Paint Activities
Program staff will follow the HUD Lead Based Paint Regulations (24 CFR Part 35). All homes built prior to 1978 will receive a lead based paint test and risk assessment to determine lead hazards. If hazards are present, a licensed lead abatement contractor shall perform all lead abatement work or interim controls and will obtain clearance test results. Homeowners are given a copy of the *Renovate Right* brochure, the test results, risk assessment report and clearance test reports.

15. Grievance and Quality Assurance Procedures:
All complaints must be submitted in writing to the CDBG Program Manager. The CDBG Program Manager will have ten (10) working days to respond in writing. If response from the CDBG Program Manager is not satisfactory, complaint should be forwarded to the Neighborhood and Family Services Director. The Neighborhood and Family Services Director will have ten (10) working days to respond in writing. If response is not satisfactory, complaint shall be submitted in writing to the Assistant City Manager. The Assistant City Manager will have ten (10) working days to respond in writing. All decisions from the Assistant City Manager are final.

16. Homeownership Maintenance Policy:
Upon completion of the repairs, program staff will provide education to the homeowner that, at a minimum, will address the need to budget for home repairs, the importance of timely mortgage payments if applicable, and the importance of maintaining homeowners insurance.

RESOLUTION 2949-111

A RESOLUTION OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, AUTHORIZING THE SUBMISSION OF A GRANT APPLICATION TO THE ARIZONA DEPARTMENT OF HOUSING FOR STATE HOUSING FUNDS AVAILABLE THROUGH THE HOME INVESTMENT PARTNERSHIP PROGRAM AND THE STATE HOUSING TRUST FUND AND ADOPTING THE AVONDALE OWNER-OCCUPIED HOME REHABILITATION POLICIES AND PROCEDURES.

WHEREAS, the Arizona Department of Housing ("ADOH") is accepting proposals from state and local agencies for project funding for housing rehabilitation programs for owner-occupied single family dwellings; and

WHEREAS, the Council of the City of Avondale (the "City Council") desires to submit a grant application to be considered by ADOH for funding for the City of Avondale (the "City") Owner-Occupied Home Rehabilitation Program (the "Application"); and

WHEREAS, ADOH procedures require that the City Council certify, by resolution, (i) its approval of submission of the Application in support of the City of Avondale Owner-Occupied Home Rehabilitation Program (the "Project"), (ii) that the Project meets the City's housing and community development needs and the requirements of the State Housing Program, (iii) that the City will comply with all State Housing Fund Program Guidelines, HOME Investment Partnership Program regulations, other applicable State and Federal Statutes and regulations and the certifications contained in the Application and (iv) that the City adopts the Avondale Owner-Occupied Home Rehabilitation Policies and Procedures to guide the conduct of the Project.

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

SECTION 1. The recitals above are hereby incorporated as if fully set forth herein.

SECTION 2. The submission of the Application to ADOH for consideration for funding in support of the Project is hereby approved.

SECTION 3. The City Council hereby finds and determines that the Project meets the City's housing and community development needs and the requirements of the State Housing Fund Program.

SECTION 4. The Avondale Owner-Occupied Home Rehabilitation Policies and Procedures are hereby adopted in the form attached hereto as Exhibit A.

SECTION 5. The City Council hereby warrants that the City will comply with all State Housing Fund Program Guidelines, HOME Investment Partnership Program regulations, other applicable State and Federal Statutes and regulations and the certifications contained in the Application.

SECTION 6. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute and submit all documents and any other necessary or desirable instruments or cause the execution and submission of all documents and any other necessary or desirable instruments in connection with the Application and to take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT A
TO
RESOLUTION NO. 2949-111

[Avondale Owner-Occupied Home Rehabilitation Program Policies and Procedures]
(State Housing Fund)

See following pages.

AVONDALE OWNER-OCCUPIED HOME REHABILITATION PROGRAM POLICIES AND PROCEDURES
(State Housing Fund)

1. The Program Design/Goals/Objectives:
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The Rehabilitation Specialist will educate each homeowner as to the proper use of newly repaired or installed equipment and provide home maintenance educational information to homeowners.

6. Method of determining scope of work:
After program eligibility has been documented and verified, the Rehabilitation Specialist will inspect the property to determine the repairs needed. The Rehabilitation Specialist will inspect each property for issues regarding Housing Quality Standards (HQS) and/or building code violations and will meet with homeowner to discuss their needs. Based on the inspection, a cost-estimate and scope of work will be developed according to Universal Building Code or local code and be reviewed with the homeowner. The scope of work shall address the required repairs that affect the safety and habitability of the home. A focus on improving the overall energy efficiency and sustainability of the home will serve as a guide in the development of the scope of work. Examples of repairs shall include roofing, heating and cooling, plumbing, electrical and accessibility issues. Upon approval of the Scope of Work, a public bid package will be created.

7. Bid Process:
Each bid is publicly advertised in the Dodge Report. A list of eligible contractors is maintained by program staff and licenses, insurance and the debarment list are checked prior to award. Only contractors attending the pre-construction/bid conference are allowed to bid on the project. Contractors seeking to be considered eligible to bid any of the projects are required to complete a contractor application and provide the following: a copy of the Arizona Registrar of Contractors license, liability and workers compensation insurances prior to submitting bids. Procurement procedures are as follows: Bids estimated to exceed $5,000.00 must be hand delivered or mailed by the contractor to the Program office in a sealed envelope with the name of the project and bid opening date on the front. All bids shall be opened at the time of the bid opening. Bids are reviewed with the homeowner and awarded to the lowest, responsive bidder. Every effort is made to obtain a minimum of three bids per project.

Since timeliness of the project completion is critical to the success of the program, bids may be awarded based on the lowest responsive bid as well as the contractor's overall ability to complete the project on time. Bid amounts and award letters are sent to all contractors after bid opening and award.

8. Construction Inspection Process:
The Rehabilitation Specialist monitors construction throughout the process and will perform a final inspection to ensure that work performed meets HQS and local building code and that all required code inspections have been completed. A final walk-through is done with the homeowner at which time the homeowner will be asked to sign off on a project completion certificate indicating that work was performed to homeowner's satisfaction and that all warranty documentation has been provided.

9. Method of Determining before and after Rehabilitation Value:
The Rehabilitation Specialist obtains a property valuation based on comparable homes and home sales data in the area. This amount is used to determine the before rehabilitation value of the home. Once the bid is awarded, the rehabilitation cost is added to the before value of the home and compared to the current Federal Housing Administration 203 (b) limits to ensure that the after rehab value does not exceed this limit. The final after rehab value is determined once the project is completed and the total investment amount is added to the before rehab value.

10. Loan Servicing Policy/Procedures Including Lien Releases:
The assistance is provided to the homeowner in the form of a forgivable loan for a set period of affordability based on the amount of investment. Forgivable loans are non-interest bearing and require no payments provided the homeowner maintains ownership of the home and the home remains their primary residence. The principle is reduced relative to the amount of time the owner lives in and owns the home on a monthly basis. The lien is secured through a Promissory Note and Deed of Trust recorded against the assisted property. The City is named the beneficiary on these documents. Loan forgiveness is conditioned upon the homeowner complying with the terms of the Deed of Trust.

11. Construction Lien Releases:
Each performing contractor signs a lien release upon completion of project and prior to receiving final payment. A copy is maintained in the client file.

12. Program Income:
In the event that program staff acquires any recaptured or repayment of assisted amounts from the beneficiaries it will be documented in the bi-monthly report in a current contract period or a notification to the Arizona Department of Housing will be sent. The notification to the Arizona Department of Housing will have the recaptured or repayment amount information attached along with a repayment check.

13. Temporary Relocation Policy:
Program staff will offer temporary relocation to homeowners as needed. All relocation costs shall be covered as part of the total maximum repair cost per unit.

14. Lead Based Paint Activities
Program staff will follow the HUD Lead Based Paint Regulations (24 CFR Part 35). All homes built prior to 1978 will receive a lead based paint test and risk assessment to determine lead hazards. If hazards are present, a licensed lead abatement contractor shall perform all lead abatement work or interim controls and will obtain clearance test results. Homeowners are given a copy of the *Renovate Right* brochure, the test results, risk assessment report and clearance test reports.

15. Grievance and Quality Assurance Procedures:
All complaints must be submitted in writing to the CDBG Program Manager. The CDBG Program Manager will have ten (10) working days to respond in writing. If response from the CDBG Program Manager is not satisfactory, complaint should be forwarded to the Neighborhood and Family Services Director. The Neighborhood and Family Services Director will have ten (10) working days to respond in writing. If response is not satisfactory, complaint shall be submitted in writing to the Assistant City Manager. The Assistant City Manager will have ten (10) working days to respond in writing. All decisions from the Assistant City Manager are final.

16. Homeownership Maintenance Policy:
Upon completion of the repairs, program staff will provide education to the homeowner that, at a minimum, will address the need to budget for home repairs, the importance of timely mortgage payments if applicable, and the importance of maintaining homeowners insurance.

CITY COUNCIL REPORT

SUBJECT:
Resolution 2948-111 - Intergovernmental Agreement with the Flood Control District of Maricopa County for Cost Sharing Drainage Improvements on 6th Street and Western Avenue

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Sue McDermott, P.E., Director of Development Services & Engineering, 623-333-4211

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council adopt a resolution authorizing an Intergovernmental Agreement (IGA) between the City of Avondale and the Flood Control District of Maricopa County (FCDMC) allowing payment of $187,500 from FCDMC to the City of Avondale for their share of the cost to construct drainage improvements along Western Avenue from 6th Street to Dysart Road, and authorize the Mayor, or City Manager and City Clerk to execute the necessary documents.

BACKGROUND:

On May 6, 2009, the Board of Directors of the FCDMC adopted a resolution authorizing FCDMC to cost-share in projects recommended under the FCDMC's Small Project Assistance Program. For FCDMC's Fiscal Year 2012 Small Project Assistance Program, the City of Avondale proposed a drainage mitigation improvement project along Western Avenue from 6th Street to Dysart Road.

Based upon its objectives and merits, the 6th Street and Western Avenue Drainage Improvement project was awarded $187,500 or 75% of the construction costs. The total cost of the project is estimated at $250,000 with Avondale's cost share at 25% or $62,500. The 6th Street and Western Avenue drainage improvement project is a proposed Capital Improvement Project for FY2011-2012 with a proposed budget of $250,000.

DISCUSSION:

The proposed project will reduce the stormwater flow that has historically threatened structural flooding and will provide the following benefits:

- Reduce the flood hazard to properties in and around the project limits;
- Construct multiple catch basins and connector pipes along Western Avenue;
- Construct a new storm drain trunk line from 6th Street to Dysart where it will outlet into the existing channel.

The IGA proposes the following:

- FCDMC will be responsible for 75% of the Construction costs with the City responsible for 25% of the construction costs.
- The City will be responsible for the design costs. The design for the project is currently programmed to be prepared by the City's Engineering Department.
- The City will serve as the lead agency for all aspects of the project's implementation.
- The City will be responsible for the maintenance of the proposed drainage improvements.

- The City will be responsible for invoicing FCDMC as outlined in the IGA.

BUDGETARY IMPACT:

Funding in the amount of $250,000 will need to be identified in the FY2011-12 CIP. The 6th Street and Western Avenue Drainage Improvement project has been submitted into the CIP evaluation process and FCDMC's cost share of $187,500 has been identified as a CIP revenue for FY2011-12.

RECOMMENDATION:

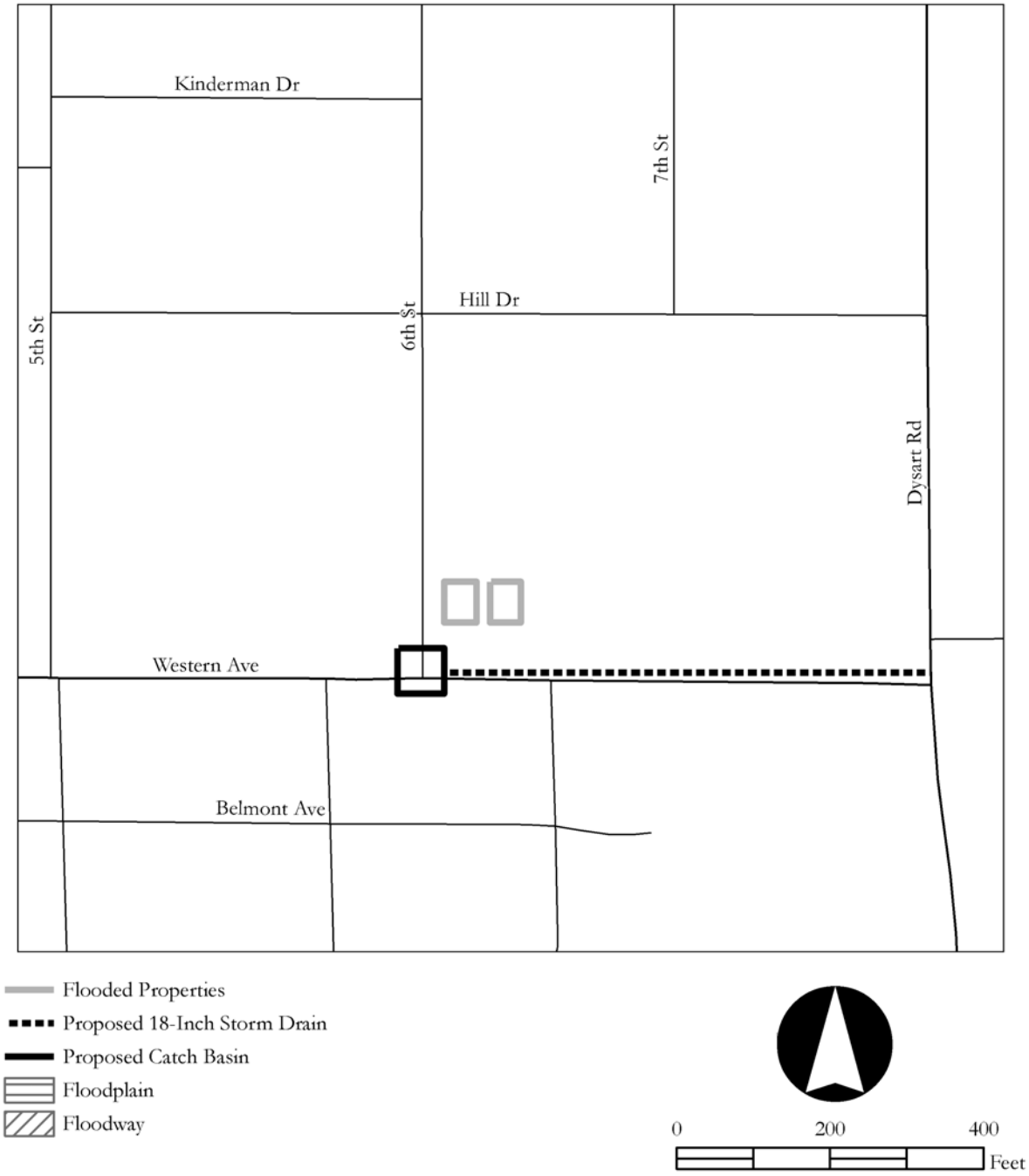
Staff recommends that the City Council adopt a resolution authorizing an Intergovernmental Agreement (IGA) between the City of Avondale and the Flood Control District of Maricopa County (FCDMC) allowing payment of $187,500 from FCDMC to the City of Avondale for their share of the cost to construct drainage improvements along Western Avenue from 6th Street to Dysart Road, and authorize the Mayor, or City Manager and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- Vicnity Map
- Resolution 2948-111

Exhibit A: 6th Street and Western Avenue Drainage Improvements Project



RESOLUTION NO. 2948-111

A RESOLUTION OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY RELATING TO THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE 6TH STREET AND WESTERN AVENUE DRAINAGE IMPROVEMENTS PROJECT.

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. The Intergovernmental Agreement with the Flood Control District of Maricopa County relating to the construction and operation and maintenance of the 6th Street and Western Avenue Drainage Improvements Project (the "Agreement") is hereby approved in substantially the form attached hereto as Exhibit A.

SECTION 2. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to take all steps necessary to cause the execution of the Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT A
TO
RESOLUTION NO. 2948-111

(Agreement)

See following pages.

When Recorded Return to:
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009-6399

INTERGOVERNMENTAL AGREEMENT

for the

CONSTRUCTION AND OPERATION AND MAINTENANCE

of the

6TH STREET AND WESTERN AVENUE DRAINAGE IMPROVEMENTS PROJECT

between the

CITY OF AVONDALE

and the

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY

IGA FCD 2010A019

Agenda Item _____

This Intergovernmental Agreement, hereinafter the Agreement, is entered into by and between the City of Avondale, a municipal corporation, acting by and through its City Council, hereinafter the CITY and the Flood Control District of Maricopa County, a municipal corporation and political subdivision of the State of Arizona, acting by and through its Board of Directors, hereinafter the DISTRICT. The CITY and the DISTRICT are hereinafter the PROJECT PARTNERS and are individually each a PROJECT PARTNER.

This Agreement shall become effective as of the date it has been executed by all parties and recorded by the Maricopa County Recorder.

STATUTORY AUTHORIZATION

1. The DISTRICT is empowered by Arizona Revised Statutes (A.R.S.) Section 48-3603, as revised, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.

2. The CITY is empowered by A.R.S. Section 11-952, as amended, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the CITY.

BACKGROUND

3. On May 6, 2009, the Board of Directors of the DISTRICT (Board) adopted Resolution FCD 2009R003 (C-69-09-062-6-00) authorizing the DISTRICT to cost-share in projects recommended under the DISTRICT's Small Project Assistance Program.

4. Under the DISTRICT's Small Project Assistance Program for Fiscal Year 2012, the CITY proposed the construction of drainage infrastructure in the vicinity of 6th Street and Western Avenue to reduce stormwater flows that have historically generated structural flooding, hereinafter the PROJECT (See Exhibit A). The PROJECT was ranked tenth by the DISTRICT among ten total submittals for the fiscal year.

5. The constructed PROJECT will provide the following benefits:

   5.1 Reduce the flood hazard to Maricopa County Assessor's Parcel Number (APN) 500-20-145, that has experienced historic flooding;

   5.2 Reduce the flood hazard to APN 500-20-149, that has experienced historic flooding;

   5.3 Reduce the flood hazard to roadways in the vicinity of the PROJECT that have experienced historic flooding.

   5.4 Objectives beyond those stated in this section are beyond the scope of the PROJECT as the term is used herein, and costs associated with the achievement of those objectives are beyond the scope of this Agreement.

PURPOSE OF THE AGREEMENT

6. The purpose of this Agreement is to identify and define the responsibilities of the DISTRICT and the CITY, hereinafter the PROJECT PARTNERS, for the construction and operation and maintenance of the PROJECT.

TERMS OF AGREEMENT

7. Construction costs associated with the flood control features of the PROJECT completed and invoiced between July 1, 2011 and June 30, 2012 are hereinafter referred to as the PROJECT CONSTRUCTION COST. The PROJECT CONSTRUCTION COST is estimated to be $250,000.

   7.1 The following costs are expressly excluded from the PROJECT CONSTRUCTION COST shared under this Agreement:

      7.1.1 Costs associated with design, rights-of-way acquisition, permitting, construction management, materials testing, survey work, operations and maintenance.

      7.1.2 Costs associated with multi-use, landscaping, and aesthetic features.

      7.1.3 Personnel and administrative costs incurred by either PROJECT PARTNER.

8. The DISTRICT shall:

8.1 Fund seventy-five percent (75%) of the PROJECT CONSTRUCTION COST incurred and invoiced between July 1, 2011 and June 30, 2012, not to exceed $250,000 in accordance with the DISTRICT's Small Project Assistance Program, making the DISTRICT's estimated share $187,500, with the DISTRICT's actual share not to exceed $250,000. DISTRICT funds will be from the DISTRICT's secondary tax levy revenues and DISTRICT funding shall be contingent upon the availability of DISTRICT Capital Improvement Program Budget funding.

8.1.1 In accordance with the DISTRICT's Small Project Assistance Program, the DISTRICT's $250,000 cost share cap for the PROJECT, and the established invoice time threshold, shall not be amended under this Agreement.

8.2 Within 30 days of receipt of an invoice from the CITY for its share of the PROJECT CONSTRUCTION COST, reimburse the CITY per the terms of this Agreement.

8.3 Participate in a final inspection of the completed PROJECT with the CITY.

9. The CITY shall:

9.1 Fund the PROJECT CONSTRUCTION COST, less the DISTRICT's cost-share, making the CITY's estimated share $62,500.

9.2 Serve as lead agency for all aspects of PROJECT implementation.

9.3 With the exception of the PROJECT CONSTRUCTION COST, as defined in this Agreement, fully fund, at no cost to the DISTRICT, all PROJECT costs, or obtain such funding from other entities.

9.4 Provide PROJECT plans and specifications to the DISTRICT, including interim submittals as appropriate, for review and comment. Incorporate DISTRICT comments into the PROJECT as appropriate. The CITY shall not construe DISTRICT review comments, or lack of review comments, as concurrence with the technical or structural adequacy of the PROJECT.

9.5 Within 30 days of award of a contract for construction of the PROJECT, but no earlier than July 1, 2011, invoice the DISTRICT for one-half (1/2) of its share of the PROJECT CONSTRUCTION COST.

9.6 Provide any proposed construction change orders to the DISTRICT for review and approval.

9.7 Coordinate a final inspection of the completed PROJECT with the DISTRICT.

9.8 Within 30 days of completion of construction of the PROJECT, or no later than June 30, 2012 (whichever occurs first), prepare a final accounting including change order costs not previously paid, and invoice the DISTRICT for the remainder of its share of the PROJECT CONSTRUCTION COST incurred to date; or reimburse the DISTRICT for any previous over-payments.

9.8.1 Funding for any work completed and/or invoiced before July 1, 2011 or after June 30, 2012 will be the full responsibility of the CITY.

9.9 Own the completed PROJECT and be responsible for operation and maintenance of the completed PROJECT.

9.9.1 Maintenance activities to be performed include, but are not limited to maintaining the flood control function of the PROJECT, including sediment and vegetation removal, maintenance of any constructed landscaping, irrigation, multi-use trails and berms, if applicable, removal of trash and debris, electricity and other operation costs for the facilities, vandalism repair and replacement, and structural repair and replacement of the flood control structures. The CITY shall fund repair or replacement as necessary of all features or structures of the PROJECT at no cost to the DISTRICT.

9.10 Coordinate and staff any necessary public involvement activities related to the PROJECT at no cost to the PROJECT.

9.11 Be liable for any and all non-flood control use, including any and all public use of the PROJECT.

9.12 If necessary, obtain a United States Army Corps of Engineers' Section 404 Environmental Permit for the PROJECT. The cost of this permit and any required mitigation are not a component of the shared PROJECT CONSTRUCTION COST.

9.13 Require that any contractor selected for the PROJECT:

9.13.1 Warrant its compliance with all federal immigration laws and regulations that relate to its employees and their compliance with A.R.S. Section 23-214(A);

9.13.2 Agree that a breach of the warranty under paragraph 9.13.1 shall be deemed a material breach of contract and is subject to penalties up to and including termination of the contract;

9.13.3 Agree that the DISTRICT retains the legal right to inspect the papers of the contractor or subcontractor employee(s) who work(s) on this Agreement to ensure that contractor or subcontractor is complying with the warranty under paragraph 9.13.1;

9.13.4 Certify that it does not have a scrutinized business operation, as defined in A.R.S. Sections 35-391 and 35-393, in either Sudan or Iran.

10. Any local permits required for the PROJECT shall be issued by the appropriate PROJECT PARTNER at no cost to the PROJECT.

11. Either party to this Agreement may with mutual written agreement of all parties delegate responsibilities to another party. Any delegation, however, shall not relieve the delegating party of its original responsibilities as defined herein.

12. In the case of any dispute over any items in this Agreement, the parties agree to use their best efforts and enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the parties to seek any remedies provided by law.

13. Each party to this Agreement shall take reasonable and necessary actions within its authority to ensure that only storm water is discharged into the PROJECT, and that such discharges into the PROJECT comply at the point of discharge with any applicable requirements of the U.S. Environmental Protection

Agency Clean Water Act, Arizona Pollutant Discharge Elimination System or any other applicable discharge requirements, including any permit requirements.

14. The parties to this Agreement agree to equally share the cost of a PROJECT compliance and cost audit to be initiated within 60 days of PROJECT completion, if requested by a PROJECT PARTNER. An independent auditing firm agreed to by all parties and on contract to the DISTRICT will perform the audit. Any payments or reimbursements necessary to bring the PROJECT into compliance with the audit findings shall be made within 45 days of acceptance by all parties of the audit report.

15. Each party to this Agreement (indemnitor) shall, to the extent permissible by law, indemnify, defend and save harmless the others (indemnitees) including agents, officers, directors, governors and employees thereof, from and against any loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of indemnitor's negligent or wrongful acts or omissions pursuant to this Agreement. Such indemnification obligation shall encompass any personal injury, death or property damages resulting from the indemnitor's negligent or wrongful acts or omissions, as well as reasonable attorney's fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the indemnitee. Indemnitee shall be liable for its own negligence or wrongful acts as provided by law.

16. Each party to this Agreement shall comply with A.R.S. Sections 41-4401 and 23-214, subsection A.

    16.1 Each party to this Agreement retains the legal right to inspect the records of the other party's and any contractors' or subcontractors' employees performing work under this Agreement to verify compliance with A.R.S. Sections 41-4401 and 23-214, subsection A.

    16.2 Failure by either party to this Agreement to comply with A.R.S. Sections 41-4401 and 23-214, subsection A shall be deemed a breach of this Agreement and is subject to penalties up to and including termination of the Agreement.

17. Pursuant to A.R.S. Sections 35-391.06 and 35-393.06, each party to this Agreement certifies that it does not have a scrutinized business operation, as defined in A.R.S. Section 35-391 and 35-393, in either Sudan or Iran.

18. All notices or demands upon either party to this Agreement shall be in writing and shall be delivered in person or sent by mail addressed as follows:

    Flood Control District of Maricopa County
    Chief Engineer and General Manager
    2801 West Durango Street
    Phoenix, Arizona 85009-6399

    City of Avondale
    City Manager
    11465 West Civic Center Drive
    Avondale, Arizona 85323

19. Each party to this Agreement will pay for and not seek reimbursement for its own personnel and administrative costs associated with this PROJECT, including but not limited to the following, unless specifically identified otherwise in this Agreement: construction, construction management, operation, maintenance, permitting, management and administration.

20. This Agreement shall expire two years from the date of recording with the County Recorder or upon completion of the PROJECT and after all funding obligations and reimbursements have been satisfied in accordance with this Agreement, whichever is the first to occur. However, by mutual written agreement of all parties, this Agreement may be amended or terminated. Potential amendments are subject to the restrictions of paragraph 8.1.1 of this Agreement. The operation and maintenance and indemnification provisions of this Agreement shall survive the expiration of this Agreement.

21. This Agreement is subject to cancellation by either party pursuant to the provisions of A.R.S. Section 38-511.

22. Attached to this Agreement or contained herein are the written determinations by the appropriate attorneys for the parties to this Agreement, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.

23. If legislation is enacted after the effective date of this Agreement that changes the relationship or structure of one or more parties to this Agreement, the parties agree that this Agreement shall be renegotiated at the written request of either party.

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
A Municipal Corporation

Recommended by:

_____

Timothy S. Phillips, P.E. Date
Chief Engineer and General Manager

Approved and Accepted:

By: _____

Chairman, Board of Directors Date

Attest:

By: _____

Clerk of the Board Date

The foregoing Intergovernmental Agreement FCD 2010A019 has been reviewed pursuant to A.R.S. Section 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

_____

General Counsel Date

CITY OF AVONDALE
A Municipal Corporation

By: _____
Marie Lopez Rogers Date
Mayor

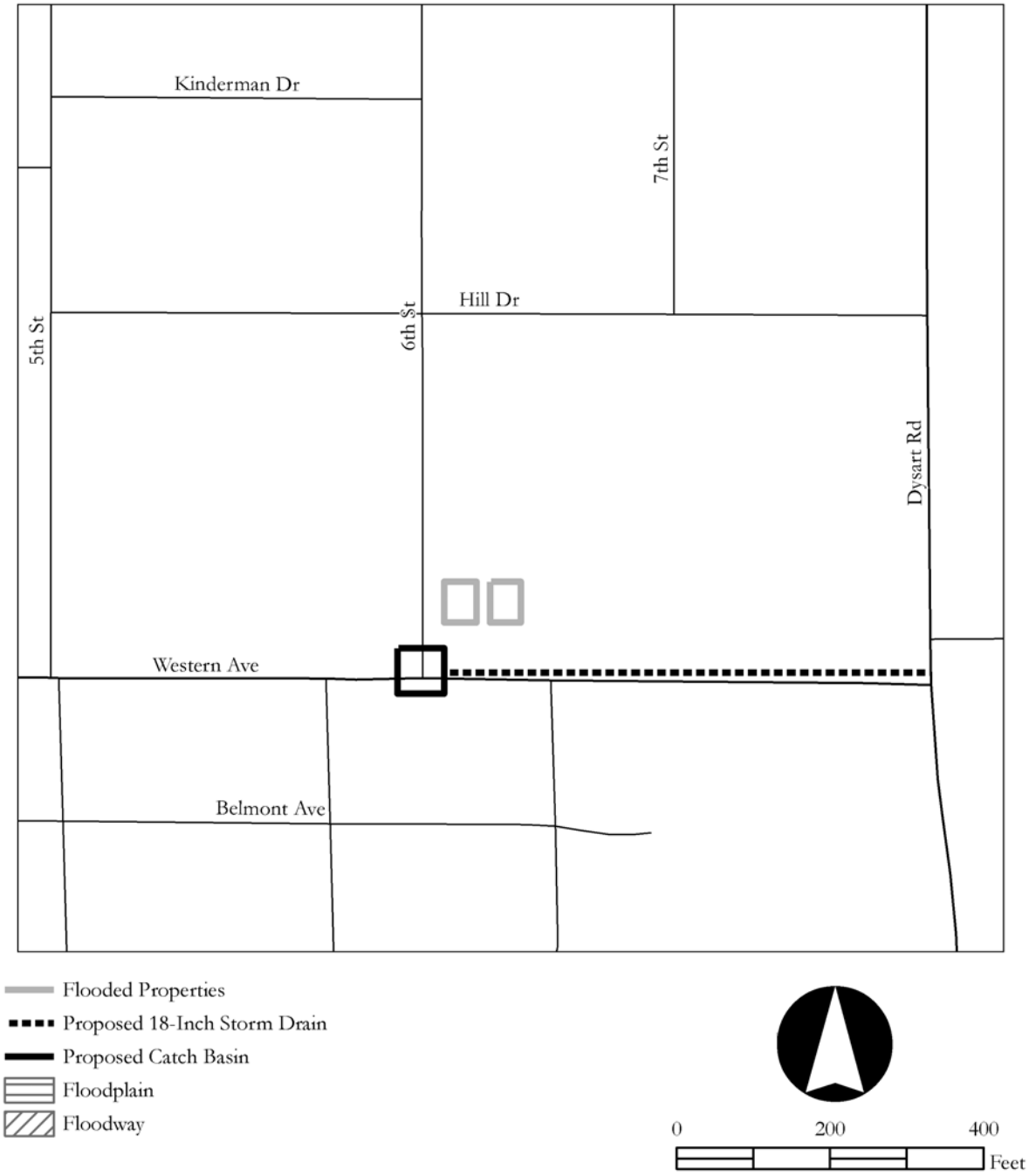
Attest:

By: _____
Carmen Martinez Date
City Clerk

The foregoing Intergovernmental Agreement FCD 2010A019 has been reviewed pursuant to A.R.S. Section 11-952, as amended, by the undersigned attorney who has determined that it is in proper form and within the power and authority granted to the City of Avondale under the laws of the State of Arizona.

By: _____
Andrew J. McGuire Date
City Attorney

Exhibit A: 6th Street and Western Avenue Drainage Improvements Project



CITY COUNCIL REPORT

SUBJECT:
Resolution 2950-111 - Authorizing Submittal of an Application for LTAF II Grant Funding

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Rogene Hill, Assistant City Manager (623)333-1012

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council adopt a resolution authorizing the City to submit an application to receive remaining FY2010 Local Transportation Assistance Funds (LTAF II) in the amount of $61,744.34.

BACKGROUND:

The Arizona Legislature, under House Bill 2565, authorizes LTAF II funds to provide statewide transit and transportation funding to each city, town and county based upon its percentage of the state's population. During 2010 the Governor swept these funds in order to help balance the state's financial crisis. This allocation reflects money collected from July 2009 - February 2010 when the program was discontinued.

In Maricopa County, the Valley Metro/Regional Public Transportation Authority administers these funds. An allocation of $5,366,000 has been made available for distribution for the current fiscal year and the City of Avondale's eligible portion is $61,744.34. The funding requires a 100%, or $61,744.34 match, which is available in the Transit Fund. The locally-sourced matching funds ratio may not be comprised of federal funds. These funds must be spent within 24 months of the grant's release. The City of Avondale was allocated $62,636.15 in 2004, $129,000 in 2005, $54,742.67 in 2006, $204,750.93 in 2007, $135,456.84 in 2008 and $106,367.98. Most recently this funding has been used for transit operations but has also helped with the transit center at Estrella Mountain Community College.

DISCUSSION:

The funding will assist the city in it's continuing effort to build a transit center in City Center. This funding will contribute to land acquisition funds and/or pay for ancillary studies or permitting associated with the Site Selection Study that was completed in 2010.

BUDGETARY IMPACT:

The required matching fundings of $61,744.34 is available in the Transit Fund 215.

RECOMMENDATION:

Staff recommends that City Council adopt a resolution authorizing the City to submit an application to receive 2010 Local Transportation Assistance Funds (LTAF II) in the amount of $61,744.34.

ATTACHMENTS:

Click to download

- Resolution 2950-111

RESOLUTION NO. 2950-111

A RESOLUTION OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, AUTHORIZING SUBMITTAL OF AN APPLICATION FOR FUNDING FROM THE ARIZONA DEPARTMENT OF TRANSPORTATION LOCAL TRANSPORTATION ASSISTANCE FUND II.

WHEREAS, the Arizona Department of Transportation ("ADOT") is seeking proposals from local agencies for transit projects relating to all aspects of transit services; and

WHEREAS, the Arizona State Legislature has authorized an allocation of Local Transportation Assistance Funds II ("LTAF II") funds to the City of Avondale (the "City") to fund transit activities; and

WHEREAS, the Council of the City of Avondale desires to submit an application for the LTAF II funds for transit projects and amenities in the City (the "Application").

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

SECTION 1. The recitals above are hereby incorporated as if fully set forth herein.

SECTION 2. The submittal of the Application to ADOT for $61,744.34 in LTAF II funds is hereby authorized. If such LTAF II funds are received, the expenditure of such funds is hereby authorized for the purposes set forth in the Application.

SECTION 3. The expenditure of $61,744.34 in matching funds is hereby authorized and officially designated to be used in conjunction with the LTAF II funds.

SECTION 4. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute and submit all documents and any other necessary or desirable instruments in connection with the Application.

SECTION 5. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute and submit all documents and any other necessary or desirable instruments in connection with the acceptance of any LTAF II funds awarded and to take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

CITY COUNCIL REPORT

SUBJECT:
Resolution 2947-111 and Ordinance 1436-111 - Amendment to the Municipal Code Chapter 20, Article III - Alarm Systems

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Kevin Kotsur, Police Chief (623) 333-7201

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council adopt an Ordinance amending the City of Avondale Alarm System Ordinance 20-30, relating to the addition of alarm registration and alarm renewal fees.

BACKGROUND:

On November 01, 2010, Council approved a Professional Services Agreement with AOT Public Safety Corporation dba Public Safety Corporation to serve as our Third Party Vendor to administer our Alarm Program. Council also approved the adoption of an Enhanced Call Verification practice that will require alarm businesses to make at least two (2) telephonic attempts (to two different numbers) in an attempt to contact the alarm owner prior to contacting the Police Department in response to not-in-progress burglar alarms (does not apply to panic or robbery alarms).

By statute, prior to Council adoption, the City is required to post the alarm registration and alarm renewal fees for sixty (60) days.

DISCUSSION:

As per statute, the City did post the alarm registration and alarm renewal fees for sixty (60) days on the City's website home page.

Significant changes / highlights of City Ordinance 20-30 (Alarm Systems) include the following:

- Alarm businesses are required to make two (2) telephonic attempts (two different numbers) to contact the alarm owner prior to contacting the Police Department in response to not-in-progress burglar alarms. (Does not apply to panic or robbery alarms.)
- Third Party Vendor will be responsible for sending written warning notifications on false alarms to the alarm company.
- Third Party Vendor will be responsible for assessing and collecting all fees, fines and assessments from alarm companies relative to police response to false alarms.
- Third Party Vendor will be responsible to hear all appeals from the alarm company.
- Third Party Vendor will be responsible for tracking all alarm permits and registrations.
- The City of Avondale (General Fund) will receive a portion of all fees, fines, and assessments collected by the Third Party Vendor.
- Alarm registration and alarm renewal fees have been added.

BUDGETARY IMPACT:

None

RECOMMENDATION:

1. Staff recommends adoption of the resolution declaring as a public record a document entitled "City of Avondale Alarm System Ordinance, Amended and Restated January 3, 2011"
2. Staff recommends adoption of the ordinance amending Municipal Code Chapter 20, Article III, Alarm Systems relating to the addition of alarm registration and alarm renewal fees.

ATTACHMENTS:

Click to download

- Ordinance 1436-111
- Resolution 2947-111
- Chapter 20

ORDINANCE NO. 1436-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, AMENDING THE AVONDALE CITY CODE, CHAPTER 20, POLICE DEPARTMENT, ARTICLE III, ALARM SYSTEMS, RELATING TO REGULATING THE ACTIVITIES AND RESPONSIBILITIES OF ALARM AND ALARM SYSTEM OWNERS AND BUSINESSES AND ADOPTING BY REFERENCE THE "CITY OF AVONDALE ALARM SYSTEM ORDINANCE, AMENDED AND RESTATED JANUARY 3, 2011."

NOW, THEREFORE, **BE IT ORDAINED** BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. That certain document known as the "City of Avondale Alarm System Ordinance, Amended and Restated January 3, 2011" (the "Restated Alarm Ordinance") three copies of which are on file in the office of the City Clerk, which document was made a public record by Resolution No. 2947-111 of the City of Avondale, Arizona, is hereby referred to, adopted and made a part hereof as if fully set out in this Ordinance.

SECTION 2. The Avondale City Code, Chapter 20, Police Department, Article III, Alarm Systems, is hereby deleted in its entirety and replaced by the Restated Alarm Ordinance, which shall be inserted into the Avondale City Code Chapter 20, Police Department, as the new Article III.

SECTION 3. Violation of the Restated Alarm Ordinance may result in assessments up to $250 for false alarms and civil penalties up to $2,500 for violations thereof.

SECTION 4. If any section, subsection, sentence, clause, phrase or portion of this Ordinance or any part of the Restated Alarm Ordinance adopted herein by reference is for any reason to be held invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

SECTION 5. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

RESOLUTION NO. 2947-111

A RESOLUTION OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, DECLARING AS A PUBLIC RECORD THAT CERTAIN DOCUMENT FILED WITH THE CITY CLERK AND ENTITLED THE "CITY OF AVONDALE ALARM SYSTEM ORDINANCE, AMENDED AND RESTATED JANUARY 3, 2011."

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. That certain document entitled the "City of Avondale Alarm System Ordinance, Amended and Restated January 3, 2011," of which three copies are on file in the office of the City Clerk and open for public inspection during normal business hours, is hereby declared to be a public record and said copies are ordered to remain on file with the City Clerk.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

CITY OF AVONDALE
ALARM SYSTEM ORDINANCE,
AMENDED AND RESTATED JANUARY 3, 2011

Part I. - General

20-30 - Applicability.
20-31 - Definitions.
20-32 - Alarm business duties.
20-33 - Subscriber's and proprietor alarm owner's duties.
20-34 - Registration requirements.
20-35 - Alarm and alarm systems activation.
20-36 - Inspections.
20-37 - Prohibition of automatic or prerecorded messages to the city; exception.

20-30 - Applicability.

This article is intended to regulate the activities and responsibilities of those persons who purchase, rent or lease and those persons who own or operate the business of selling, renting, leasing, installing, maintaining, monitoring or servicing alarms or alarm systems. It is further intended to encourage the improvement in reliability of such alarms and alarm systems and to ensure that police department personnel will not be unduly diverted from responding to actual criminal as a result of responding to false alarms. This article specifically encompasses audible, monitored, and robbery, burglary or panic alarm and alarm systems. The provisions of this article shall not apply to (i) alarms or alarm systems owned and/or operated by the city, county, state, or federal government and installed on premises which such entity occupies or uses for governmental purposes, (ii) audible alarms affixed to automobiles, or (iii) smoke detectors or fire alarms in single-family residences that are not connected to an alarm monitoring company.

20-31 - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"Act of God:" An unusual, extraordinary, sudden and unexpected manifestation of the forces of nature, which cannot be prevented by reasonable human care, skill or foresight.

"Alarm or alarm system:" Any instrument, device or system which is used for the purpose of protecting buildings, places or premises from criminal acts or unauthorized entries by warning persons of a crime or an unauthorized entry through the emission or transmission of an alarm signal including audible, monitored, and robbery, burglary or panic alarm systems.

"Alarm administrator:" A person, persons or independent contractor hired by the City to administer, control and review false alarm reduction efforts and administer the provisions of this ordinance.

"Alarm agent:" Any person who is employed by an alarm business either directly or indirectly, and whose duties include selling, renting, leasing, installing, maintaining, monitoring or servicing alarms or alarm systems in or on any building, place or premises. Any person whose duties consist solely of resetting an alarm or alarm system following activation shall not be deemed to be an alarm agent.

"Alarm business:" Any owner or operator of a business that sells, rents, leases, installs, maintains, monitors or services alarms or alarm systems.

"Alarm signal:" A detectable signal; audible or visual, including an inaudible (silent) signal to a central monitoring station, generated by an alarm system, to which law enforcement is requested to respond.

"Alarm user:" Any person who (which) leases, rents, purchases, or uses any alarm, alarm system, device, or service.

"Audible alarm:" An alarm or alarm system designed for the detection of a criminal act or an unauthorized entry on building, places or premises and which, when activated, generates an audible sound on the premises.

"Cancellation:" The process where response is terminated when the alarm business (designated by the alarm user) notifies the police department that there is not an existing situation at the alarm site requiring police response after an alarm dispatch request. If cancellation occurs prior to police arriving at the scene, this is not a false alarm for the purpose of civil/criminal penalty, and no penalty will be assessed.

"Common cause:" A common technical difficulty or malfunction that causes an alarm or alarm system to generate a series of false alarms within a twenty-four-hour period, for which the responsible subscriber, alarm business or proprietor alarm owner has taken action to rectify the cause of the false alarms and the alarm or alarm system generates no additional false alarms from the same common technical difficulty or malfunction for a period of thirty (30) days thereafter.

"False alarm:" Any activation of an alarm or alarm system through mechanical or electronic failure, malfunction, improper installation, or the negligence of the alarm user, his/her employees or agents, and signals activated to summon law enforcement personnel unless law enforcement response was cancelled by the alarm user or the alarm user's agent before law enforcement personnel arrive at the alarm location. An alarm is false within the meaning of this article when, upon inspection by the police department, evidence indicates that no unauthorized entry, robbery, or other such crime was committed or attempted in or on the premises which would have activated a properly functioning alarm or alarm system. Notwithstanding the foregoing, a false alarm shall not include (i) an activation caused by the police department (ii) an activation for testing purposes when the police department has been given advance notice of such testing (iii) an activation which can reasonably be determined to have been caused by an act of

God or (iv) other extraordinary circumstances not reasonably subject to control by the alarm user.

"Monitored alarm:" An alarm or alarm system designed for the detection of a criminal act or unauthorized entry in a building, place or premises, and which, when activated, generates an alarm signal.

"Robbery, burglary or panic alarm:" An alarm or alarm system designed for the detection of a robbery, burglary or the commission of an unlawful act, and which, when intentionally activated by a person, generates an inaudible (silent) signal to a central monitoring station. A robbery, burglary or panic alarm may also generate an audible sound on the premises.

"Person:" An individual, corporation, partnership, incorporated association and any other legal entity.

"Proprietor alarm:" Any alarm or alarm system that is not rented, leased, installed, maintained, monitored or serviced by an alarm business.

"Subscriber:" Any person who rents or leases an alarm or alarm system, or purchases, rents or leases any monitored alarm or robbery, burglary or panic alarm from an alarm business.

"Verify:" An attempt by an alarm business, or its representative, to contact the alarm site and/or alarm user by telephone and/or other electronic means, whether or not actual contact with a person is made, to attempt to determine whether an alarm signal is valid before requesting law enforcement dispatch, in an attempt to avoid an unnecessary alarm dispatch request.

20-32 - Alarm business duties.

(a) The duties of an alarm business shall be as follows:

(1) To comply with the registration requirements set forth in section 22-34 below with respect to each alarm or alarm system that it rents, leases, installs, maintains, monitors or services within the city.

(2) Instruct each of its alarm or alarm system purchasers and subscribers in the proper use and operation of the alarm or alarm system. Such instruction shall include all necessary instructions in turning the alarm or alarm system on and off and in avoiding false alarms.

(3) To provide each purchaser and subscriber with a copy of this article.

(4) Upon installing, maintaining or servicing an alarm or alarm system:

a. Ensure that the alarm or alarm system is installed, maintained or serviced in good working order.

b. Take reasonable measures to prevent the occurrence of false alarms.

c. If the alarm business has agreed to provide maintenance or repair service to the alarm system, to service the alarm system within seventy-two (72) hours of a request for service.

(5) Upon renting or leasing an audible alarm:

a. Conspicuously place on the premises a tag identifying the pertinent alarm business including the telephone number to call when the alarm has been activated.

b. Maintain records of the location of all such alarms and the name and telephone number of the person and alternate to be notified whenever the alarm is activated and readily report such information to the police department upon request.

c. Inactivate or cause to be inactivated the alarm within fifteen (15) minutes of the notification of its activation in the event the primary and alternate contact persons cannot be contacted or do not respond.

(6) Upon selling, renting or leasing a monitored alarm or robbery, burglary or panic alarm:

a. Establish a central monitoring station in order to monitor the alarm.

b. Organize its central monitoring station in order to be able to readily and positively identify the type of alarm, i.e., unlawful entry, robbery, hold-up or panic, and the exact location of each such alarm.

c. Maintain records as to each of these alarms, which shall include the name of the owner or occupant of the premises, the name and telephone number of the subscriber, a primary person and at least one alternate person responsible for responding to the premises when the alarm is activated, and information concerning whether the alarm system includes an audible alarm.

d. Attempt to verify, by calling the alarm site and/or alarm user by telephone, to determine whether an alarm signal is valid before requesting dispatch. Telephone verification shall require, at a minimum that a second call be made to a different number, if the first attempt fails to reach an alarm user who can properly identify themselves to attempt to determine whether an alarm signal is valid, except in the case of a panic or robbery-in-progress alarm, or in cases where a crime-in-progress has been verified by video and/or audible means.

e. Make notification of activated alarms in the manner prescribed by the city manager, or authorized designee, and provide all information concerning the alarm as the police department may request.

f. Arrange for either the owner, subscriber, alarm agent, alarm business or other responsible representative to go to the premises of an activated alarm, if requested by the police department, within thirty (30) minutes of the activation of the alarm, in order to be available to assist the police in determining the reason for activation and securing the premises. The alarm business shall not unreasonably delay in arriving at the location of the alarm.

(b) Alarm businesses which sell but do not rent, lease, install, maintain, monitor or service alarms or alarm systems shall not be subject to subsections (a)(1), (4), (5) or (6) of this section.

(c) Alarm businesses which monitor but do not sell, rent, lease, install, maintain or service alarms or alarm systems shall not be subject to subsections (a)(1) through (5) of this section.

20-33 – Subscriber's and proprietor alarm owner's duties.

(a) Each proprietor alarm owner shall comply with the registration requirements set forth in section 22-34 below with respect to each alarm or alarm system that the proprietor alarm owner purchases for use within the city that is not otherwise registered by an alarm business.

(b) The duties of each subscriber and proprietor alarm owner shall be as follows:

(1) Instruct all authorized personnel who place the alarm or alarm system into operation in the appropriate method of operation for locking and securing all points of entry.

(2) Maintain the alarm or alarm system in good working order and take reasonable measures to prevent false alarms.

(3) Respond to the scene of an activated alarm or alarm system within thirty (30) minutes of the alarm's or alarm system's activation, after notification by the police department or the subscriber's alarm business.

20-34 - Registration Requirements.

(a) Except as provided in subsections (b) or (c) of this section 20-34, each proprietor alarm owner shall register each alarm or alarm system that it purchases for use within the city with the police department, or authorized designee, on the form prescribed by the city manager, or authorized designee. Registration shall be made within 30 days of the installation date of the alarm or alarm system.

(b) Each alarm business shall register each alarm or alarm system that it rents, leases, installs, maintains, monitors or services within the city with the police department, or authorized designee, on the form prescribed by the city manager, or authorized designee. Registration shall be made within 30 days of the installation date of the alarm or alarm system. The alarm business shall update the registration and remit a new annual registration fee if the possession of the premises at which an alarm or alarm system is maintained is transferred.

(c) Alarm systems operated by the city, county, state, or federal government and installed on premises such entity occupies or uses for governmental purposes shall not be required to register an alarm or alarm system pursuant to this section.

(d) Each registration application shall be accompanied by an annual registration fee in an amount established by the city council as part of the annual budget process or as otherwise adopted by city council resolution. All registrations issued pursuant to this section shall be for a period of one (1) year from the date of issue and shall be renewable annually, one (1) year from the original date of issue or renewal, as applicable, and subject to the annual registration fee. An alarm business' and a proprietor alarm owner's registration shall be available within the premises protected by the alarm or alarm system and shall be available for inspection by the police department.

(e) If an alarm user has one or more alarm systems protecting two or more separate structures having different addresses and/or tenants, a separate permit shall be required for each structure and/or tenant.

(f) Registration is not transferable from one user of the alarm or alarm system to another user or from one address to another address.

20-35 - Alarm and alarm systems activation.

It shall be unlawful for any person to intentionally activate any alarm or alarm system, except to warn of a criminal act or unauthorized entry on or into an alarm-protected premises, or to test an alarm or alarm system when the police department has been given advance notice of such testing.

20-36 - Inspections.

Every alarm and alarm system shall be inspected and serviced by the subscriber or alarm business, or the proprietor alarm owner, at least once in each eighteen-month period. The inspecting party shall maintain records for each alarm and alarm system showing dates of inspection and the name of the person making each inspection. Such records shall be kept for a minimum of two (2) years and be open upon request to the police department, or authorized designee, upon twenty-four (24) hours' notice.

20-37 - Prohibition of automatic or prerecorded messages to the city; exception.

No person shall use or cause to be used any telephone device or attachment that automatically selects or dials a published emergency telephone number or any city telephone number and then reproduces a prerecorded message or signal. This section shall not apply to a life safety alert system utilizing residential transmitting equipment designated for direct telephone access to dedicated control receiving equipment located in the city fire department.

Part II. - Permitting

20-38 - Alarm businesses and agents; permit requirement.
20-39 - Alarm businesses and agents; permit application.
20-40 - Alarm businesses and agents; application fee; fingerprints.
20-41 - Permit issuance standards.
20-42 - Permit issuance; expiration; renewal.
20-43 - Identification cards.
20-44 - Display of permits and identification cards.
20-45 - Duty to ensure compliance by alarm agents.
20-46 - Nontransferability; temporary permits.
20-47 - Permit revocation or suspension.
20-48 - Appeal from denial, revocation or suspension of permit.
20-49 - Violations; penalties.

20-38. - Alarm businesses and agents; permit requirement.

(a) It shall be unlawful for any person to engage in, conduct or carry on an alarm business within the corporate limits of the city without first having obtained an alarm permit pursuant to this article. Each and every alarm involved in the alarm business shall constitute a separate offense under this subsection.

(b) It shall be unlawful for any person to engage in, represent him or herself to be, or operate as, an alarm agent within the corporate limits of the city without first having obtained an alarm permit pursuant to this article. Each day that a person engages in or operates as an alarm agent and each time that a person represents himself or herself to be an alarm agent without such alarm permit shall constitute a separate offense.

20-39 - Alarm businesses and agents; permit application.

(a) The application for the permit required by the provisions of this article shall be submitted to the budget and finance department utilizing such format as may be prescribed by the budget and finance department and approved by the chief of police, or authorized designee.

(b) The application for an alarm business permit shall include:

(1) The name, address and telephone number of the alarm business.

(2) The names and addresses of the alarm agents employed by the alarm business.

(3) The business telephone number at which each alarm agent may be reached.

(4) The required application fee.

(c) The application for alarm agent permit shall include:

(1) The name, address, and business telephone number of the individual applying for the permit.

(2) The alarm business for which the applicant is employed.

(3) Whether or not the applicant has been convicted of any felonies.

(4) The required application fee.

20-40 - Alarm businesses and agents; application fee; fingerprints.

(a) The amount of the application fee for a permit issued under this article shall be established by the city council as part of the annual budget process or as otherwise adopted by city council resolution.

(b) Each applicant for a permit shall submit a full set of fingerprints to the police department for the purpose of obtaining a state and federal criminal records check by the department of public safety pursuant to A.R.S. § 41-1750 and Public Law

(PL) 92-544, as amended. The department of public safety is authorized to exchange this fingerprint data with the Federal Bureau of Investigation. In addition to any other fees imposed under this article, an applicant for a permit issued under this article shall pay an amount necessary to cover the costs of federal fingerprint processing or federal criminal history record information checks. The specific amount of such additional fee shall be set by administrative order based upon information received from the Department of Public Safety as to the costs of fingerprint processing and record information checks. The additional fees collected pursuant to this subsection shall be transmitted to the department of public safety as required by A.R.S. § 41-1750, as amended.

(c) No application or fingerprinting fee paid pursuant to this article shall be returned to an applicant if his or her application is withdrawn or denied.

20-41 - Permit issuance standards.

(a) No individual shall be issued a permit under this article if such individual:

(1) Knowingly makes any false or misleading statement in the course of applying for or renewing a permit.

(2) Has been convicted of any felony involving dishonesty, deceit, theft, assaultive conduct or sexual misconduct within five (5) years from the date that the application is submitted.

(3) Is under the age of eighteen (18) years.

(4) Has been denied a permit required by this article or had such a permit revoked, for a period of six (6) months following the final denial or revocation decision.

(b) No person which is not an individual shall be issued a permit under this article if any of the following individuals would be disqualified from being issued a permit under subsection (a):

(1) Any officer or director of an applicant that is a corporation.

(2) Each general partner of an applicant that is a partnership.

(3) The managing officer or agent for the in-state operations of the applicant.

(4) Each managing member of a limited liability company, or if there are no designated managing members, all members.

(c) No permit shall be issued under this article to any person if the city manager, or authorized designee, determines that, due to the nature and location of the person's proposed business, the operation of such business is likely to create

unreasonably unsafe conditions or to unreasonably increase existing unsafe conditions in the surrounding neighborhood.

20-42 - Permit issuance; expiration; renewal.

(a) Any permit issued under this article shall be valid only for the calendar year in which it is issued. Each permit expires on December 31 of each year and must be renewed on or before January 31 of the following year by filing an application for renewal and paying the applicable renewal fee. The application and payment for renewal must be received by the city finance and budget department by January 31 to be deemed timely filed.

(b) No permit shall be issued or renewed under this article unless the permitee is in full compliance with all provisions of this Code at the time of renewal.

20-43 - Identification cards.

The city finance and budget department shall issue to each alarm agent an identification card. Each identification card shall expire on December 31 of the year in which it is issued, and the alarm agent shall obtain a new identification card on or before January 31 of the following year.

20-44 - Display of permits and identification cards.

(a) A copy of the alarm business permit shall at all times be conspicuously displayed at the central station or main office of the alarm business.

(b) At all times that a person is acting as an alarm agent within the city, such person shall carry on his or her person a valid alarm agent permit and identification card. An alarm agent shall display his or her permit and identification card upon request to any police officer, law enforcement official or city official whose duties are related to licensing.

20-45 - Duty to ensure compliance by alarm agents.

(a) An alarm business shall not allow any employee to work as an alarm agent until such person has displayed to the alarm business a valid alarm agent permit and identification card. An alarm business shall require that all persons employed as alarm agents maintain current alarm agent permits and identification cards at all times that such persons work for the alarm business. On or before January 31 of each year, the alarm business shall verify with each alarm agent that such alarm agent has renewed his or her alarm agent permit and identification card.

(b) An alarm business shall not allow any person who contracts with the alarm business to perform, on behalf of the alarm business, any services for which an alarm agent permit is required until such person has displayed to the alarm

business a valid alarm agent permit and identification card. An alarm business shall require that all persons so contracting with the alarm business maintain current alarm agent permits and identification cards at all times that such persons perform services on behalf of the alarm business for which an alarm agent permit is required.

20-46 - Nontransferability; temporary permits.

(a) No permit issued under this article shall be transferable between persons or locations.

(b) Except as provided in subsection (c) below, upon the termination of an alarm agent's employment with an alarm business, the alarm agent shall surrender his or her alarm agent permit and identification card to such business. The alarm business shall mail or deliver the alarm agent permit and identification card to the city finance and budget department within five (5) days of such surrender. If the alarm agent fails to surrender his or her alarm agent permit and identification card to the alarm business, the alarm business shall give notice to the city finance and budget department within fifteen (15) days of such termination that the alarm agent's employment has been terminated and that the alarm agent has failed to surrender his or her permit and identification card.

(c) If an alarm agent terminates his or her employment with an alarm business for the purpose of transferring employment to another alarm business, such person shall surrender his or her permit as provided in subsection (b) above and shall advise the city finance and budget department of his or her intentions. The city finance and budget department shall issue the alarm agent a temporary permit until such time as a new permit is issued to the alarm agent. Both the temporary and new permit will be issued to the alarm agent without charge.

20-47 - Permit revocation or suspension.

(a) The city finance and budget department may suspend any permit issued under this article for a specified period not to exceed sixty (60) days, or revoke such permit, for any of the following reasons:

(1) Conviction of the permitee of a felony involving dishonesty, deceit, theft, assaultive conduct or sexual misconduct.

(2) When the permitee has knowingly made any false or misleading statement in any report or record required to be made or kept under this article.

(3) Any other violation of this article.

(b) The city shall give written notice of the revocation or suspension to the permitee, which statement shall contain the reasons for the revocation or suspension and, if

applicable, the length of the suspension. Such notice shall be personally served on the permitee or mailed to the permitee's last known address. Service of the notice shall be deemed complete upon mailing.

(c) The permitee may request an informal hearing on such revocation or suspension by submitting a written request to the city finance and budget department within fifteen (15) days after the notice of revocation or suspension is given. An informal hearing before the city finance and budget department shall be held within fifteen (15) days after the request for the same is received by the city. If the permitee does not request a hearing within said fifteen-day period, the revocation or suspension shall take effect on the sixteenth day after service of the notice of revocation or suspension. If a hearing is requested, the revocation or suspension shall not take effect until after the informal hearing and service on the permitee of a new notice from the city finance and budget department setting forth the city finance and budget department's final decision. Such notice shall be personally served on the permitee or mailed to the permitee's last known address. Service of the notice shall be deemed complete upon mailing.

20-48 - Appeal from denial, revocation or suspension of permit.

(a) A person who has been denied a permit or whose permit has been revoked or suspended after an informal hearing with the city finance and budget department may appeal such decision to the city manager, or authorized designee. The appeal shall be requested within ten (10) days from the date on which such person is given notice of the determination from which the appeal is taken. The request shall be in writing, shall be filed with the city manager, or authorized designee, and shall set forth specifically the grounds for such appeal.

(b) The city manager, or authorized designee, shall conduct a hearing in accordance with this section. The city manager, or authorized designee, may, in his or her discretion, stay any revocation or suspension pending final determination of the appeal.

(c) The burden of proof at the hearing shall be on the applicant or permitee to establish, by a preponderance of the evidence, that he or she meets all requirements for holding a permit under this article. The city manager, or authorized designee, shall hear such testimony and consider such evidence as is relevant to the determination of such issues. The city manager, or authorized designee, shall not be bound by technical rules of evidence or procedure in conducting the hearing.

(d) The city manager, or authorized designee, shall render a written decision within thirty (30) days after the hearing is concluded based on the evidence presented by the city and the applicant or permitee. The decision of the city manager, or authorized designee, shall be final.

20-49 - Violations; penalties.

(a) General.

(1) When two (2) or more persons have liability to the city or are responsible for a violation of any provision of sections 20-33 through 20-46 of this article, their responsibility shall be joint and several.

(2) Each day any violation exists of any provision of sections 20-33 through 20-46 of this article or the terms and/or conditions of any permit issued under the provisions of this article exists shall constitute a separate offense.

(b) Civil violations. It shall be a civil violation, punishable as set forth below, for a person to:

(1) Fail to perform any act or duty required by any provision of sections 20-33 through 20-46 of this article.

(2) Violate the terms and/or conditions of any permit issued under the provisions of this article.

(c) Civil penalties. Any person that commits a civil violation as set forth in subsection (b)(1) or (2) above, shall be subject to a civil action in any court of competent jurisdiction to collect a civil penalty for a sum not to exceed two thousand five hundred dollars ($2,500.00) base fine for each violation. In seeking the assessment of a civil penalty, the following criteria shall be considered:

(1) The seriousness of the violation.

(2) The economic benefit, if any, resulting from the violation.

(3) Any good-faith efforts to comply with the applicable requirements.

(4) The economic impact of the penalty on the violator.

(5) Such other factors as justice may require.

(d) Violations not exclusive. Violations of this article are in addition to any other violation enumerated within this Code and in no way limit the penalties, actions or procedures which may be taken by the city for any violation of this article which is also a violation of any other provision of this Code or any other applicable law. The remedies specified herein are cumulative and the city may proceed under these or any other remedies authorized by law.

(e) Restitution. In addition to any civil penalty provided for in this article, no permit or renewal thereof pursuant to this article shall be issued to any applicant who has

engaged in activity under this article without a permit in violation of the provisions of this article unless the applicant first pays the amount of permit fees for which the applicant would have been liable under the provisions of this article had the applicant been permitted. The court shall impose restitution in addition to any civil penalties.

(f) Enforcement of judgments. Any judgment for restitution or civil penalties taken pursuant to this article may be enforced as any other civil judgment.

Part III. - False Alarms

20-50 - False alarms; warning notice.
20-51 - Police department review of false alarms.
20-52 - False alarm assessments.
20-53 - Appeal procedures for assessments.
20-54 - Grace period.

20-50 - False alarms; warning notice.

When any alarm or alarm system generates two (2) false alarms within any consecutive three hundred and sixty-five-calendar-day-period, the police department, or authorized designee, shall provide written notification by mail to the alarm business or the proprietor alarm owner operating the alarm or alarm system generating the false alarm(s), at the address registered with the police department, or authorized designee, that one (1) subsequent false alarm within the same period will subject such alarm business or such proprietor alarm owner to assessments as provided in this article.

20-51 - Police department review of false alarms.

(a) Upon the police department's, or authorized designee's, recording of a third and any subsequent false alarm(s) within any consecutive three hundred and sixty-five-calendar-day-period, the police department, or authorized designee, shall provide written notification by mail to the alarm business or the proprietor alarm owner, operating the alarm or alarm system generating the false alarm(s), at the address registered with the police department, or authorized designee, of such false alarm(s). The written notification to be provided by the police department, or authorized designee, shall (i) state the details regarding the false alarm, (ii) state the amount of the penalty to be assessed pursuant to section 20-52 below, and (iii) set forth the process by which the alarm business or proprietor alarm owner may appeal the assessment.

(b) An alarm business or proprietor alarm owner may appeal the penalty to be assessed under section 20-52 below by submitting a report to the chief of police, or authorized designee, within twenty (20) days of the date of mailing of the

police department's, or authorized designee's, written notification. The report shall contain:

1. A description of the action taken to discover and eliminate the cause of the false alarm(s).

2. The specific reason(s), if any, why the false alarm(s) should not be subject to an assessment. Evidence that an alarm was caused by an act of God, common cause or action of the telephone company shall constitute valid reasons why an assessment should not imposed.

(c) If the report required in subsection (b) is not submitted within the specified time period, the alarm business or the proprietor alarm owner shall have waived their right to any further review or hearing and the alarm business or the proprietor alarm owner operating the alarm system generating the false alarms shall be liable for the assessment imposed under section 20-52 below.

(d) After submission of the report required in subsection (b) above, the chief of police, or authorized designee, shall review the corrective action taken to discover and eliminate the cause of the false alarm(s) and the specific reason(s), if any, for the false alarm(s). If the chief of police, or authorized designee, determines that the corrective action taken or to be taken will substantially reduce the likelihood of false alarms or that a valid reason for the false alarm(s) has been shown, a written notice will be sent by mail to the alarm business or the proprietor alarm owner at the address registered with the police department, or authorized designee, indicating that no assessment will be imposed for that particular false alarm(s). The notice shall set forth the findings and conclusions of the chief of police, or authorized designee, with respect to the review of the report submitted.

(e) If the chief of police, or authorized designee, determines that the corrective action taken or to be taken will not substantially reduce the likelihood of false alarms or that a valid reason for the false alarm(s) has not been shown, a written notice shall be sent by mail to the alarm business or the proprietor alarm owner at the address registered with the police department, or authorized designee, that the alarm business or the proprietor alarm owner is liable for the assessment imposed under section 20-52 below. The notice shall set forth the findings and conclusions of the chief of police, or authorized designee, with respect to the review of the report submitted.

(e) The alarm business shall be responsible for the payment of assessment(s) imposed upon an alarm system serviced by the alarm business. The proprietor alarm owner shall be responsible for the payment of assessment(s) imposed upon a proprietor alarm system.

20-52 - False alarm assessments.

(a) Every alarm business monitoring an alarm or alarm system, and every proprietor alarm owner having an alarm or alarm system, that elicits a police department response shall receive a written warning for the second false alarm that occurs within any consecutive three hundred and sixty-five-calendar-day-period and, unless waived pursuant to section 20-51 above, pay to the city an assessment for each and every false alarm that occurs after the first two (2) false alarms within any consecutive three hundred and sixty-five-calendar-day-period, as follows:

Second false alarm warning letter sent

Third false alarm $150.00

Fourth false alarm $200.00

Fifth or more false alarms $250.00

(b) Failure to pay such false alarm assessments within thirty (30) days from the date of the notice mailed pursuant to subsection 20-51(d) above, may result in legal action by the city, or authorized designee, to collect all unpaid fees and assessments.

(c) Failure to pay such false alarm assessments within sixty (60) days from the date of the notice mailed pursuant to subsection 20-51(d) above, shall constitute a class 1 misdemeanor.

20-53 - Appeal procedures for assessments.

(a) Any party aggrieved by a decision of the police department, or authorized designee, made pursuant to subsection 20-51(d) may appeal such decision to the city manager, or authorized designee. The appeal shall be requested within ten (10) days from the date of the notice mailed pursuant to such subsection. The appeal shall be in writing, shall be filed with the city manager, or authorized designee, and shall set forth specifically the grounds for such appeal.

(b) The city manager, or authorized designee, shall conduct a hearing in accordance with this section. The city manager, or authorized designee, may, in his or her discretion, stay any enforcement of the assessment pending final determination of the appeal. The city manager, or authorized designee, shall set a time and place for the appeal hearing as soon as practicable.

(c) The burden of proof at the hearing shall be on the appellant to establish, by a preponderance of the evidence that the corrective action taken or to be taken will substantially reduce the likelihood of false alarms or that a valid reason for the false alarm(s) had been shown. The city manager, or authorized designee, shall hear such testimony and consider such evidence as is relevant to the determination

of such issues. The city manager, or authorized designee, shall not be bound by technical rules of evidence or procedure in conducting the hearing.

(d) The city manager, or authorized designee, shall render a written decision within thirty (30) days after the hearing is concluded based on the evidence presented by the city and the appellant. The decision of the city manager, or authorized designee, shall be final.

20-54 - Grace period.

All newly installed and reinstalled alarm and alarm systems shall not be subject to the provisions of this article relating to the counting and assessment of false alarms for a period of thirty (30) days from the date the alarm system becomes operational. For the purposes of this section, reinstalled alarm and alarm system means the installation of a new control panel.

20-55 – Police Department delegation of Duties.

Except as otherwise provided in this section, the police department is authorized to delegate to the alarm administrator, or to any other authorized designee, all duties of the police department as set forth in this article. The police department may not delegate (i) its duty to respond to an alarm activation, (ii) its duty to process fingerprints or (iii) any other duty specifically reserved to law enforcement.

CITY COUNCIL REPORT

SUBJECT:
Ordinance 1440-111 - Authorizing the Dedication of a USA Easement for the Avondale Boulevard and Interstate 10 Traffic Interchange Improvement Project

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Sue McDermott, P.E., Director of Development Services & Engineering, 623-333-4211

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council approve an ordinance authorizing the dedication of an easement to the United States for the Avondale Boulevard and I-10 Traffic Interchange (TI) Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents.

BACKGROUND:

As a part of the FY10-11 Capital Improvement Program (CIP), the City is in the process of constructing roadway widening improvements and installing a traffic signal at the intersection of Avondale Boulevard and I-10 (see attached vicinity map). This project was warranted based on the increased amount of time to access eastbound I-10 combined with the need for additional lanes under the freeway.

DISCUSSION:

On November 16, 2009, Council adopted an ordinance which allowed the acquisition of real property for right-of-way for the Avondale Boulevard and I-10 TI Improvement Project. On January 11, 2010, Council adopted an ordinance authorizing the release of a public utility easement (PUE) for this same project. The newly acquired right-of-way was within an existing PUE area and is to be rededicated as a United States (USA) fee title easement for use by the Salt River Project (SRP) for the relocation of an irrigation pipe. At that time, SRP's annual dry-up was scheduled to occur and the process to relocate the USA easement and install the new pipe could not be completed before the dry-up end. The City requested and received a waiver from SRP to install the irrigation pipe with the understanding that the USA easement was forthcoming. The United States Department of the Interior Bureau of Reclamation has since reviewed and approved this new easement area as a USA fee title easement.

BUDGETARY IMPACT:

The proposed USA easement will have no budgetary impact on the City.

RECOMMENDATION:

Staff recommends that the City Council approve an ordinance authorizing the dedication of an easement to the United States for the Avondale Boulevard and I-10 Traffic Interchange (TI) Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- Ordinance 1440-111

ORDINANCE NO. 1440-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, GRANTING AN EASEMENT TO THE UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION FOR CONSTRUCTION, RECONSTRUCTION, OPERATION AND MAINTENANCE OF WATER DISTRIBUTION SYSTEM PIPELINES.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. An easement is hereby granted to the United States Department of the Interior Bureau of Reclamation for construction, reconstruction, operation and maintenance of water distribution system pipelines, as part of the Salt River Project water distribution system, for the Avondale Boulevard and Interstate 10 Traffic Interchange Improvement Project in the form attached hereto as Exhibit 1 and incorporated herein by reference, through, over, under and across certain real property, generally located along Avondale Boulevard, south of Interstate 10, described in Exhibit A to the easement form attached hereto as Exhibit 1

SECTION 2. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT 1
TO
ORDINANCE NO. 1440-111

[Contract and Grant of Easement]

See following pages.

Contract No. 10LE323974
Case No. 09-023

ORIGINAL

Exempt per A.R.S. § 11-1134 A.3.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SALT RIVER PROJECT

CONTRACT AND GRANT OF EASEMENT

THIS CONTRACT AND GRANT OF EASEMENT, made this _____ day of _____, _____, pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388), the Reclamation Project Act of 1939 (53 Stat. 1187), and all acts amendatory thereof or supplementary thereto, between the **UNITED STATES OF AMERICA**, hereinafter referred to as "United States," and the **CITY OF AVONDALE, an Arizona municipal corporation,** hereinafter referred to as "Grantor."

WITNESSETH:

That the Salt River Project Agricultural Improvement and Power District (SRP), an agricultural improvement district organized and existing under the laws of the State of Arizona, intends to

relocate an irrigation facility acquired for a project purpose to a piped irrigation facility at a new location; and,

WHEREAS, the United States owns a real property interest along the existing irrigation facility, and Grantor owns the fee title to a portion of the real property onto which the irrigation facility will be relocated; and,

WHEREAS, Grantor intends to grant to the United States and its assigns that certain real property interest needed for a portion of the relocated facility in exchange for the real property interest no longer needed for project purposes; and,

WHEREAS, the United States will release its interest, if any, in and to the real property interest no longer needed by Contract No. 10LE323975 to the State of Arizona, by and through its Department of Transportation and the City of Avondale, an Arizona municipal corporation, and any and all other owners of record of the underlying fee title.

NOW THEREFORE, for valuable consideration, receipt of which is hereby acknowledged, the following grant and mutual covenants by and between the parties:

1. Grantor does hereby grant unto the United States, its successors and assigns, a perpetual easement to construct, reconstruct, operate and maintain certain water distribution system

pipelines, as part of the SRP water distribution system, and such structures, installations and facilities used in the construction, reconstruction, operation and maintenance of said water distribution system, across certain land situated in the County of Maricopa, State of Arizona, and more fully described in Exhibit "A" attached hereto and by this reference made a part hereof.

2. The grant of easement herein contained shall include the perpetual right of ingress and egress over said premises to construct, reconstruct, operate, maintain, enlarge, improve, relocate, remove, repair and renew said water distribution system, together with the present and future right to clear said right-of-way to the extent deemed necessary by the United States to protect the rights and privileges herein granted.

3. The United States, its successors and assigns, may hold such easement forever for all purposes consistent with the water distribution feature of SRP, or any changes, or additions or modifications that may hereafter be made therein, and the United States, its successors and assigns, will have the perpetual right to take and use materials, as well as all of the rights incident to such water distribution feature, or any changes, additions, or modifications thereof over, upon or across said right-of-way described in Exhibit "A."

4. The Grantor hereby ratifies and affirms the right of the United States, its permittees, successors or assigns, to construct, reconstruct, operate, maintain, enlarge, improve, relocate, remove, repair and renew, together with the right of access thereto for such purposes, at any time

and from time to time, a water conduit and related facilities, consisting of one or more canals, pipelines, laterals, markers, air valves, manholes, valves, meters, surge control devices, buried communication conduits, and all other fixtures, devices and appurtenances related thereto, and to conduct all related activities in, on, under, and across the land described in Exhibit "A" under the following conditions:

(a) The United States shall have the right to use the subject land for ingress and egress at any time without prior notice, together with the right to use existing or future roadways, lanes and rights-of-way on Grantor's property adjacent thereto, as may be convenient and necessary for the purposes of exercising the rights herein granted. The United States may, at any time, install and/or use gates in any fences which are now or may hereafter be constructed and to trim, cut and clear away trees or brush whenever, in its judgment, the same shall be necessary for the convenient and safe exercise of the rights hereby granted, on said lands described in Exhibit "A," or on such adjoining lands for the purpose of exercising the rights herein granted.

(b) The rights granted to, and exercised by, the United States shall be subject to all existing structures, fencing, canals, ditches, pipelines, roadways, and rights-of-way, and all future uses thereof, including but not limited to the right of the Grantor to use the lands within said parcel for agricultural and other purposes, which do not or could not directly or indirectly interfere with or endanger the exercise of the rights of the United States; PROVIDED, HOWEVER, that the Grantor shall clear and keep clear the lands described in Exhibit "A" from explosives, buildings and structures of all kinds or facilities of a permanent nature which directly

or indirectly interfere or could interfere with the rights of the United States, and shall not drill any well, install swimming pools, or alter ground level by cut or fill, within the limits of said rights-of-way and the United States shall have the permanent right of exclusive use and possession within the easement.

5. The grant of easement herein contained is subject to easements and rights-of-way existing or of record in favor of the public or third parties, and subject to any outstanding interest in any and all organic or inorganic substances in or under said land.

6. Grantor warrants that no person or agency has been employed or retained to solicit or secure this grant upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Grantor for the purpose of securing business.

7. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this grant or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this grant if made with a corporation or company for its general benefit.

8. The provisions of this grant shall obligate and inure to the benefit of the respective heirs, executors, administrators, successors, and assigns of the parties to this grant.

IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written.

CITY OF AVONDALE, an Arizona municipal corporation

By:_____

Title:_____

UNITED STATES OF AMERICA

By: _____
Area Manager
Phoenix Area Office
Bureau of Reclamation

ACKNOWLEDGMENT

State of Arizona)
) ss.
County of Maricopa)

On this ____ day of_____, _____, before me,

_____, a Notary Public in and for said County and State,

personally appeared _____, _____, on behalf of

the **CITY OF AVONDALE, an Arizona municipal corporation,** known to me to be the person described in the foregoing instrument, and acknowledged to me that he/she executed the same in the capacity therein stated and for the purpose therein contained.

_____
Notary Public in and for
said County and State

ACKNOWLEDGMENT

State of Arizona)
) ss.
County of Maricopa)

On this 3rd day of December, 2010, before me, Ellen L. Stender, a Notary Public in and for said County and State personally appeared Randy N. Chandler, Area Manager, Phoenix Area Office, Bureau of Reclamation, Department of the Interior, **UNITED STATES OF AMERICA**, known to me to be the person described in the foregoing instrument, and acknowledged to me that he/she executed the same on behalf of the United States in the capacity therein stated and for the purpose therein contained.

ELLEN L. STENDER
Notary Public - Arizona
Maricopa County
My Comm. Expires Aug 2, 2011

Ellen L. Stender
Notary Public in and for
said County and State

URS

EXHIBIT "A" **CONTRACT NO. 10LE323974**
CASE NO. 09-023

PROPOSED USA EASEMENT PROPERTY
CITY OF AVONDALE TO USA
AVONDALE BOULEVARD (115th Avenue) & I-10

That portion of the Northeast quarter of Section 1, Township 1 North, Range 1 West, of the Gila and Salt River Meridian, Maricopa County, Arizona, being more particularly described as follows:

COMMENCING at the East quarter corner of said Section 1 (3" brass cap) from which the Northeast corner of said Section 1 (3" brass cap) bears North 00°02'35" West, 2627.36 feet;

thence North 00°02'35" West, 171.26 feet along the East line of said Section 1;

thence departing said East line South 89°57'25" West, 65.00 feet to the West line of the East 65.00 feet of said Section 1 and the POINT OF BEGINNING;

thence departing said West line of the East 65.00 feet of Section 1, North 02°45'02" West, 317.54 feet;

thence North 22°21'50" West, 3.95 feet;

thence North 00°02'35" West, 20.00 feet;

thence North 89°57'25" East, 4.25 feet;

thence North 43°24'32" East, 17.80 feet to said West line of the East 65.00 feet of Section 1;

thence South 00°02'35" East, 353.77 feet along said West line of the East 65.00 feet of Section 1 to the POINT OF BEGINNING.

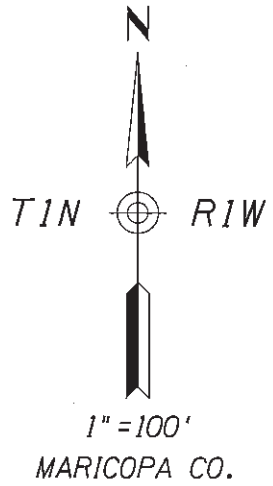
Said Parcel contains 2,846 square feet or 0.0653 acres more or less.

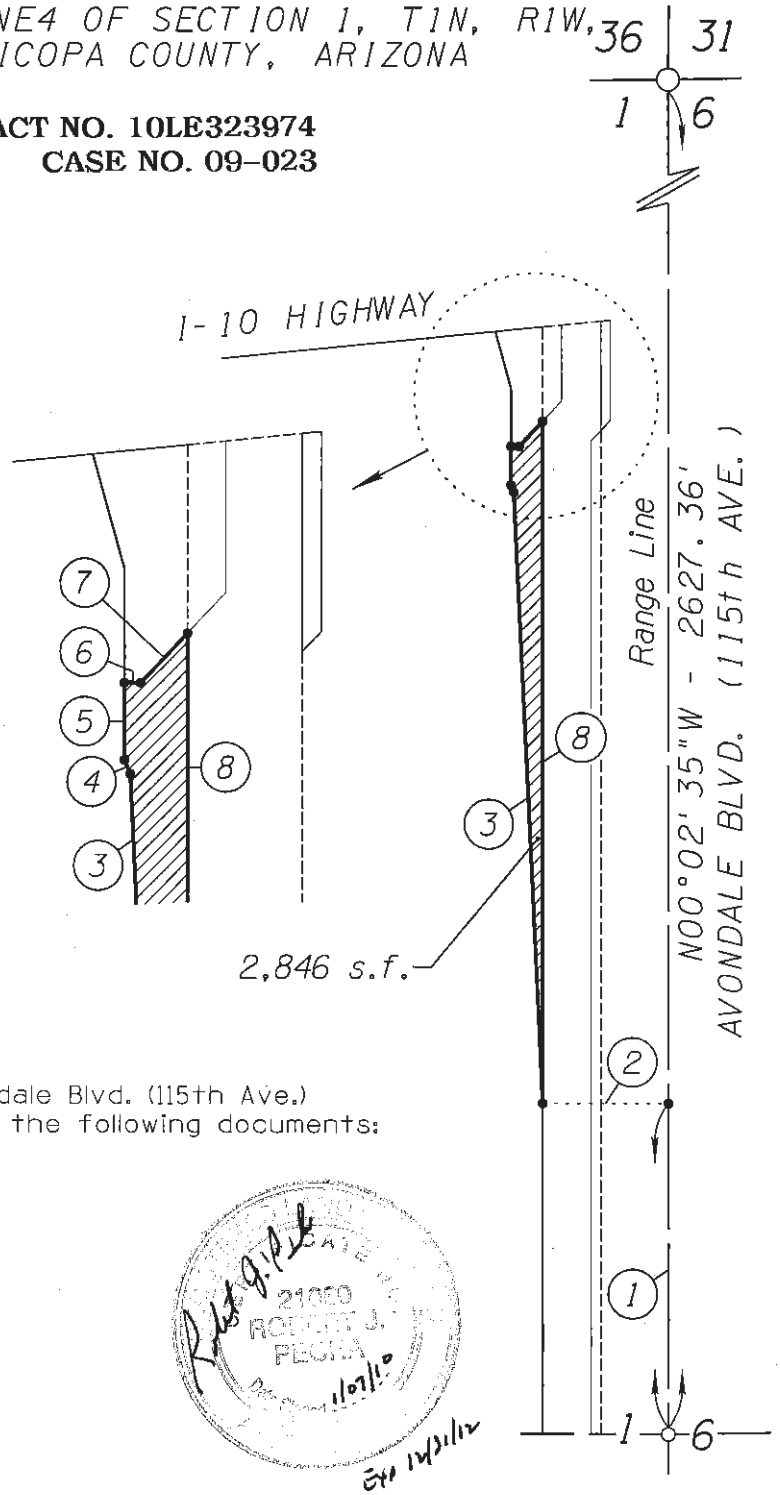
REGISTERED LAND SURVEYOR
21000
ROBERT J. PECHA
Date Signed 11/07/12
Exp 12/31/12

EXHIBIT "A"
PROPOSED USA EASEMENTS PROPERTY
CITY OF AVONDALE TO USA
Avondale Blvd. (115th Ave.) and I-10

PORTIONS OF THE NE4 OF SECTION 1, T1N, R1W, G&SRM, MARICOPA COUNTY, ARIZONA

CONTRACT NO. 10LE323974
CASE NO. 09-023





DATA TABLE

1	N00°02'35"W	171.26'
2	S89°57'25"W	65.00'
3	N02°45'02"W	317.54'
4	N22°21'50"W	3.95'
5	N00°02'35"W	20.00'
6	N89°57'25"E	4.25'
7	N43°24'32"E	17.80'
8	S00°02'35"E	353.77'

The Existing Right of Way for Avondale Blvd. (115th Ave.) lying within Section 1 is covered by the following documents:

Bk. 2 of Maps, Pg. 14
Bk. 28 Road Maps, Pg. 35
Dkt. 16182, Pg. 498
Doc. No. 2002-1304448
Doc. No. 2009-1190611

0 50 100
Scale

URS
7720 North 16th Street
Suite 100 - Phoenix, AZ
85020 - 602.371.1100

PROPOSED USA EASEMENT PROPERTY
CITY OF AVONDALE TO USA
AVONDALE BLVD. & I-10

srp-esmt-101-exh.dgn

CITY COUNCIL REPORT

SUBJECT:
Ordinances 1437-111 and 1438-111 - Dedication of Easements to SRP for the Avondale Boulevard and I-10 Traffic Interchange Improvement Project

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Sue McDermott, P.E., Director of Development Services & Engineering, 623-333-4211

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council adopt two ordinances dedicating power distribution easements to Salt River Project (SRP) for the Avondale Boulevard and I-10 Traffic Interchange (TI) Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents.

BACKGROUND:

As a part of the FY10-11 Capital Improvement Program (CIP), the City is in the process of constructing roadway widening improvements and installing a traffic signal at the intersection of Avondale Boulevard and I-10 TI (see attached vicinity map). This project was warranted based on the increased amount of time to access eastbound I-10 combined with the need for additional lanes under the freeway.

DISCUSSION:

On November 16, 2009, Council adopted an ordinance which allowed the acquisition of real property for right-of-way for the Avondale Boulevard and I-10 Traffic Interchange Improvement Project. This ordinance also included the acquisition of land for several public utility easements. Two (2) of said easements will contain only SRP equipment and SRP requires dedicated power distribution easements. The dedication of the easements to SRP is necessary to relocate existing power facilities for the proposed roadway improvements along Avondale Boulevard.

BUDGETARY IMPACT:

The proposed dedication of easements to SRP will have no budgetary impact on the City.

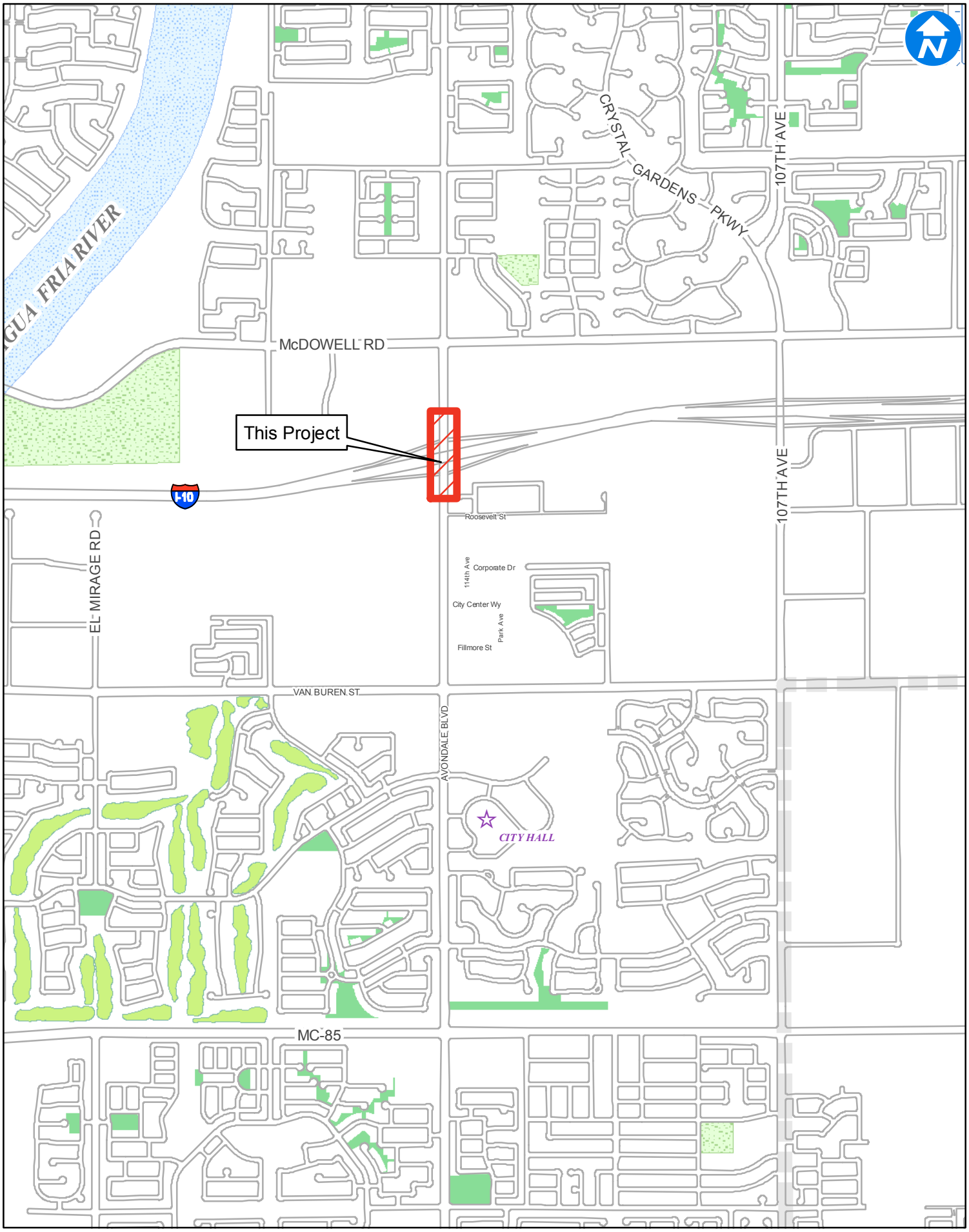
RECOMMENDATION:

Staff recommends the City Council adopt two ordinances dedicating power distribution easements to Salt River Project (SRP) for the Avondale Boulevard and I-10 Traffic Interchange Improvement Project and authorize the Mayor or City Manager, and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- Vicinity Map
- Ordinances 1437-111
- Ordinances 1438-111



Map Produced by Avondale Water Resources/GIS Division

City of Avondale
Avondale Blvd & I-10 TI Improvements

ORDINANCE NO. 1437-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, GRANTING AN EASEMENT TO SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. An easement is hereby granted to Salt River Project Agricultural Improvement and Power District in the form attached hereto as Exhibit 1 and incorporated herein by reference, through, over, under and across certain real property, generally located along Avondale Boulevard, north of Roosevelt Street, as more particularly described and depicted in Exhibit A to the easement form attached hereto as Exhibit 1.

SECTION 2. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT 1
TO
ORDINANCE NO. 1437-111

[Salt River Project Easement Agreement]

See following pages.

WHEN RECORDED MAIL TO:

SALT RIVER PROJECT
Land Department/PAB350
P. O. Box 52025
Phoenix, Arizona 85072-2025

POWER DISTRIBUTION EASEMENT

Maricopa County
NW ¼, Sec. 6, T1N, R1E

Agt. SCF
Job # KJ6-7011
W _____ C _____

CITY OF AVONDALE,
an Arizona municipal corporation,

hereinafter called Grantor, for and in consideration of the sum of One Dollar, and other valuable consideration, receipt of which is hereby acknowledged, does hereby grant and convey to **SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT**, an agricultural improvement district organized and existing under the laws of the State of Arizona, its agents, employees, contractors and permittees and its and their respective successors and assigns, hereinafter called the Grantee, a non-exclusive easement in, upon, over, under, across, through and along the lands hereinafter described (such lands hereinafter described being sometimes referred to herein as the "Easement Parcel") to construct, install, reconstruct, replace, remove, repair, operate and maintain underground electrical conductors, conduits, pipes, cables, vaults, pads, switching equipment, enclosures, manholes and transformers and all other appliances, appurtenances and fixtures (collectively "Facilities") for the transmission and distribution of electricity and for all other purposes connected therewith at such locations and elevations, in, upon, over, under, across, through and along the Easement Parcel as Grantee may now or hereafter deem convenient or necessary from time to time, together with the right of ingress and egress to, from, across and along the Grantor's Property. Grantee is hereby authorized to permit others to use the Easement Parcel for additional Facilities jointly with or separately from the Grantee for their purposes.

The lands in, upon, over, under, across, through and along which this easement is granted are situated in the County of Maricopa, State of Arizona, and are more particularly described as:

Grantor's Property:

That portion of Lot 1, AVONDALE GATEWAY, according to the plat of record, Book 854 of Maps, Page 35, records of Maricopa County, Arizona.

Easement Parcel:

Said easement as described on Exhibit A, attached hereto and by this reference made a part hereof.

CAUTION: Facilities placed within the Easement Parcel may contain high voltage electrical equipment. Notice is hereby given that the location of underground electrical conductors or facilities must be verified as required by Arizona Revised Statutes, Section 40-360.21, et seq., Arizona Blue Stake Law, prior to any excavation.

Grantor shall maintain a clear area that extends 3.00 feet from and around all edges of all transformer pads and other equipment pads, and a clear operational area that extends 12.00 feet immediately in front of all transformer and other equipment openings. No obstruction, trees, shrubs, fixtures or permanent structures shall be placed within said areas.

Grantor shall not construct, install or place, or permit to be constructed, installed or placed any building or other structure, plant any trees, drill any well, store materials of any kind, or alter ground level by cut or fill, within the area of the Easement Parcel.

Grantee shall have the right (but not the obligation) to trim, cut and clear away trees, brush or other vegetation on the Easement Parcel whenever in its judgment the same shall be necessary for the convenient and safe exercise of the rights herein granted.

In the event Grantee records a document to formally abandon the easement granted herein, all Grantee's rights hereunder shall cease, except the right to remove any and all property placed upon the Easement Parcel within a reasonable time subsequent to such abandonment.

The covenants and agreements herein set forth shall extend and inure in favor and to the benefit of and shall be binding on the heirs, administrators, executors, personal representatives, legal representatives, successors (including successors in ownership and estate), assigns and lessees of the Grantor and Grantee.

IN WITNESS WHEREOF, **CITY OF AVONDALE**, an Arizona municipal corporation, has caused its name to be executed by its duly authorized representative(s), this _____ day of _____, _____.

CITY OF AVONDALE,
an Arizona municipal corporation,

By _____
City Manager

ATTEST:

By _____
City Clerk

STATE OF _____)
) ss
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20_____, by _____ and _____, as _____ and _____, respectively, of **CITY OF AVONDALE**, an Arizona municipal corporation, and such authorized representative acknowledged that this document was executed on behalf of the corporation for the purposes therein contained.

My Commission Expires:

_____ _____
Notary Public

_____
Notary Stamp/Seal

Note: This instrument is exempt from the real estate transfer fee and affidavit of legal value required under A.R.S. Sections 11-1132 and 11-1133 pursuant to the exemptions set forth in A.R.S. Sections 11-1134(A)(2) and (A)(3).

URS

EXHIBIT A

LEGAL DESCRIPTION FOR
SRP POWER DISTRIBUTION EASEMENT
(Maricopa County Assessor Parcel No. 102-56-015)

That portion of Lot 1, AVONDALE GATEWAY, according to the plat of record, Book 854 of Maps, Page 35, recorded at the Maricopa County Recorder's Office, said Lot 1 also lies within the Northwest quarter of Section 6, Township 1 North, Range 1 East, of the Gila and Salt River Meridian, Maricopa County, Arizona, being more particularly described as follows:

COMMENCING at the West quarter corner of said Section 6 (3" brass cap) from which the Northwest corner of said Section 6 (3" brass cap) bears North 00°02'35" West, 2627.36 feet;

thence North 00°02'35" West, 177.19 feet along the West line of said Section 6;

thence departing said West line North 89°57'25" East, 84.34 feet to the POINT OF BEGINNING;

thence South 88°52'26" East, 8.00 feet;

thence South 01°07'34" West, 20.00 feet;

thence North 88°52'26" West, 8.00 feet;

thence North 01°07'34" East, 20.00 feet to the POINT OF BEGINNING.

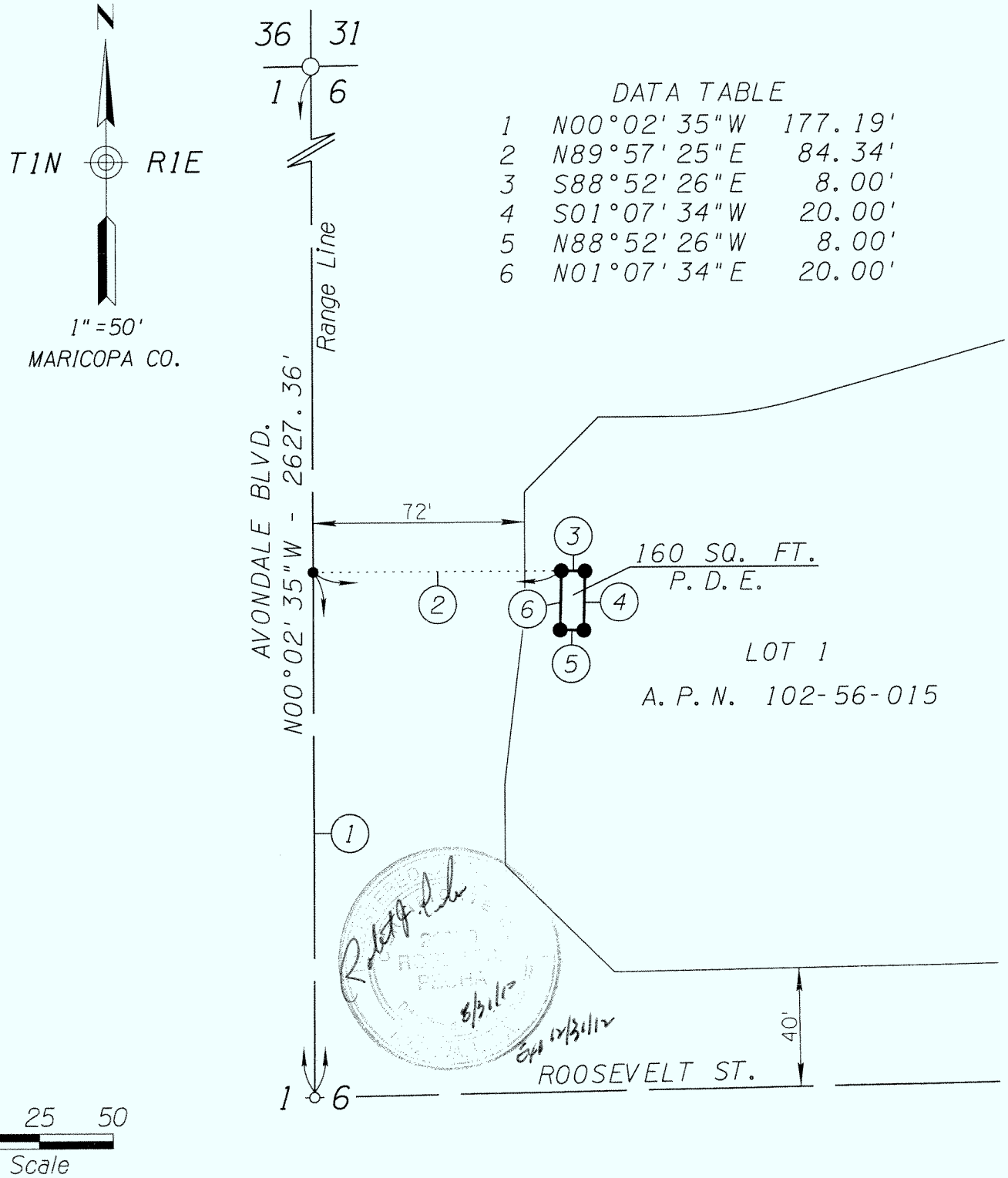
Said Power Distribution Easement contains 160 square feet or 0.0037 acres more or less.

REGISTERED LAND SURVEYOR
21050
ROBERT J.
PECHA
Date Signed 8/31/12
ARIZONA, U.S.A.
Exp 12/31/12

EXHIBIT A

EXHIBIT C1
SRP POWER DISTRIBUTION EASEMENT

A PORTION OF LOT 1, AVONDALE GATEWAY,
ACCORDING TO BOOK 854 OF MAPS, PAGE 35
RECORDS OF MARICOPA COUNTY, ARIZONA



DATA TABLE

1	N00°02'35"W	177.19'
2	N89°57'25"E	84.34'
3	S88°52'26"E	8.00'
4	S01°07'34"W	20.00'
5	N88°52'26"W	8.00'
6	N01°07'34"E	20.00'

URS
7720 North 16th Street
Suite 100 - Phoenix, AZ
85020 - 602.371.1100

EXHIBIT OF SRP POWER DISTRIBUTION EASEMENT
AVONDALE BLVD. & ROOSEVELT ST.

102-56-015-pue.dgn

ORDINANCE NO. 1438-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, GRANTING AN EASEMENT TO SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. An easement is hereby granted to Salt River Project Agricultural Improvement and Power District in the form attached hereto as Exhibit 1 and incorporated herein by reference, through, over, under and across certain real property, generally located along Interstate Highway I-10, east of Avondale Boulevard, as more particularly described and depicted in the easement form attached hereto as Exhibit 1.

SECTION 2. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT 1
TO
ORDINANCE NO. 1438-111

[Salt River Project Easement Agreement]

See following pages.

WHEN RECORDED MAIL TO:

SALT RIVER PROJECT
Land Department/PAB350
P. O. Box 52025
Phoenix, Arizona 85072-2025

POWER DISTRIBUTION EASEMENT

Maricopa County
NW ¼, Sec. 6, T1N, R1E

Agt. SCF
Job # KJ6-7011
W_____ C_____

CITY OF AVONDALE,
an Arizona municipal corporation,

hereinafter called Grantor, for and in consideration of the sum of One Dollar, and other valuable consideration, receipt of which is hereby acknowledged, does hereby grant and convey to **SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT**, an agricultural improvement district organized and existing under the laws of the State of Arizona, its agents, employees, contractors and permittees and its and their respective successors and assigns, hereinafter called the Grantee, a non-exclusive easement in, upon, over, under, across, through and along the lands hereinafter described (such lands hereinafter described being sometimes referred to herein as the "Easement Parcel") to construct, install, reconstruct, replace, remove, repair, operate and maintain underground electrical conductors, conduits, pipes, cables, vaults, pads, switching equipment, enclosures, manholes and transformers and all other appliances, appurtenances and fixtures (collectively "Facilities") for the transmission and distribution of electricity and for all other purposes connected therewith at such locations and elevations, in, upon, over, under, across, through and along the Easement Parcel as Grantee may now or hereafter deem convenient or necessary from time to time, together with the right of ingress and egress to, from, across and along the Grantor's Property. Grantee is hereby authorized to permit others to use the Easement Parcel for additional Facilities jointly with or separately from the Grantee for their purposes.

The lands in, upon, over, under, across, through and along which this easement is granted are situated in the County of Maricopa, State of Arizona, and are more particularly described as:

Grantor's Property:

That portion of Lot 2, AVONDALE GATEWAY, according to the plat of record, Book 854 of Maps, Page 35, records of Maricopa County, Arizona.

Easement Parcel:

Said easement as described on Exhibit A, attached hereto and by this reference made a part hereof.

CAUTION: Facilities placed within the Easement Parcel may contain high voltage electrical equipment. Notice is hereby given that the location of underground electrical conductors or facilities must be verified as required by Arizona Revised Statutes, Section 40-360.21, et seq., Arizona Blue Stake Law, prior to any excavation.

Grantor shall maintain a clear area that extends 3.00 feet from and around all edges of all transformer pads and other equipment pads, and a clear operational area that extends 12.00 feet immediately in front of all transformer and other equipment openings. No obstruction, trees, shrubs, fixtures or permanent structures shall be placed within said areas.

Grantor shall not construct, install or place, or permit to be constructed, installed or placed any building or other structure, plant any trees, drill any well, store materials of any kind, or alter ground level by cut or fill, within the area of the Easement Parcel.

Grantee shall have the right (but not the obligation) to trim, cut and clear away trees, brush or other vegetation on the Easement Parcel whenever in its judgment the same shall be necessary for the convenient and safe exercise of the rights herein granted.

In the event Grantee records a document to formally abandon the easement granted herein, all Grantee's rights hereunder shall cease, except the right to remove any and all property placed upon the Easement Parcel within a reasonable time subsequent to such abandonment.

The covenants and agreements herein set forth shall extend and inure in favor and to the benefit of and shall be binding on the heirs, administrators, executors, personal representatives, legal representatives, successors (including successors in ownership and estate), assigns and lessees of the Grantor and Grantee.

IN WITNESS WHEREOF, **CITY OF AVONDALE**, an Arizona municipal corporation, has caused its name to be executed by its duly authorized representative(s), this _____ day of _____, _____.

CITY OF AVONDALE,
an Arizona municipal corporation,

By _____
City Manager

ATTEST:

By _____
City Clerk

STATE OF _____)
) ss
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20_____, by _____ and _____, as _____ and _____, respectively, of **CITY OF AVONDALE**, an Arizona municipal corporation, and such authorized representative acknowledged that this document was executed on behalf of the corporation for the purposes therein contained.

My Commission Expires:

_____ _____
Notary Public

_____
Notary Stamp/Seal

Note: This instrument is exempt from the real estate transfer fee and affidavit of legal value required under A.R.S. Sections 11-1132 and 11-1133 pursuant to the exemptions set forth in A.R.S. Sections 11-1134(A)(2) and (A)(3).

URS

LEGAL DESCRIPTION FOR
SRP POWER DISTRIBUTION EASEMENT
(Maricopa County Assessor Parcel No. 102-56-016)

That portion of Lot 2, AVONDALE GATEWAY, according to the plat of record, Book 854 of Maps, Page 35, recorded at the Maricopa County Recorder's Office, said Lot 2 also lies within the Northwest quarter of Section 6, Township 1 North, Range 1 East, of the Gila and Salt River Meridian, Maricopa County, Arizona, being more particularly described as follows:

COMMENCING at the West quarter corner of said Section 6 (3" brass cap) from which the Northwest corner of said Section 6 (3" brass cap) bears North 00°02'35" West, 2627.36 feet;

thence North 00°02'35" West, 594.29 feet along the West line of said Section 6;

thence departing said West line North 89°57'25" East, 94.00 feet to the northerly line of said Lot 2 and the southerly right of way of the I-10 Phoenix-Ehrenberg Highway and the POINT OF BEGINNING;

thence North 70°50'00" East, 20.28 feet along said northerly line of Lot 2 and the southerly right of way of the I-10 Phoenix-Ehrenberg Highway;

thence departing said northerly line of Lot 2 and the southerly right of way of the I-10 Phoenix-Ehrenberg Highway, South 01°19'40" West, 33.10 feet;

thence North 88°40'20" West, 19.00 feet;

thence North 01°19'40" East, 26.00 feet to the POINT OF BEGINNING.

Said Power Distribution Easement contains 561 square feet or 0.0129 acres more or less.

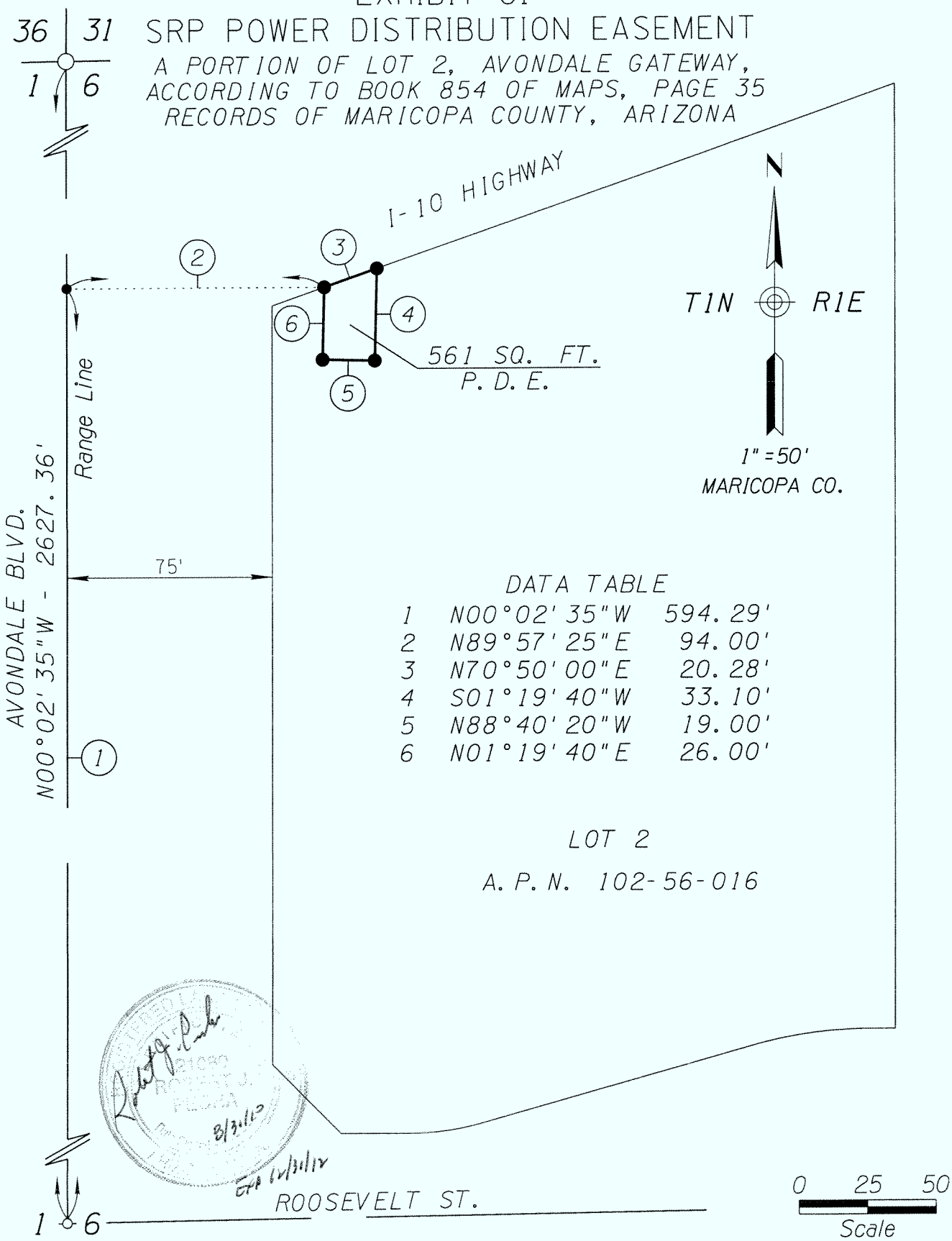
REGISTERED LAND SURVEYOR
21080
ROBERT J.
PECHA
Date Signed 8/3/10
ARIZONA U.S.A.

Exp 12/31/12

EXHIBIT C1

SRP POWER DISTRIBUTION EASEMENT

A PORTION OF LOT 2, AVONDALE GATEWAY,
ACCORDING TO BOOK 854 OF MAPS, PAGE 35
RECORDS OF MARICOPA COUNTY, ARIZONA



DATA TABLE

1	N00°02'35"W	594.29'
2	N89°57'25"E	94.00'
3	N70°50'00"E	20.28'
4	S01°19'40"W	33.10'
5	N88°40'20"W	19.00'
6	N01°19'40"E	26.00'

LOT 2

A. P. N. 102-56-016

8/31/12

EXP 12/31/12

URS

7720 North 16th Street
Suite 100 - Phoenix, AZ
85020 - 602.371.1100

EXHIBIT OF SRP POWER DISTRIBUTION EASEMENT
AVONDALE BLVD. & I-10

102-56-016-pue.dgn

CITY COUNCIL REPORT

SUBJECT:
Lease Agreement - Ground Control Coffee and Wine Bar, LLC

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Daniel Davis. Economic Development Director (623) 333-1411

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council approve a Lease Agreement with Ground Control Coffee and Wine Bar, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

BACKGROUND:

The City of Avondale initiated the development of City Center with the construction of the American Sports Centers-Avondale at the Randall McDaniel Sports Complex. The new recreation facility opened on November 1, 2010. On July 5, 2010 Council approved the construction of 24,000sf of retail space adjacent to the sports facility. The scope of work includes the construction of the core and shell of the building. The interior finishes of the buildings will be completed in conjunction of the tenant improvements associated with each tenant lease. The retail buildings are scheduled to be completed by February 28, 2011.

DISCUSSION:

During the past year, staff has identified potential businesses that were looking for expansion opportunities and would complement the City Center. Staff has negotiated a lease agreement with Ground Control Coffee and Wine Bar for approximately 2,500sf of floor space, along with 525 sf of patio space. Ground Control Coffee and Wine Bar will utilize the premises for a full service coffee and wine bar, pizza restaurant and bistro. The initial term of the lease will be seven (7) years with the option to extend the lease for an additional seven (7) year period. The initial annual lease for the tenant is $59,940 plus an increase each year beginning in year two (2) and continuing until the end of the seven (7) year period for a total of $494,660

The City will provide the tenant an allowance in the amount of $270,000 that will be used for tenant improvements, including the dining and public area improvements. The tenant will supply and install all kitchen equipment and other furniture, fixtures & equipment needed for the restaurant. The cost of these improvements will not be less than $100,000. Any additional costs incurred for building improvements will be solely borne by the tenant. The tenant will be responsible for all professional design fees associated with the improvements.

BUDGETARY IMPACT:

Funding for this project was approved by Council and is budgeted in the Parks Capital Improvement fund account No. 310-1119-00-8210. Total funds obligated or expended to date for both the infrastructure, ASC facility, and the retail building construction are within budget estimates.

RECOMMENDATION:

Staff recommends that the City Council approve a Lease Agreement with Ground Control Coffee and Wine Bar, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents.

ATTACHMENTS:

Click to download

- Lease Agreement

_____, 20___

LEASE AGREEMENT
By and Between

THE CITY OF AVONDALE,
an Arizona municipal corporation, as Landlord

and

GROUND CONTROL COFFEE AND WINE BAR, LLC,
an Arizona limited liability company, as Tenant

MAIN STREET RETAIL AT AVONDALE CITY CENTER
Avondale, Arizona

LEASE AGREEMENT

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EXHIBIT E	FORM OF LEASE GUARANTY

LEASE AGREEMENT

This Lease Agreement ("**Lease**") is made and entered into on _____ (the "**Effective Date**"), which shall be the last date of execution of this Lease by Landlord or Tenant (as applicable) as set forth in the signature page hereof.

The following is incorporated into and forms a part of the Lease:

COVER SHEET

LANDLORD NAME:	THE CITY OF AVONDALE an Arizona municipal corporation
TENANT NAME:	GROUND CONTROL COFFEE AND WINE BAR, LLC, an Arizona limited liability company
TENANT ADDRESS:	745 N. 114th Avenue, Suite 2 Avondale, Arizona 85323
TRADE NAME:	_____

ITEM 1. **PREMISES:** Those certain premises (the "**Premises**") contemplated to contain approximately 2,495 square feet of "**Floor Area**" (as defined in **ITEM 2** of the Cover Sheet), and approximately 525 square feet of patio space, located in the retail component of the mixed-use development associated with the amateur sports facility being constructed by the City of Avondale (the "**Sports Facility**") between Corporate Drive and City Center Drive at the east side of 114th Avenue, Avondale, Arizona (hereafter referred to as the "**Center**"). The approximate layout of the Center and location of the Premises therein are shown on the site plan attached hereto as **Exhibit A** (the "**Site Plan**"). The Floor Area of the Premises is subject to remeasurement as provided in **Section 1.1** of the Lease. Landlord may, from time to time, designate additions, deletions and other changes to the Center. For purposes of this Lease, the "**Center**" shall initially consist of the portion of the Sports Facility development shown on the Site Plan, all improvements constructed thereon, together with such additions, deletions and other changes as Landlord may from time to time designate for the Center, subject to and in accordance with the terms of this Lease. Tenant acknowledges that the scope and configuration of the Center may change from time to time as portions thereof are developed, and that portions thereof may be converted to condominiums, parcelized or otherwise sold separate and apart from other portions thereof, and that as a result thereof, notwithstanding anything to the contrary contained in this Lease, Landlord may elect to exclude such portions of the Sports Facility development from the "**Center**." The "**Center**" shall consist of those portions of the Sports Facility development that Landlord may elect, in Landlord's sole discretion, to include in such term from time to time.

ITEM 2. **FLOOR AREA:** With respect to each building or structure in the Center, the number of square feet of floor space intended for exclusive occupancy at each level or story lying within the exterior faces of exterior walls thereof (except party walls, as to which the center line, not the exterior faces, shall be used), whether or not leased or occupied

("**Floor Area**"). If such space is office space, "**Floor Area**" shall refer to the rentable area of the space in question.

ITEM 3. **PERMITTED USE & EXCLUSIVE USE:** Subject to the other provisions of this Lease, Tenant shall use the Premises only for a full service coffee and wine bar, pizza restaurant and bistro; however, Tenant shall not be permitted to operate a full service sit down or takeout restaurant serving Mexican food totaling 15% or more of Tenant's gross sales ("**Permitted Use**"), and for no other use or purpose, and under the Trade Name set forth above and under no other trade name, without Landlord's prior written consent. Tenant will not commit, omit or permit any act, condition or event that is contrary to any Legal Requirement or Insurance Requirement, as defined below. Landlord further agrees that during the term of this lease, Landlord will not hereafter enter into a new lease in the Center with Tenants whose principal permitted use involves the sale of pizza or coffee in an amount greater than 10 percent of their total net sales (the "**Exclusive Use**").

ITEM 4. Intentionally Left Blank

ITEM 5. **INITIAL TERM:** The term of this Lease (the "**Initial Term**") shall commence on May 26, 2011, or sooner, and shall end 84 months from the Commencement Date (defined below). Calculation of the "**Lease Years**" is defined in **Article 2**.

OPTION TERM: The tenant has an option to extend the lease for one additional 84 month period (the "**Option Term**").

The Initial Term of this Lease, and any Option Term exercised by Tenant, are sometimes herein referred to as the "**Term.**"

ITEM 6. **DELIVERY DATE:** The "**Delivery Date**" shall be the date on which Landlord delivers possession of the Premises to Tenant with all of "**Landlord's Work**" (as described in **ITEM 11**) "**substantially complete**" (i.e., complete to the extent that Tenant may commence "**Tenant's Work**" (as defined in **Exhibit B-2**) in the Premises without substantial interference from Landlord or its contractor). Tenant shall acknowledge delivery of the Premises by executing the Delivery Date Certificate in the form attached hereto as **Exhibit B-1**.

ITEM 7. **COMMENCEMENT DATE:** Subject to the provisions of this Lease, the Initial Term of this Lease and Tenant's obligation to pay "**Rent**" (as defined in **Article 3**) shall commence on the date (the "**Commencement Date**") that is the earlier of the following: **(A)** the date that Tenant opens for business to the public in the Premises; or **(B)** the date that is 100 days after the Delivery Date but not later than May 26, 2011. Within 30 days after the Commencement Date has been determined, Landlord and Tenant shall execute and deliver to each other a commencement date memorandum in the form attached hereto as **Exhibit D** and incorporated herein by this reference ("**Form of Commencement Date Memorandum**").

ITEM 8. **MINIMUM RENT:** The Minimum Rent payable by Tenant pursuant to this Lease shall include all of the following:

A. From the Commencement Date through the first Lease Year the minimum rent will be $59,940.00, plus an increase each year beginning the first month of Year Two of the lease and continuing each year thereafter until the end of the first 84 month term of the lease. The amount of the fixed rent for Years Two through Seven shall be as follows:

Year 2 - $63,180

Year 3 - $66,420

Year 4 - $69,660

Year 5 - $72,900

Year 6 - $79,380

Year 7 - $83,180

B. In consideration of Tenant opening on or before May 26, 2011, the monthly rent due per month shall be waived until September 1, 2011 (the "**Free Rent Period**") and Tenant shall pay $0.00 per month. Commencing on September 1, 2011 and continuing throughout the Term, Tenant shall make monthly payments toward the Minimum Rent. Tenant shall pay to Landlord Minimum Rent in equal monthly installments, in advance, on the first day of each month, without prior notice or demand, setoff or deduction. Minimum Rent shall be prorated for any partial calendar month.

ITEM 9. Intentionally Left Blank

ITEM 10. **CENTER FLOOR AREA:** The total Floor Area of all buildings and structures in the Center from time to time (including the Premises) ("**Center Floor Area**").

ITEM 11. **IMPROVEMENTS BY LANDLORD AND TENANT:**

A. **Landlord's Work**.

1. Landlord shall deliver the Premises to Tenant as a "cold dark shell," with: **(a)** the exterior of the building completed in accordance with the design concepts, including all glazing, doors, building skin, patio areas, if any, and all related site improvements; **(b)** the exterior walls of the Premises demised, but the interior of which shall not include drywall; **(c)** the floor of the Premises as unfinished graded dirt; **(d)** utilities in capacities determined by Landlord stubbed to the exterior walls of the Premises; **(e)** HVAC units (excluding distribution equipment) to serve the Premises in capacities determined by Landlord, such units will penetrate the roof and be capped; **(f)** HVAC control unit and wiring from control to HVAC units and **(g)** communications lines brought into the suite and terminated at the demark panel (the "**Landlord's Work**"). Landlord is not required to perform any additional improvements to the Premises prior to the Commencement of the Lease. Tenant agrees to accept the Premises in its "AS IS" condition. All other work done by Landlord at Tenant's request shall be at Tenant's

expense and shall be paid for within ten days after the completion of such other work and presentation to Tenant of a bill for such work.

2. Landlord shall have delivered possession of the Premises to Tenant on or before the Delivery Date, which is not more than 100 days before the Commencement Date. If for any reason, Landlord cannot deliver possession of the Premises to Tenant on or before 100 days prior to the Commencement Date, (**a**) this Lease will not be void or voidable and Landlord will not be liable to Tenant for any resultant loss or damage and (**b**) the Commencement Date and Expiration Date shall each be delayed by one day for each day of such delay; provided, however, if the Commencement Date is delayed by more than 90 days, Tenant, by written notice to Landlord prior to the Commencement Date, may terminate this Lease. Tenant will execute the Form of Commencement Date Memorandum attached to this Lease as **Exhibit D** within 15 days of Landlord's request.

B. **Tenant's Work**.

1. Tenant shall, at its sole cost and expense, fixturize and stock the Premises and perform all work designated as "**Tenant's Work**" in **Exhibit B-2** in the manner set forth in this Lease. Tenant shall, at its sole cost and expense, cause an architect licensed in the state to prepare interior plans and specifications for Tenant's Work.

2. Tenant agrees to furnish to Landlord, for Landlord's prior review and approval, the Plans and Specifications (as such term is referred to in **Exhibit B-2**) with respect to the Premises prepared in the manner and within the time periods required in the Construction Guidelines. If such Plans and Specifications are not furnished by Tenant to Landlord within the required time period in a form to permit approval by Landlord, then Landlord may avail itself of its options under the Construction Guidelines. Landlord's approval of Tenant's Plans and Specifications or any modifications thereof shall not constitute the assumption of any responsibility by Landlord for their accuracy or sufficiency or their conformity with applicable laws, and Tenant shall be solely responsible therefor. In addition to conforming to the requirements specified in the Construction Guidelines, all work performed by Tenant shall comply with such reasonable rules and regulations as Landlord and its representatives may make and Tenant shall schedule its work so as not to interfere with any work being performed by Landlord or by any other tenant in the Center, or with the operation of the Center and its tenants. It is further understood and agreed that: **(a)** Landlord shall have no responsibility or liability whatsoever for any loss of, or damage to, any fixtures, equipment, merchandise, or other property belonging to Tenant or its agents, employees and contractors, installed or left in the Premises; and **(b)** Tenant's entry upon and occupancy of the Premises prior to the Commencement Date shall be governed by and subject to all the provisions, covenants and conditions of this Lease.

3. Additional alterations to the interior and/or exterior of the Premises shall be approved by the Landlord. The Tenant shall submit any proposed improvements and/or alterations to the Landlord in writing and drawings, at the request of the Landlord. The Landlord has a minimum of 60 days to approve or deny any proposed improvements and/or alterations. Tenant is responsible for the cost of any such improvements including all applicable fees and charges by City. Tenant shall be

responsible for repairing any damage caused to the Premises by virtue of any improvements and/or alterations installed by or on behalf of Tenant.

C. **Performance of Tenant's Work and Other Alterations**.

1. Tenant shall not perform Tenant's Work or make or cause to be made any other alterations, repairs, additions or improvements in or to the Premises (other than painting), including the installation of floor covering (other than carpeting), interior or exterior lighting, plumbing fixtures, shades, canopies or awnings, or make any changes to the counter or soffit face or the mechanical, electrical, plumbing or sprinkler systems without providing to Landlord, according to the time requirements set forth in the Construction Guidelines, any drawings or specifications required by Landlord, and without Landlord's prior written consent, which Landlord may grant or deny in its sole and absolute discretion. In the event Landlord grants such consent, such repairs, alterations, additions or improvements shall be performed in a good and workmanlike manner and in accordance with all applicable legal and insurance requirements and all drawings or specifications approved by Landlord. Any work performed by Tenant shall be subject to Landlord's inspection and approval after completion.

2. Tenant shall timely obtain at its sole cost all certificates and approvals with respect to work done and installations made by Tenant that may be required for the issuance of a non-temporary certificate of occupancy for the Premises, and shall immediately deliver to Landlord a copy of all such certificates and approvals. Promptly upon the completion of its work, Tenant shall repair, clean and restore to their prior condition all portions of the Center affected by any work of Tenant. In the event that any mechanic's, materialman's or other lien is filed against the Premises or the Center as a result of any work or act of or on behalf of Tenant, Tenant, at its expense, shall discharge or bond off the same within ten days from the filing thereof. If Tenant fails to discharge said mechanic's, materialman's or other lien, Landlord may bond or pay the same without inquiring into the validity or merits of such lien and all sums so advanced and fees incurred (including legal fees) shall be paid by Tenant on demand as Additional Rent. It shall be Tenant's continuing obligation to keep and maintain the Premises and all other parts of the Center free from any and all liens arising out of any work performed, materials furnished or obligations incurred by or for Tenant. In addition, Tenant shall replace any bonds posted by Landlord pursuant hereto with a suitable bond of equivalent amount within seven days after Landlord's demand therefor. Tenant shall have the right to contest the correctness or the validity of any such lien provided Tenant is diligently pursuing the matter to resolution and further provided that Landlord, in its reasonable judgment, concludes that there is no jeopardy to Landlord's title to the Premises or the Center. In the event Landlord concludes that its title to the Premises or the Center is jeopardized hereunder, Tenant shall, within ten days of notice from Landlord, procure and record a lien release bond meeting the requirements of ARIZ. REV. STAT. § 33-1004, as amended, or any successor statute.

D. **Removal by Tenant**. All repairs, alterations, decorations, additions and improvements made by Tenant shall be deemed to be attached to the leasehold and to have become the property of Landlord upon such attachment. Upon the expiration or sooner termination of this Lease, Tenant shall not remove any of such alterations, decorations, additions and improvements, except that trade fixtures, furniture and equipment installed by Tenant may be removed if: **(1)** such trade fixtures, furniture

and equipment are not integral to the operation of the Building or the Premises (by way of example only and not limitation, HVAC systems and plumbing may not be removed); **(2)** all Rents hereunder are paid in full; and **(3)** Tenant has performed all of its other obligations hereunder. Notwithstanding the foregoing, prior to the expiration of the Term, Landlord may designate by written notice to Tenant those alterations, decorations, additions and improvements which shall be removed by Tenant at the expiration or termination of this Lease and Tenant shall promptly remove same and repair any damage to the Premises caused by such removal. Tenant hereby acknowledges and agrees that any property remaining in the Premises after the expiration or earlier termination of this Lease, shall be deemed abandoned by Tenant and Landlord may dispose of such personal property as it deems appropriate, at Tenant's cost, without any liability to Tenant therefore.

E. **Allowance for Tenant Improvement Costs**. Landlord and Tenant agree that Landlord will provide Tenant $270,000.00 for Tenant Improvements, including the dining and public area improvements, dining room furnishings, professional and/or utilities fees, signage or other costs incurred in providing Tenant Improvements. Any cost for the Tenant Improvements above $270,000.00 shall be solely borne by Tenant.

F. **Kitchen Equipment and Improvement Costs**. Tenant agrees that as part of the Tenant Improvements, it shall supply and install all necessary kitchen equipment, kitchen and service area furniture, and other furniture, fixtures & equipment and opening materials needed for the proper functioning of the restaurant with a cost not less $100,000.00. Any amount less than $100,000.00 (the "**Tenant Shortfall**"), will be deducted by Landlord from Tenant's allowances as set forth in **ITEM 11(E)** and the Landlord's maximum responsibility for Tenant's Improvement Costs shall be reduced by the amount of the Tenant Shortfall.

G. **Design Services and Fees**. The Landlord will pay for all professional fees associated with the cold dark shell design and construction of the Premises. The Tenant will pay for all professional fees associated with the design and review of the Tenant Improvements.

H. **Development Services and Fees**. The Landlord will pay for all municipal development and infrastructure hookup and impact fees associated with the Premises.

ITEM 12. **GUARANTOR:**

Name:	Sean Rassas
Address:	18129 W. Juniper Dr. Goodyear AZ 85338
Telephone:	623-606-6874
Social Security # or EIN:	355-58-6046

ITEM 13. **SECURITY DEPOSIT:** An amount equal to $5,000.00, to be paid at the time of Tenant's execution of this Lease ("**Security Deposit**"). See **Article 33**.

ITEM 14. **TENANT'S STORE PLANNING CONTACT PERSON:**

Name: _____

Address: _____
_____

Telephone: _____

Email: _____

ITEM 15. Intentionally Left Blank

ITEM 16. Intentionally Left Blank

ITEM 17. **CITY:** The City of Avondale, an Arizona municipal corporation (the "**City**").

ITEM 18. **STATE:** The State of Arizona (the "**State**").

ITEM 19. **BUILDING:** the building in the Center in which the Premises are located, or the retail portion of the building in the Center in which the Premises are located.

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LEASE AGREEMENT

ARTICLE 1

Lease of Premises; Right to Remeasure; Use of Common Areas; Reservation of Rights

1.1 **Lease of Premises; Right to Remeasure**. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises. Within 30 days after the Delivery Date, either party shall have the right to cause the Floor Area of the Premises to be measured by an architect at the cost of the electing party. If the Floor Area of the Premises differs from the Floor Area set forth in **ITEM 1** of the Cover Sheet and the non-electing party agrees with such measurement, the Minimum Rent and all other charges and allowances (including the Construction Allowance, if any) payable hereunder based upon the Floor Area of the Premises shall be appropriately adjusted. If the other party disputes the determination of the Floor Area based on the measurement, and if such party shall so notify the measuring party within five days after receipt of the measurement, the disputing party shall have the right, at its own cost, to have the Premises remeasured by an architect. If the two measurements differ, the parties shall select an independent third architect, whose measurement of the Floor Area in the Premises shall control.

1.2 **Use of Common Areas**. Except as otherwise specifically set forth by the Landlord in subsequent documents governing the use of the Center Common Areas, Landlord grants to Tenants and its agents, employees and invitees, the non-exclusive right, together with all of the occupants of the Center and their agents, employees and invitees, to use the Common Areas.

1.3 **Landlord's Reservation of Rights**. Landlord reserves "as-is": **(A)** the exclusive use of the exterior walls (other than the storefront), the roof, the airspace above the roof and the space below the floor slab; and **(B)** the right to install, maintain, use, repair and/or replace pipes, ducts, conduits and wires in the space above the interior surfaces of the ceilings, below the finished floor, within the demising walls of the Premises and in all of the "**Common Areas**" (as defined in **Article 4**) of the Center.

ARTICLE 2

Lease Year; Option Term; Obligation to Open and Continuously Operate

2.1 **Lease Year**. For purposes of this Lease, the term "**Lease Year**" shall mean a period of 12 full, consecutive calendar months. The first Lease Year shall commence on the Commencement Date and end on the last day of the twelfth full calendar month following the Commencement Date. If the Commencement Date occurs on a date other than the first day of the month, then the first Lease Year shall include the partial month between the Commencement Date and the last day of the month during which the Commencement Date occurs, and the Minimum Rent and other charges payable during such partial month shall be appropriately prorated based on the number of days in such month. Notwithstanding anything in this Lease to the contrary, in the event the last day of the final Lease Year of the Initial Term would otherwise occur on a date other than December 31st, then such final Lease Year shall automatically be extended to include the period between the date on which the Initial Term would otherwise expire and the next succeeding December 31 (such period being herein referred to as the "**Extended Period**") and the Minimum Rent and other charges payable during the Extended Period shall be the same as the Minimum Rent and other charges payable during such final Lease Year. Any Lease Year which is for any

reason shorter than a full 12-month calendar year is sometimes herein referred to as a "**partial**" Lease Year. For purposes of calculating and paying the Minimum Rent and all recurring "**Additional Rent**" (as defined in **Article 3**) payable under this Lease during any partial Lease Year, such charges shall be appropriately prorated based on the number of days in such partial Lease Year.

2.2 **Option Term**. Provided, **(A)** Tenant is fully operating its business for the Permitted Use in all portions of the Premises; and **(B)** no "**Event of Default**" (as defined in **Article 23**) exists on the date Tenant exercises its right or on the date that the Option Term would otherwise commence, Tenant shall have the right to extend the Initial Term for the Option Term by delivering written notice (the "**Option Notice**") to Landlord not less than 180 days prior to expiration of the Initial Term (the "**Exercise Window**"). The right to exercise the Option Term is personal to the named Tenant herein and may not be exercised by any person or entity other than Tenant or a permitted assignee. Provided Tenant has properly and timely exercised the applicable Option Term, prior to the expiration of the Exercise Window, the Term shall be extended for the period of the Option Term, and all terms, covenants and conditions of the Lease shall remain unmodified and in full force and effect, except that Minimum Rent payable by Tenant during the Option Term shall be as set forth in **ITEM 8** of the Cover Sheet. Notwithstanding anything contained in this Lease to the contrary, in the event Tenant properly exercises its option to extend the Term, Tenant shall be deemed to have waived any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right as of the date of Tenant's Option Notice.

2.3 **Tenant Obligation to Open and Continuously Operate**. Tenant agrees to open for business to the public in the Premises on the Commencement Date and to continuously operate thereafter throughout the remainder of the Term and on all business days during the Center business hours except for major holidays including Christmas, New Years Day, and Thanksgiving (as reasonably adjusted by Landlord from time to time). If Tenant fails to open for business by the Commencement Date, or "**ceases operating**" (as defined in this Section) at any time during the Term (including an Option Term exercised by Tenant), then and in either of such events, in addition to Landlord's other rights and remedies with respect to such default, Tenant shall pay to Landlord, in addition to the Minimum Rent and Additional Rent payable hereunder, as liquidated damages ("**Liquidated Damages**"), an additional amount equal to 50% of the total Rent due from Tenant hereunder (calculated at a daily rate based on a 30-day month) for each day between the Commencement Date and the date Tenant opens for business in the Premises as required under this Lease, or between the date Tenant ceases operating for business in the Premises and the date Tenant resumes operating for business in the Premises as required under this Lease (as applicable). Tenant shall pay Landlord the Liquidated Damages together with the monthly installments of Minimum Rent and other charges payable under this Lease. Tenant agrees that the forgoing amount of Liquidated Damages is a reasonable estimate of the damage to Landlord that would be caused by Tenant's failure to open or continuously operate the Premises for business as required under this Lease. Tenant covenants that it shall, from and after the Commencement Date, continually operate in the Premises for the Permitted Use and under the name as approved by Landlord. Tenant agrees to operate with diligence and in accordance with the best standards of operation for retail businesses. Tenant acknowledges that the Center is an interdependent enterprise and its success is dependent upon the opening and continued operation of Tenant's business in accordance with the terms of this Lease. Tenant shall maintain in the Premises all suitable furniture, fixtures, equipment and other personal property necessary for the conduct of Tenant's business therein. For purposes of this Section, the term "**ceases operating**" shall mean and refer to any period when Tenant has not been open for business with the public in the Premises in accordance with the provisions of this Lease for 15 or more consecutive days (exclusive of

reasonable periods during which the Premises are being restored following casualty damage thereto or a "**Taking**" (as defined in **Article 22**) thereof, and periods during which the Premises are being remodeled (such periods of remodeling not to exceed a total of 20 days in the aggregate during any single Lease Year)); PROVIDED, HOWEVER, in the event Tenant resumes operating for business in the Premises as required hereunder following any period during which Tenant ceases operating, but fails thereafter to remain open for a period of at least 180 consecutive days following such resumption of operations, then Tenant shall be deemed not to have resumed operating for business in the Premises for purposes of this Section and, without limiting the foregoing provisions of this Section, Tenant shall pay Landlord Liquidated Damages, retroactively, for the period between the date Tenant resumed operating for business in the Premises and the date Tenant is deemed to have resumed operating for business in the Premises as provided in this Section (i.e., the date on which Tenant has resumed operating for a period of not less than 180 consecutive days).

ARTICLE 3

Rent; Payment of Rent; Late Charge

3.1 **Rent.** The term "**Rent**" shall mean all amounts required to be paid by Tenant to Landlord under this Lease. Tenant shall pay Landlord the following amounts as Rent:

A. **Minimum Rent**. Commencing as of September 1, 2011 and continuing throughout the Term, Tenant shall pay to Landlord Minimum Rent in equal monthly installments (as set forth in **ITEM 8** of the Cover Sheet), in advance, on the first day of each month, without prior notice or demand, setoff or deduction. Minimum Rent shall be prorated for any partial calendar month. If the Commencement Date is a date other than the first day of a calendar month: **(1)** Minimum Rent for the month containing the Commencement Date shall be prorated based upon the ratio that the number of days in the Term within such month bears to the total number of days in such month; and **(2)** the initial monthly rental period shall include the month in which the Commencement Date occurs and the following full calendar month (unless the Commencement Date is the first day of a calendar month, in which event the initial monthly rental period shall include only the month containing the Commencement Date).

B. **Additional Rent**. The term "**Additional Rent**" means all amounts required to be paid by Tenant to Landlord hereunder, other than Minimum Rent, whether or not such amount is specifically designated Additional Rent.

3.2 **Payment of Rent**. Tenant shall pay all sums required to be paid to Landlord, without prior notice, demand, setoff or deduction, at the office of Landlord, City of Avondale, 11465 W. Civic Center Drive, Suite 250, Avondale, Arizona 85323, Attention: Accounts Receivable, or at such other place or places as Landlord may designate from time to time. The obligation of Tenant to pay any amount due to Landlord hereunder shall be independent of any obligation of Landlord under this Lease.

3.3 **Late Charge**. Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent shall cause Landlord to incur various expenses not contemplated by this Lease, the exact amount of which is presently difficult to ascertain. Accordingly, if any payment of Rent due from Tenant under this Lease is not received by Landlord when due, then, in addition to the required payment, Tenant shall also pay to Landlord a "**Late Charge**" equal to $50.00 per day after a seven

calendar day grace period, plus interest from the end of the grace period to the date of payment at the rate of 12% per annum unless prohibited by law, in which event the rate shall be the maximum rate permitted by law (the "**Interest Rate**"). Tenant agrees that the Late Charge represents a fair and reasonable estimate of the expenses that Landlord shall incur by reason of a late payment by Tenant. Acceptance of the Late Charge by Landlord shall not constitute a waiver of Tenant's default with respect to any past due amounts, nor prevent Landlord from exercising any other rights and remedies granted to Landlord under this Lease or at law or in equity. The Late Charge and the interest on past due amounts shall be considered Additional Rent.

3.4 **Rent Tax**. Tenant shall pay to Landlord all Rent Tax (as defined below) due in connection with this Lease or the payment of Rent hereunder, which Rent Tax shall be paid by Tenant to Landlord concurrently with each payment of Minimum Rent made by Tenant to Landlord under this Lease. For purposes of this paragraph, "**Rent Tax**" means any tax or excise on rent or on other sums or charges required to be paid by Tenant under this Lease, and gross receipts tax, transaction privilege tax or other tax, however described, which is levied or assessed by the United States of America, the state in which the Center is located or any city, municipality or political subdivision thereof, against Landlord in respect to the Minimum Rent or other rental or charges payable under this Lease or as a result of Landlord's receipt of such rents or other charges accruing under this Lease.

ARTICLE 4

Common Areas; Control of Common Areas; Operating Costs; Trash

4.1 **Common Areas**. The Common Areas shall be operated and maintained by the Landlord. The term "**Common Areas**" means all areas, space, equipment and services in or serving the Center and the Premises provided for the common or joint use and benefit of Landlord, Tenant and the occupants of the Center and their employees, agents, servants, customers and other invitees, including, without limitation, storage areas not within the Premises, public restrooms other than those within the Premises, offices not within the Premises, utility rooms other than those within the Premises, the parking areas serving the Center (the use of which is subject to the fees, rules and regulations established therefor by the operator of the parking facility from time to time), access roads, corridors, balconies, stairs, elevators, escalators, driveways, retaining walls, exterior boundary walls and fences, water, sanitary and storm sewers (including, without limitation, any on or off-site sewer lines), on or off-site water retention and drainage facilities serving the Center and which Landlord is required to maintain (however, Landlord shall only maintain as part of the Operating Costs, sanitary sewers up to the Premises), gas, electric, telephone and other utilities lines, systems, conduits and facilities to the perimeter walls of any building (even though intended for the use of only one or a limited number of occupants) and those serving more than one premises within a building, and any of the foregoing which serve the Common Areas, plantings, landscaped areas, truck service ways, loading dock areas and facilities, courts, ramps, sidewalks, any drinking fountains, and the facilities appurtenant to the foregoing.

4.2 **Control of Common Areas**. Subject to the Landlord's subsequent documents relating to use of the Common Areas, it is agreed that: **(A)** all Common Areas shall be subject to the exclusive control and management by Landlord, and Landlord shall have the right at any time (either before, during or after the initial arrangement of the entrances, access roads, parking areas and other Common Areas), to construct buildings and other improvements thereon and therein, and to permit the owners and occupants of land located outside the Center and Premises and their

invitees to use the Common Areas; **(B)** Landlord shall have the right to demolish and make alterations and additions to the buildings in the Center (including the construction of additional buildings therein), and to add and exclude areas from the Center, and to relocate improvements; and **(C)** Landlord shall have the right to do and perform such other acts in and to the Common Areas as Landlord shall determine to be advisable, in its sole and absolute discretion. The rights of Landlord as reserved in this Lease shall be subject to the condition that no exercise of such rights by Landlord shall alter the physical dimensions of the Premises, or change their location or relative proximity to other stores, or otherwise materially or unreasonably interfere with the conduct of Tenant's business in the Premises.

4.3 **Operating Costs**. The term "**Operating Costs**" or **"Operating Expenses"** shall mean the total cost and expense incurred in managing, operating, maintaining, replacing, equipping, inspecting, protecting, and repairing the Common Areas.

A. **Included in Operating Costs**. Operating Costs include, but are not necessarily limited to, real and personal property taxes and assessments (and any tax levied in whole or in part in lieu of or in addition to real property taxes); wages, salaries and compensation of employees employed at or allocated to the Center; consulting, accounting, legal, janitorial, maintenance, guard, and other services; management fees and costs (charged by Landlord, any affiliate of Landlord, or any other entity managing the Center and determined at a rate consistent with prevailing market rates for comparable services and projects); reasonable reserves for Operating Expenses; that part of office rent or rental value of space in the Center used or furnished by Landlord to enhance, manage, operate, and maintain the Center; power, water, waste disposal, and other utilities; project signage, landscape, and fire protection; rooftop heating, ventilating and air conditioning system (the "**HVAC System**"); office supplies, materials and supplies; maintenance, repairs, and necessary replacements of Common Area items; insurance obtained with respect to the Center; depreciation on personal property and equipment (except as set forth in subsection 4.3(C) below or which is or should be capitalized on the books of Landlord); and any other costs, charges, and expenses which, under generally accepted accounting principles, would be regarded as management, maintenance and operating expenses.

B. **Cost & Interest**. Operating Costs also include the cost (amortized over such period as Landlord will reasonably determine) together with interest at the greater of (1) the Prime Rate prevailing plus 2% or (2) Landlord's borrowing rate for such capital improvements plus 2%, on the unamortized balance of any capital improvements (a) which are made to the Center by Landlord for the purpose of reducing Operating Expenses, or (b) which are required under any governmental law or regulation that was not applicable to the Center at the time it was constructed and which are not a result of special requirements for any tenant's use of the Center (whether or not such law or regulation is applicable to the Center as a result of Landlord's or any tenant's status under such law or regulation, Landlord's or any tenant's use, occupancy, or alteration of any portion of the Center, or improvements made by or for any tenant in its premises). Notwithstanding the foregoing, the Center's Operating Expenses will not include the cost of capital improvements which are required to be made to any tenant's premises.

C. **Excluded from Operating Costs**. Operating Costs shall not include (1) the "**Security Services**" (as defined in this Article), which shall be separately billed to and payable by Tenant as provided below in this Article; (2) depreciation on the Center (other than depreciation on personal property, equipment, window coverings on exterior windows provided by Landlord and carpeting in public corridors and common areas); (3) costs of alterations of space or other improvements made for tenants of the Center; (4) finders' fees and real estate brokers' commissions;

(5) ground lease payments, mortgage principal or interest, if any; (6) capital items other than those referred to in clause 4.3 (B) above; (7) costs of replacements to personal property and equipment for which depreciation costs are included as an Operating Expense; (8) costs of excess or additional services provided to any tenant in the Center which are directly billed to such tenants; (9) the cost of repairs due to casualty or condemnation which are reimbursed by third parties; (10) any cost due to Landlord's breach of this Lease; (11) any income, estate, inheritance, or other transfer tax and any excess profit, franchise, or similar taxes on Landlord's business; (12) all costs, including legal fees, relating to activities for the solicitation and execution of leases of space in the Center; (13) any legal fees incurred by Landlord in enforcing its rights under other leases for premises in the Center; and (14) Maintenance of Center signage along Avondale Boulevard and Interstate 10, if any. The cost of common signage maintenance for the Center will be paid for by the Tenants on a pro-rata basis.

D. **Adjustments**. The Operating Expenses which vary with occupancy and which are attributable to any part of the Term in which less than 95% of the Rentable Area of the Center is occupied by tenants, will be adjusted by Landlord to the amount which Landlord reasonably believes that they would have been if 95% of the Rentable Area of the Center had been so occupied.

E. **Representations**. Tenant acknowledges that Landlord has not made any representation or given Tenant any assurances that the Operating Expenses Base will equal or approximate the actual Operating Expenses per square foot of Rentable Area of the Premises for any calendar year during the Term. In no event shall Operating Expenses within the control of Landlord exceed 5% per year.

F. **Marketing Costs**. The Landlord has the right to implement a marketing program for the Center. The cost of marketing the Center, both on-premise and off-premise, will be paid for by the Tenants on a pro-rata basis. The Tenant has the right of review and reasonable approval of its pro-rata share of marketing costs.

4.4 **Tenant's Operating Costs Contribution**.

A. **Operating Expenses**.

1. **First Lease Year**. Commencing on the first day of the first Lease Year, Tenant agrees to pay operating expenses on a per-square-foot basis. Tenant agrees to pay $0.44 per square foot of Floor Area in the Premises, plus Tenant's patio space, per month, for the entirety of the first Lease Year.

2. **Annual Calculation for Second Lease Year & Thereafter**. Commencing on the first day of February of the second Lease Year, and continuing during the entire Term (including the Option Period, if exercised), Tenant shall pay Landlord a contribution toward the Operating Costs. At the end of the first Lease Year, Landlord shall calculate the actual total operating costs for the first year. The actual total operating costs will be used to calculate the estimated total Operating Costs for the subsequent year of the Term (the "**Estimated Annual Operating Costs**" or "**EAOC**"). The Landlord will **(a)** calculate the Estimated Annual Operating Costs by multiplying the immediately preceding calendar year actual total Operating Costs by 103% and **(b)** calculate Tenant's share of the Estimated Annual Operating Costs by dividing the total rentable square footage of Tenant's Premises by the total rentable square footage of the Center (the "**Tenant's Percentage Share**" or "**TPS**"). Tenant agrees to pay Tenant's portion of the total Operating Costs for each year (the "**Tenant's Operating Costs Contribution**" or "**TOC**") calculated as follows:

TOC = EAOC x TPS

Tenant shall pay the Tenant's Operating Costs Contribution in equal monthly installments on the first day of each month, starting on the first day of February of the second Lease Year. Tenant's Operating Costs Contribution shall be appropriately prorated for any partial calendar year in which this Lease commences, expires or terminates, Tenant's Operating Costs Contribution shall be prorated, if applicable, on a per diem basis.

B. **Annual Settlement**. Within 30 days after the end of each calendar year or as soon after such 30-day period as practicable, Landlord will deliver to Tenant a statement of amounts payable under section 4.4(A) for such calendar year prepared and certified by Landlord. Such certified statement will be final and binding upon Landlord and Tenant unless Tenant objects to it in writing to Landlord within 15 days after it is given to Tenant. If such statement shows an amount owing by Tenant that is less than the estimated payments previously made by Tenant for such calendar year, the excess will be held by Landlord and credited against the next payment of Rent; however, if the Term has ended and Tenant was not in default at its end, Landlord will refund the excess to Tenant. If such statement shows an amount owing by Tenant that is more than the estimated payments previously made by Tenant for such calendar year, Tenant will pay the deficiency to Landlord within 30 days after the delivery of such statement. Tenant may review Landlord's records of the Operating Expenses, at Tenant's sole cost and expense, at the place Landlord normally maintains such records during Landlord's normal business hours upon reasonable advance written notice.

4.5 **Security Services**. In addition to Tenant's Operating Costs Contribution, if Landlord elects to provide security services (in the exercise of Landlord's sole and absolute discretion) in the Common Areas ("**Security Services**"), Tenant shall pay its proportionate share of the costs thereof; PROVIDED, HOWEVER, if Landlord so elects to provide Security Services: **(A)** the Security Services shall be intended solely for the operation and benefit of the Common Areas and not for the benefit or protection of the Premises or any other premises occupied by tenants or occupants of the Center; and **(B)** except for instances of gross negligence of Landlord, its agents, employees or contractors, Landlord shall not be liable in any manner whatsoever to Tenant or any third party by reason of any act or omission of Landlord in providing or maintaining Security Services (or electing not to provide or maintain Security Services) in the Common Areas. Tenant shall pay Tenant's Proportionate Share of Security Services to Landlord in equal monthly installments on the first day of each calendar month, in advance, in an amount reasonably estimated by Landlord from time to time and shall be prorated for any partial calendar month based upon the ratio that the number of days in such month within the Term bears to the total number of days in such month. For the calendar year in which this Lease commences, expires or terminates, Tenant's Share of Security Services shall be prorated, if applicable, on a per diem basis.

4.6 **Administrative Fee**. In addition to the above-referenced amounts payable by Tenant to Landlord, in consideration of Landlord's administrative costs in connection with the Security Services, "**Landlord's Insurance**" (as defined in **Article 7**) and "**Real Estate Taxes**" (as defined in **Article 7**), Tenant shall pay Landlord an administrative fee (the "**Administrative Fee**") equal to 15% of the total amount of Tenant's Proportionate Share of Security Services, "**Proportionate Share of Landlord's Insurance**" (as defined in **Article 7**) and "**Proportionate Share of Real Estate Taxes**" (as defined in **Article 7**). Commencing as of the Commencement Date, Tenant shall pay the Administrative Fee in equal monthly installments on the first day of each calendar month, in advance, in an amount based upon the estimated Security Services, Landlord's Insurance and Real Estate Taxes from time to time and shall be prorated for any partial calendar month based upon the ratio that

the number of days in such month within the Term bears to the total number of days in such month. For the calendar year in which this Lease commences, expires or terminates, the Administrative Fee shall be prorated, if applicable, on a per diem basis. Additionally, if Tenant elects to remain open for business after normal operating hours, Tenant shall pay its Proportionate Share (based upon the Floor Area of all tenants so electing to remain open after normal operating hours) of any additional costs incurred during the additional hours that the Premises remain open.

4.7 **Summary**. Within 90 days after the end of each calendar year, Landlord shall furnish Tenant with a statement in reasonable detail summarizing the actual Security Services and the Administrative Fee for the preceding calendar year and showing the calculation of Tenant's Proportionate Share. If the aggregate of Tenant's monthly payments of all or any of the Security Services and the Administrative Fee during any calendar year exceeds the amount, which is actually due from Tenant with respect to such Security Services and the Administrative Fee, the excess shall be credited against the next succeeding monthly estimated payments of such Security Services and the Administrative Fee. If the aggregate of the monthly estimated payments paid by Tenant during any calendar year with respect to any or all of such Security Services and the Administrative Fee is less than the actual amount due hereunder, Tenant shall pay Landlord the amount of the deficiency within 30 days after demand therefor by Landlord.

4.8 **Trash**. Tenant shall be solely responsible for the removal of trash and garbage from the Premises, including the placing of all trash and garbage in containers approved or provided by Landlord or Landlord's contractor for such purpose, and shall contract directly for such service with the provider thereof. Tenant understands and agrees that Landlord may direct Tenant to contract with a trash removal provider chosen by Landlord, provided the cost of such service is reasonable. Notwithstanding the foregoing, Landlord may establish a common trash removal program for the Center (or certain tenants and occupants therein, which may include Tenant) and in the event the removal of Tenant's trash and garbage is included in such program, Tenant shall pay its proportionate share (based on the Floor Area of the tenants and occupants included in such trash program) of the costs of trash disposal and compactor costs (collectively, the "**Trash Removal Costs**") within 20 days after receipt of an invoice therefor from time to time (but not more often than monthly). In the event Landlord does not establish a common trash removal program, Tenant shall obtain and pay for the cost of such service directly from a local provider. If Tenant fails to pay all or any portion of such cost to such provider, Landlord shall have the right (but not the obligation) to pay such cost and to bill Tenant for the same. Tenant shall, within 15 days after receipt of a bill therefor, pay Landlord as Additional Rent an amount equal to the costs paid to such provider by Landlord, together with an amount equal to 25% of such costs.

ARTICLE 5

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ARTICLE 6

Gross Sales: Records and Reporting; Definition of Gross Sales

6.1 **Gross Sales Records and Reporting**. Whether or not Tenant is required to pay Percentage Rent, on or before the 15th day of each calendar month, Tenant shall furnish to Landlord, at the following address (or such other address as Landlord may designate in writing from time to time): City of Avondale, 11465 W. Civic Center Drive, Avondale, Arizona 85323-6809, Suite 610, Attention: Finance Director, a written statement of Gross Sales for the preceding calendar month, such statement to be in a form reasonably acceptable to Landlord. Within 45 days after the last day of each Lease Year Tenant shall also furnish to Landlord a statement, certified by an officer of Tenant, of Gross Sales for the preceding Lease Year and shall tender therewith the balance of Percentage Rent due, if any, for such Lease Year. If the installments of Percentage Rent paid by Tenant for any Lease Year exceed the amount thereof due for such Lease Year, Landlord shall credit the amount of the overpayment, first to the payment of Minimum Rent due and unpaid, and the rest, if any, shall be applied to Percentage Rent payments next falling due. Tenant shall keep at its home office during the Term hereof, for a period of three years after the close of each Lease Year, or longer if there is an ongoing dispute regarding such Gross Sales, a complete record of Gross Sales from the Premises in accordance with generally accepted accounting principles consistently applied. The Landlord may request certification of requested documents by a Certified Public Accountant selected by the Landlord.

6.2 **Definition of Gross Sales**. The term "**Gross Sales**" means the aggregate gross amount of all sales of food, beverages and merchandise transacted or made and all charges for services performed on or from the Premises (including gift and merchandise certificates), rental of equipment and all business (including, but not limited to, all sales by telephone or mail, catalogue and internet sales when merchandise is either ordered or purchased on the Premises, vending machines, all other merchandising dispensing equipment, receipts from pay telephones, interest, finance charges, service charges) transacted in, upon or from the Premises by Tenant, its subtenants, licensees, contractors, franchisees or any other occupants of the Premises, including all sales made from cash or upon credit, or partially for cash and partially upon credit and upon any other money transfer procedure accomplished by electronic transfer or similar method, or by barter or exchange, regardless of collection of charges for which credit is given and all sales, charges or unreturned deposits for services and business transacted for which orders are taken in, upon or from the Premises regardless of whether or not the merchandise sold is delivered wholly or in part, the services are rendered or the business is transacted in, upon or from the Premises. Each sale, charge or business transacted upon installments or contracts thereof shall be treated as a Gross Sale for the full price or charge to the customer in the month in which such sale, charge or contract shall be made. Gross Sales shall not include, or shall be deducted therefrom, as appropriate: **(A)** any sales tax levied upon such sales or charges, including, the amount of any City, county, State or federal sales, use, luxury or excise tax on such sales which is both added to the selling price (or absorbed therein) and paid to the taxing authorities by Tenant; **(B)** interstore transfers of merchandise where such transfer is made solely for the convenient operation of the business of Tenant and not for purpose of consummating a sale which has theretofore been made in or from the Premises and/or for the purpose of depriving Landlord of the benefit of a sale which otherwise would be made in or from the Premises; **(C)** cash or credit refunds; returns to suppliers or manufacturers; **(D)** any penalty charged by Tenant for a returned check; **(E)** reimbursement of amounts for postage, express or delivery services, including, but not limited to, United Parcel Service, incurred in delivering merchandise to customers, provided that such charges are at all

times properly segregated from amounts includable in Gross Sales and so identified on Tenant's records; **(F)** for sales at a discount to bona fide employees of Tenant, only the discounted purchase price shall be included in Gross Sales, provided such sales do not exceed a total of 2% of Tenant's total Gross Sales, in the aggregate, in any Lease Year; **(G)** any sale of fixtures or equipment not in the regular course of Tenant's business or after use thereof; **(H)** gift certificates, or like vouchers, until such time as they have been converted into a sale by redemption at the Premises; **(I)** catalog and internet sales where the item purchased is neither ordered from nor paid for at the Premises; and **(J)** bad debt expense with respect to merchandise sold on credit or purchased by check, provided, if the amount thereof is subsequently collected, it shall be included in Gross Sales in the year of collection.

6.3 **Gross Sales Information**. If Tenant reports its sales from the Premises and from any other premises operated by Tenant in the City of Avondale, Arizona collectively on its City transaction privilege tax reports, then Tenant will provide the City with a separate accounting of the taxable revenues derived from the Premises. Finally, upon Landlord's request, Tenant will provide Landlord with a copy of Tenant's most recent annual (fiscal year) report of gross sales derived from the Premises. Landlord will hold any such report in strict confidence and will not divulge the same to any third parties, except that Landlord may **(A)** provide copies to bona fide prospective lender or buyers of the Premises, provided the recipient agrees to maintain the confidentiality of such report and to use the same only in evaluating its potential loan or purchase; or **(B)** divulge the same to the extent required by Laws in any legal proceeding. By executing this Lease, Tenant specifically waives any claims it has or may have in the future relating to Landlord’s use of the confidential information in accordance with this subsection 6.3.

ARTICLE 7

Real Estate Taxes; Proportionate Share of Real Estate Taxes; Landlord's Insurance; Proportionate Share of Landlord's Insurance; Summary

7.1 **Real Estate Taxes**. Tenant covenants and agrees to pay to Landlord, in monthly installments and as Additional Rent, its "**Proportionate Share of Real Estate Taxes**" (as defined in this Article), if any, whether federal, state, county or municipal, levied or assessed against the Premises, the Center, and buildings of the Center and all other taxes and assessments attributable to the Center and the operation thereof ("**Real Estate Taxes**"). Tenant shall pay Landlord, on the first day of each calendar month during the Term, amounts reasonably estimated by Landlord to be Tenant's monthly installment of its Proportionate Share of such Real Estate Taxes. The term "**Real Estate Taxes**" includes: **(A)** any fee, license fee, license tax, business license fee, commercial rental tax, excise tax (including, without limitation, the Excise Tax as defined below)), levy, charge, assessment (whether general or special), speculative builder's tax, penalty or tax imposed by any taxing or judicial authority against the Center or land upon which the Center is located or land upon which any on or off-site retention and drainage facilities serving the Center are located; **(B)** any tax on Landlord's right to receive, or the receipt of, rent or income from the Center or against Landlord's business of leasing the Center; **(C)** any tax or charge for fire protection, streets, sidewalks, road maintenance, refuse or other services provided to the Center by any governmental agency; **(D)** any tax imposed upon this transaction, or based upon a re-assessment of the Center due to a change in ownership or transfer of all or part of Landlord's interest in the Center; **(E)** any charge or fee replacing any tax previously included within the definition of Real Estate Taxes; **(F)** costs, including reasonable attorneys', appraisers' and consultants' fees, incurred in contesting any Real Estate Taxes; and **(G)** assessments (both special and general) imposed in connection with any tax

increment financing district, transportation development district, special assessment district, special benefit district, sanitary improvement district, local improvement district or any similar district of which the Center (or any portion thereof) is a part. The term Real Estate Taxes does not include any income, gross income, franchise, personal property, devolution, estate and inheritance or gift taxes. In no event shall Tenant contest or appeal or have any right to contest or appeal any Real Estate Taxes levied or assessed against the Premises or the Center. In addition to paying its Proportionate Share of Real Estate Taxes, Tenant shall pay all taxes applicable to all other property in the Premises that is not taxed as real property and included in Real Estate Taxes, as set forth in **Section 20.1** (captioned "**Tenant's Property**"). Pursuant to ARIZ. REV. STAT. §§ 42-6201 et seq. (the "**Excise Tax Statutes**"), because the City is the fee owner of the Center, the Center, upon completion, will not be assessed property taxes. Pursuant to the Excise Tax Statutes, the Center is instead subject to the assessment or levy of an excise tax (the "**Excise Tax**"). The Excise Tax is calculated in accordance with the provisions of ARIZ. REV. STAT. § 42-6203. In the event that the Excise Tax Statutes are modified or repealed during the Term, then from and after the effective date of such modification or repeal, if any, the term "**Real Estate Taxes**" shall include all real estate taxes assessed against the Premises and/or or all Excise Taxes assessed or levied against the Premises, as applicable.

7.2 **Tenant's Proportionate Share of Real Estate Taxes**. Tenant's "**Proportionate Share of Real Estate Taxes**" shall be an amount equal to the Real Estate Taxes on the "**Center Tax Parcel**" (as defined in this Section) multiplied by a fraction, the numerator of which is the Floor Area of the Premises and the denominator of which is the total Floor Area of the buildings within the Center Tax Parcel, including the Premises. The term "**Center Tax Parcel**" shall be defined as land owned by Landlord improved for use as part of the Center (which may be comprised of one or more individual tax parcels), but excluding any portions thereof which are separately assessed and taxed or are the subject of records maintained by the taxing authority from which the amount of tax allocable to such portions may be separately determined and billed to the following: **(A)** to any entity other than Landlord or paid directly by that entity; or **(B)** to Landlord but paid by another entity. Landlord shall be entitled, at any time and from time to time during the Term, to change or modify the Center Tax Parcel in the exercise of its reasonable discretion. In the event the Premises are, or become, separately assessed for tax purposes, Tenant covenants and agrees to pay Landlord the following (as its proportionate share of Real Estate Taxes): **(1)** all Real Estate Taxes assessed with respect to the Premises; and **(2)** a Proportionate Share of Real Estate Taxes levied or assessed against the Common Areas in the Center.

7.3 **Landlord's Insurance**. Landlord shall carry insurance policies as set forth in **Section 15.4** (collectively, "**Landlord's Insurance**"). Tenant covenants and agrees to pay to Landlord, in monthly installments as Additional Rent, its Proportionate Share of the cost of Landlord's Insurance. Notwithstanding any contribution by Tenant to the costs of Landlord's Insurance premiums (as provided in this Lease), Landlord shall not be required to carry insurance of any kind on Tenant's Property, and Tenant hereby acknowledges and agrees that Tenant shall have no right to receive any proceeds from any insurance policies carried by Landlord.

7.4 **Tenant's Proportionate Share of Landlord's Insurance**. Tenant's "**Proportionate Share of Landlord's Insurance**" shall be computed by multiplying the cost of Landlord's Insurance by a fraction, the numerator of which shall be the Floor Area of the Premises and the denominator of which shall be the total Floor Area of the buildings within the Center, including the Premises.

7.5 **Summary**. Upon receipt of the statements for Real Estate Taxes and Landlord's Insurance for each year, Landlord shall compute the share thereof due from Tenant, and a

summary shall be furnished to Tenant reflecting the amount due for Real Estate Taxes, Landlord's Insurance and the Administrative Fee. If the amounts paid by Tenant during the preceding year were in excess of its Proportionate Share of Real Estate Taxes, Proportionate Share of Landlord's Insurance and the Administrative Fee, the excess shall be credited against the next ensuing payments due from Tenant, and if the amount paid by Tenant is less than its Proportionate Share of Real Estate Taxes, Proportionate Share of Landlord's Insurance and the Administrative Fee, Tenant shall pay the deficiency within 30 days after receipt of notice thereof. If the notice furnished to Tenant includes a computation of the estimated sums that are due from Tenant each month for the current year, the monthly payment shall be adjusted accordingly.

ARTICLE 8

Liens

In no event shall any material or equipment that is incorporated in or affixed to the Premises be subject to any notice of lien, lien, encumbrance or security interest; PROVIDED, HOWEVER, the foregoing shall not preclude Tenant from granting a security interest in Tenant's Property. Notice is hereby given that Landlord shall not be liable for any work or materials furnished to Tenant on credit and that no notice of lien or mechanic's or other lien for any such work or materials shall attach to or affect Landlord's interest in the Premises based on any work or material supplied to Tenant or anybody claiming through Tenant. Tenant shall not permit any notice of lien or lien to be filed against the Premises or any portion of the Center for labor, services or materials claimed to have been performed for or furnished to Tenant, its contractors and subcontractors. If such a notice of lien or lien is filed, Tenant shall discharge the notice of lien or lien within ten days after the filing thereof (the "**Lien Cure Period**"). In the event Tenant fails to discharge such notice of lien or lien prior to the expiration of the Lien Cure Period, then such failure shall constitute an Event of Default to which no further cure period applies. Tenant hereby acknowledges its failure to discharge or "bond over" such a notice of lien or lien prior to the expiration of the Lien Cure Period shall cause Landlord to incur expenses not contemplated by this Lease, the exact amount of which is difficult to ascertain. Accordingly, if Tenant fails to "bond over" or discharge any such notice of lien or lien within the Lien Cure Period, then in addition to Landlord's other rights and remedies under this Lease, at law or in equity, Tenant shall pay to Landlord liquidated damages in the amount of $500.00 for each day between the expiration of the Lien Cure Period and the date such notice of lien or lien is removed or "bonded over." In addition, should Tenant fail to pay or "bond over" any liens within the Lien Cure Period, Landlord may (but shall not be obligated to) "bond over" such lien or pay the lien claimant and obtain a release of the lien without inquiring into the validity thereof and without liability to Landlord for any such payment, and offset any reasonable costs so incurred against any amount owed Tenant, and Tenant shall, upon demand and as Additional Rent, reimburse Landlord for the amount so paid together with all reasonable attorneys' fees incurred by Landlord. In addition to Landlord's rights and remedies under this Lease and at law or in equity, Tenant shall indemnify, defend, and hold Landlord harmless, utilizing legal counsel acceptable to Landlord, for, from and against any and all claims, demands, actions, causes of action, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees of Landlord, arising from or connected in any way with any notice of lien or lien. Nothing in this Lease shall be construed as a consent or request by Landlord, express or implied, to any contractor, subcontractor, laborer or materialman for the performance of any labor at or the furnishing of any materials to the Premises.

ARTICLE 9

Parking & Public Rights of Way

9.1 **Parking**. Tenant and its employees, customers and invitees may have the non-exclusive right, together with Landlord and all other tenants and occupants of the Center, and subject to payment of the fees (which fees will be consistent with market fees for comparable parking spaces in Avondale, Arizona, established by the operator from time to time, which rules and regulations will be reasonable and enforced in a non-discriminatory manner to the extent that the parking operator is Landlord, an affiliate of Landlord or operating pursuant to a contract with Landlord, to use the publicly designed parking lot serving the Sports Facility. Neither Tenant, nor its employees shall use any parking spaces marked or designated as reserved parking spaces. Tenant shall, within five days after request from Landlord, furnish to Landlord the automobile license numbers of all automobiles owned or used by Tenant or its employees. If there is a violation of the foregoing requirement by any employee of Tenant, Landlord shall give Tenant notice thereof, and if such violation continues following notice to Tenant, Landlord shall have the right, at Landlord's option, to tow any vehicle parked in violation of the terms hereof, or to charge Tenant the sum of $35.00 per day for each violation. Landlord may designate certain portions of the parking areas as reserved for use by certain tenants or customers of certain tenants. To accommodate Tenant parking during peak restaurant hours, the Landlord will impose daily parking restrictions between the hours of 5pm and 8pm along the north side of City Center Drive and the east side of 114th Avenue. These restrictions will provide a maximum of two hour parking along these streets.

9.2 **Parking Fees**. At some time in the future the Landlord may convert all or some of the surface parking to structured parking. However, Landlord agrees to make reasonable efforts to minimize the need for structured parking if initial development does not warrant the installation of a parking structure on the block west of 114th Avenue, north of City Center Drive, and south of Corporate Drive. In the event Landlord reasonably deems structured parking is appropriate for the Center on the block west of 114th Avenue, north of City Center Drive, and south of Corporate Drive, Landlord has the right to charge Tenant $2,100.00 per month for 25 structured parking spaces, non-designated nor reserved for Tenant. The parking charge will commence when the parking structure is made operational, but in no event earlier than the fourth Lease Year. The parking fees will be administered and collected through an amendment to the Tenant’s Operating Costs Contribution as set forth in Subsection 4.4 above. The City will also provide temporary parking spaces to Tenant during the parking structure construction period. Landlord shall retain ownership of such parking spaces upon expiration or termination of this Lease. Costs and expenses of parking shall be construed to include, but not be limited to, all sums expended by Landlord in connection with the parking and common areas for all general maintenance and repairs, resurfacing, painting, restriping, cleaning, sweeping and janitorial services; planting and landscaping, lighting and other utilities and any and all other expenses associated with the parking.

9.3 **Public Rights-of-Way**. The public rights-of-way may from time to time at the sole discretion of the City, be temporarily closed for events. The City or Landlord is under no obligation to temporarily or permanently replace the loss of parking due to closure of public rights-of-way. The City or Landlord is responsible for maintenance and cleaning of public rights-of-way after any such event.

ARTICLE 10

Construction of the Premises

Landlord and Tenant agree that the Premises shall be constructed in accordance with the terms and provisions of **ITEM 11** and **Exhibit B-2** hereto. Landlord agrees to use reasonable efforts to complete Landlord's Work and to deliver possession of the Premises to Tenant with all such work substantially completed by Landlord's designated delivery date, which may be adjusted by Landlord from time to time, or as soon thereafter as reasonably possible. Tenant agrees that Landlord has made no representations or warranties regarding the condition of the Premises or the Center, except as expressly set forth in this Lease.

ARTICLE 11

Alterations; Roof Penetration; Signs; Indemnification

11.1 **Interior Non-Structural Alterations**. Tenant shall have the right to make interior, non-structural alterations or additions to the Premises without Landlord's consent. Tenant shall provide 30 days' prior notice to Landlord before the commencement of any interior, non-structural alterations or additions to be made to the Premises.

11.2 **Structural and Exterior Alterations**. Tenant shall not make any structural or exterior modifications, improvements, alterations, additions or installations in or to the Premises (the "**Alterations**") without Landlord's prior, written consent. Along with any request for Landlord's consent and before commencement of any Alterations or delivery of any materials to be used in any Alterations, Tenant shall furnish Landlord with a complete set of plans and specifications, names and addresses of contractors, copies of permits and licenses, and an indemnification in such form and amount as may be reasonably satisfactory to Landlord and, if required by Landlord, a performance bond executed by a commercial surety reasonably satisfactory to Landlord, and in an amount equal to the cost of the Alterations and the payment of all liens for labor and material arising therefrom. All Alterations shall be done only by licensed, bondable contractors or subcontractors reasonably approved by Landlord, and at such time and in such manner as Landlord may from time to time reasonably designate. Tenant shall pay the cost of all Alterations (including a reasonable charge for Landlord's services and for Landlord's inspection, architectural and engineering time), and also the cost of painting, restoring or repairing any portion of the Premises and the Center required because of Tenant's Alterations. Upon completion of the Alterations, Tenant shall furnish Landlord with contractor's affidavits and full final, unconditional waivers of liens and a reasonably detailed breakdown of the costs of all labor and materials employed in such Alterations. All Alterations shall comply with all insurance requirements and all laws, ordinances, rules and regulations of all governmental authorities (including, without limitation, the Americans With Disabilities Act) and shall be constructed in a good and workmanlike and lien free manner. Tenant shall permit Landlord to inspect construction operations in connection with any Alterations. Tenant shall not be allowed to make any modifications, improvements, Alterations, additions or installations if such action results or would result in a labor dispute or otherwise would materially interfere with Landlord's operation of the Center. Subject to applicable federal and state law, in the event any Alterations result in a labor dispute, Tenant shall cause work to be halted immediately, remove the workers, contractors or mechanics responsible for such dispute and replace them with workers, contractors and mechanics acceptable to Landlord and whose work shall not (in the sole and absolute discretion of Landlord) result in a labor dispute.

11.3 **Roof Penetration**. Tenant must obtain prior, written approval from Landlord before accessing the roof of the Center for any type of roof puncture/penetration or for attaching any items to the roof, and such work must be performed by Landlord's roofing contractor at a competitive market price or by a contractor approved by Landlord. Tenant shall be responsible for any damage to the Premises, the roof or the building containing the Premises or the Center caused by Tenant, its agents or contractors, including, but not limited to, any roof puncture/penetration. Tenant shall be responsible for the roof above its premise in the event it makes an alteration, with or without Landlord permission, and any damage to the Premises occurs.

11.4 **Tenant's Signs**. Tenant shall comply at all times with the provisions of **Exhibit C** with respect to Tenant's interior signs. All of Tenant's signs shall comply with all Legal Requirements for the Center. Tenant shall be responsible for the costs of designing, manufacturing, installing, illuminating, operating and maintaining its signs. Upon the termination of this Lease, Tenant shall remove its signs and restore and repair all parts of the Premises and the Center affected by the installation or removal of its signs, to the condition existing prior to installation or to a condition reasonably acceptable to Landlord. If Tenant fails or refuses to remove its sign as herein required, Landlord may, but shall not be obligated to, remove such signs and repair and restore all damage caused by their removal, and Tenant shall pay to Landlord the costs of all such removal, repair and restoration, together with an amount equal to 25% of such costs, within ten days after receipt of an invoice therefor. Landlord reserves the right to place signage on the exterior of the Premises, including, without limitation, building identification signage, directional signage and signage for other tenants and occupants of the Center.

11.5 **Indemnification**. Tenant agrees to indemnify, defend and hold Landlord harmless, utilizing legal counsel acceptable to Landlord, for, from and against any and all claims, demands, actions, causes of action, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees of Landlord arising from or connected in any way with Tenant's interior non-structural alterations, Alterations, roof puncture/penetrations, Tenant's signs, or any other work performed by or on behalf of Tenant on the Premises regardless of whether or not such claim, demand, action, cause of action, loss, damage, cost or expense is caused in part by a party indemnified hereunder. The provisions of this Section shall survive the expiration or termination of this Lease.

ARTICLE 12

Repair and Maintenance

12.1 **Landlord Repairs**. Landlord agrees to make or cause to be made the following repairs (which shall include replacements, if necessary) (collectively, "**Landlord Repairs**") within a reasonable period of time after receipt of notice from Tenant of the need therefor:

A. **Structural Repairs**. Structural portions of the Premises ("**structural portions**" consisting only of the foundation, roof, floor slab and members supporting the roof), the cost of which shall be included in Operating Costs; PROVIDED, HOWEVER, notwithstanding the foregoing, in no event shall Landlord be responsible for the repair or replacement of the floor covering in the Premises.

B. **Utility Repairs**. All repairs to and replacements of utility systems and sewer lines up to the point of the meters located in the mechanical room or, if there is no mechanical

room, to the point at which they are stubbed to the Premises, the cost of which shall be included in Center Operating Costs. PROVIDED, HOWEVER, in the event any damage is caused by one or more acts or omissions of Tenant, its agents, employees, customers or invitees (or any other person other than Landlord), or if a damaged utility line exclusively serves the Premises, Tenant shall pay the cost of such repairs within 20 days after receipt of an invoice therefor. Additionally, Landlord shall include in Operating Costs the costs of repair(s) to plumbing and utility lines from the entrance points of the utility lines into the Center to the mechanical room(s) or, if there is no mechanical room, to the point at which they are stubbed to the Premises.

12.2 **Tenant Repairs**. Except as is Landlord's obligation under this Article, Tenant agrees, at its own cost and expense, to take good care of the Premises and Tenant's trash area and to keep them in good and first-class order, condition and state of repair (which shall include replacements, if necessary) including, without limitation, the following:

A. **Interior Repairs**. Any and all interior repairs, including but not limited to all repairs to its trade fixtures and electrical equipment and fixtures, plumbing fixtures, lines and equipment and other utility lines (including sewer and utility lines within and exclusively serving the Premises), from the point of the meters in the mechanical room or, if there is no mechanical room, to the point at which they are stubbed to the Premises), elevators, if any, and wiring (including that within walls or ceilings, or under flooring or floor covering, or in or under the slab).

B. **Storefront Repairs**. All storefront repairs, including glass and doors, door frames, locks, lifts, openers and hardware.

C. **Window Repairs**. All repairs to windows (including sashes, frames, locks and hardware) and all Tenant's signs (including replacement of signs).

D. **Maintenance Repair**. All the maintenance, repair and replacement of the HVAC System located in and exclusively serving the Premises, including maintenance of all fixtures, equipment, ducts, machinery, machinery controls, appliance and utility lines as are used for, in connection with or which are part of the electrical, plumbing, heating, air conditioning, ventilation or other mechanical systems in and exclusive to the Premises. Tenant shall, within 30 days after the Delivery Date, enter into and provide Landlord a copy of, and thereafter maintain a preventative maintenance contract on the HVAC System in the Premises, which contract shall provide for periodic maintenance in accordance with the manufacturer's specifications, Tenant shall be allowed to replace HVAC filters as part of the preventative maintenance. In the event Tenant fails to maintain such preventative maintenance contract, Landlord, at its option, may arrange for such a preventative maintenance contract for the HVAC System; PROVIDED, HOWEVER, Landlord has notified Tenant of this failure of Tenant to comply with the maintenance requirements set forth herein and Tenant has failed to cure such noncompliance within 30 days after receipt by Tenant of Landlord's notice, in which event the cost of such preventative HVAC System maintenance shall be billed directly to Tenant and shall be paid within ten days after receipt of an invoice therefor.

ARTICLE 13

Inspections; Self Help; Construction in the Center

13.1 **Inspections**. Landlord shall have the right, upon reasonable prior notice, except in the event of an emergency (in which case only such notice as is practicable shall be required), to enter upon the Premises for any purpose, including to determine Tenant's compliance with this Lease or to maintain and repair any pipes, conduits or ducts, whether used in the supply of services to Tenant or to other occupants of the Center. Landlord shall further have the right, on at least 48 hours prior notice, to enter the Premises in connection with the following: **(A)** construction on the Premises; or **(B)** completing any work, repairs, alterations, or improvements in and about the Premises.

13.2 **Landlord's Right to Self Help**. If Tenant neglects or refuses to make repairs to or to maintain the Premises as required under this Lease, or to fulfill any other obligation (or any part thereof) as required under this Lease, then in addition to all other rights and remedies of Landlord as a result of such failure, Landlord and/or its agents shall have the right, upon giving Tenant reasonable notice of its election to do so, except in the event of an emergency (in which case only such notice as is practical shall be required), to make the repairs or perform the maintenance or other obligations on behalf of and for the account of Tenant. The cost of the work so done or obligations performed by Landlord or its agents, together with an amount equal to 25% of such costs, shall be paid for by Tenant within ten days after Tenant's receipt of a bill therefor. If Tenant fails to pay such amount within such 10-day period, the amount shall accrue interest at the Interest Rate upon the expiration of such 10-day period until paid. Nothing herein shall imply any duty on the part of Landlord to do any work which Landlord is not specifically and expressly required to perform under this Lease or which, under any provisions of this Lease, Tenant is required to perform, and the performance of such work by Landlord shall not constitute a waiver of Tenant's default. Landlord shall have no liability to Tenant for any loss or damage which may result to its stock or business by reason of such repairs, replacements or action.

13.3 **Construction in the Center**. In connection with any construction, excavation or other building operations related to changes to the Center, Landlord, its agents, employees and contractors shall have the right of access to enter the Premises and to strengthen, add to or shore the foundations, walls, columns or supporting members thereof, and to erect scaffolding and/or protective barricades around and about the Premises (but not so as to preclude entry thereto) and to do any act or thing necessary for the safety or preservation of the Premises, in Landlord's sole discretion, and Landlord shall use reasonable efforts to complete all construction in the Premises as promptly as possible (considering the nature and extent of the construction and subject to prudent construction practices). Tenant's obligations under this Lease shall not be affected by any such changes, construction, excavation or other building operations, and so long as Landlord acts reasonably, Landlord shall not be liable for any inconvenience, disturbance, loss of business or any other annoyance arising therefrom.

ARTICLE 14

Utilities/Meters; Interruption of Service

14.1 **Utilities/Meters**. Landlord shall provide utility lines to the Premises, including **(A)** one sewer stub directly into the Premises, **(B)** an 800 amp service panel, **(C)** HVAC System controls and all

required wiring from panel to HVAC System units for Tenant, and **(D)** one water line of a size sufficient for the Premises. Tenant agrees to obtain directly from the provider thereof and pay all charges for electricity, air conditioning, heating, gas, water, sanitary sewer and other utility bills relating to the Premises from and after the Delivery Date. If any utility services are not separately metered to the Premises, Landlord may require Tenant (as part of Tenant's Work or at any time during the Term of this Lease), at Tenant's sole cost and expense, to install check or sub-meters to measure Tenant's consumption of such utilities, and shall pay Landlord as Additional Rent, a share of the cost of such utilities (based on Tenant's consumption thereof as evidenced by such check or sub-meter and the rate for such utilities paid by Landlord). Additionally, if any utility service (whether separately or jointly metered to the Premises) is required to be maintained in Landlord's name, Tenant shall either pay all charges for such utility if separately metered to the Premises, or a proportionate share thereof (as set forth in this paragraph above) if jointly metered with other premises. Tenant shall pay any tap, connection and hook-up fees, and any security and other deposits, payable in connection with the utilities serving the Premises except for such development impact fees or hook-up fees charged by the City. All utilities (if separately metered) shall be transferred into Tenant's name on or before the Delivery Date (or such earlier date as Tenant may enter the Premises to perform Tenant's Work) and if Tenant fails to do so Landlord shall have the right to have the utility service to the Premises terminated. If Tenant installs any electrical equipment that overloads the lines in the Premises, Tenant shall, at its own expense, make whatever changes are necessary to comply with the requirements of codes and ordinances of the City or any governing body having jurisdiction.

14.2 **Interruption of Service**. No interruption in, or temporary stoppage of, any of the services or utilities furnished to the Premises is to be deemed an eviction or disturbance of Tenant's use and possession of the Premises, nor does any such interruption or stoppage relieve Tenant from any obligation under this Lease, render Landlord liable for damages or entitle Tenant to any Rent abatement.

ARTICLE 15

Tenant's Insurance; Landlord's Insurance; Mutual Release and Waiver of Subrogation

15.1 **Tenant's Insurance**. Tenant, at its sole cost and expense, shall obtain and keep in force commencing as of the Delivery Date, the following insurance with an insurance company authorized to do business in Arizona and which has a general policy rating of A or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a similar rating from a similar or successor service):

A. **"Special Form Causes of Loss" Property Insurance**. Property insurance using ISO forms CP0010 and CP1030 (or their equivalent) and including equipment breakdown covering all of Tenant's Property, plate glass and all "**Leasehold Improvements**" (as defined in **Article 21**) in the Premises made and paid for by Tenant (including, without limitation, Leasehold Improvements paid for with the Construction Allowance, if any), in an amount equal to the full replacement cost thereof.

B. **Business Interruption Insurance**. Business interruption insurance using ISO form CP0030 (or its equivalent) and including equipment breakdown, with a deductible or waiting period of no greater than 72 hours, in an amount that shall reimburse Tenant for direct or indirect loss of earnings attributable to all perils insured against in the previous Subsection or attributable to

the prevention of access to the Premises by civil authority; and sufficient to reimburse Tenant for Rent in the event of a casualty to, or temporary taking of, the Center or the Premises.

C. **Commercial General Liability Insurance**. Commercial general liability insurance to protect against claims for bodily injury and property damage arising out of premises operations, products, and completed operations, and advertising and personal injury liability, including Dram Shop or host liquor liability (if alcoholic beverages are sold or served in, from or about the Premises), written on an occurrence basis using ISO form CG0001 (or its equivalent) with no amendments to the definition of an insured contract, and including specific coverage for Tenant's security guards, with policy limits of not less than $2,000,000.00 per occurrence, exclusive of defense costs, unless Landlord agrees to a lesser amount. The foregoing policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

D. **Environmental Insurance**. Without limiting the provisions of **Article 32**, in the event Tenant's use of the Premises does or might result in the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants (including, without limitation, any Hazardous Materials) into or upon land, the atmosphere or any watercourse or body of water, then Tenant shall obtain environmental insurance insuring against any loss for bodily injury, property damage, cleanup costs and defense expenses resulting from any of the above-described causes with limits of not less than $5,000,000.00 inclusive per occurrence and $5,000,000.00 annual aggregate, per location, or such higher limits as Landlord may require from time to time during the Term. The policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager and all mortgagees of Landlord.

E. **Employer's Liability Insurance and Workers Compensation**. Employer's Liability insurance, with minimum limits of not less than $500,000.00, bodily injury each accident, $500,000.00 bodily injury by disease policy limit, and $500,000.00 bodily injury by disease each employee, and Worker's Compensation in form and amount as required by applicable law. The policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

F. **Umbrella Liability Insurance**. Umbrella liability insurance over such primary general liability, employer's liability insurance policies and/or commercial automobile liability insurance (as applicable) in limits of not less than $5,000,000.00, inclusive, per occurrence, and $5,000,000.00 annual aggregate, per location, or such higher limits as Landlord may require from time to time during the Term. The policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

G. **Builder's Risk Insurance**. In the event Tenant performs any repairs or alterations in, on or about the Premises, Builder's Risk insurance on a "Special Form" basis (including collapse) using a completed value (non reporting) form for full replacement cost covering all work which Tenant contracts for or performs in the Center and all materials and equipment used or installed by Tenant in or about the Premises, off site and in transit. This insurance shall include: **(1)** interests of Tenant, Landlord, Landlord's property manager, all mortgagees of Landlord, Tenant's contractor, subcontractors and sub-subcontractors; and **(2)** a mutual release and waiver of subrogation for all parties.

H. **Commercial Automobile Liability Insurance**. Commercial automobile liability insurance to include contractual liability insurance for the indemnities set forth in this contract covering all owned, non-owned and hired automobiles, in limits of not less than $1,000,000.00 combined single limit (each accident), or such higher limits as Landlord may require from time to time during the Term. The policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord and its members, shareholders, employees and property manager.

I. **Insurance Changes**. Landlord may, from time to time, require changes or endorsements to Tenant's insurance required herein.

15.2 **Policies of Insurance**. Tenant shall have the right to satisfy the insurance required by this Article by means of blanket insurance policy(ies), provided that no other loss which may also be insured by the blanket insurance shall affect the insurance coverages required hereby and further provided that Tenant delivers to Landlord a certificate specifically stating that such coverages apply to Landlord, Landlord's property manager, all mortgagees of Landlord, the Premises and the Center. All policies of insurance or certificates thereof, except with respect to workers compensation or professional liability, shall name Landlord, Landlord's property manager, and all mortgagees of Landlord, as additional insureds, as their respective interests may appear. All self-insured retentions and deductible amounts shall be subject to Landlord's prior written approval. Any and all deductibles or co-insurance in the above-described policies or inadequacy of limits for coverage shall be assumed by, for the account of, and at Tenant's sole risk. Prior to commencing any work under this Agreement, Tenant will provide Landlord with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Tenant’s insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Landlord shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. Tenant agrees to further provide Landlord evidence of renewals of policies not later than 30 days prior to the end of the expiring term. All policies of insurance carried by Tenant shall be primary and non-contributing in the event of any loss or damage with any insurance required to be maintained by Tenant under this Lease. All policies and certificates shall require the insurer to notify Landlord, Landlord's property manager, and all mortgagees of Landlord, in writing, not less than 30 days before any lapse, non-renewal or cancellation, including cancellation for nonpayment of premium, or other termination thereof, and shall include a clause or endorsement denying the insurer any rights of subrogation against Landlord, Landlord's property manager, and all mortgagees of Landlord. Landlord reserves the right to request or receive for review certified copies of any and all insurance policies to which this Lease is applicable. The required coverage and/or limits referred to herein shall in no way affect or limit Tenant's liability with respect to its duties and obligations under this Lease.

15.3 **Uses Which Affect Insurance**. Tenant shall not knowingly conduct or permit to be conducted in the Premises any activity, or place any equipment in or about the Premises or the Center, which shall invalidate the insurance coverage in effect or increase the rate of insurance on the Premises or the Center, and Tenant shall comply with all requirements and regulations of Landlord's property and liability insurers. If any invalidation of coverage or increase in the rate of

insurance occurs or is threatened by any insurance company due to any act or omission by Tenant, or its agents, employees, representatives, or contractors, such statement or threat shall be conclusive evidence that the increase in such rate is due to the act of Tenant, and Tenant shall be liable for the increase and such amount shall be considered Additional Rent payable with the next monthly installment of Minimum Rent due under this Lease.

15.4 **Landlord's Insurance**. Landlord shall, at all times during the Term, carry a policy or policies of commercial general liability insurance covering the Common Areas in the Center and special form causes of loss insurance covering Landlord's improvements in the Center, all in such forms and amounts and with such deductibles and self-insured retentions as Landlord reasonably deems appropriate. If insurance coverages generally maintained by landlords of similar space in similar buildings in the area in which the Center is located increase or otherwise change, Landlord may similarly change the insurance coverages Landlord maintains under this Lease.

ARTICLE 16

Non-Liability of Landlord; Tenant Indemnification; Landlord Indemnification; Third Party Claims; Tenant's Risk

16.1 **Non-Liability of Landlord**. Except as provided in **Section 16.3** (captioned "**Landlord Indemnification**"), neither Landlord, nor its affiliates, owners, members, managers, partners, directors, officers, agents and employees shall be liable to Tenant and Tenant hereby waives all claims for any loss, injury, or damage, to Tenant or to any other person, or to its or their property, irrespective of the cause of such injury, damage or loss. Further, except as provided in **Section 16.3**, neither Landlord, nor its affiliates, owners, members, managers, partners, directors, officers, agents and employees shall be liable to Tenant and Tenant hereby waives all claims: **(A)** against Landlord for damage to any property or injury to, or death of, any person in, upon, or about the Center, including the Premises, arising at any time and from any cause, except to the extent solely caused by the negligence or willful misconduct of Landlord, its agents, employees, or contractors; **(B)** for any damage caused by other tenants or persons in the Center or by occupants of property adjacent thereto, or by the public, or caused by construction (except to the extent solely caused by the negligence or willful misconduct of Landlord, its agents, employees, or contractors), or by any private, public or quasi-public work; **(C)** for any injury or damage to persons or property resulting from the condition or design of, or any defect in, the Center or its mechanical systems or equipment which may exist or occur, or matters arising out of the provision or lack of provision of security, or the action or inaction of any third party security contractor; **(D)** with respect to matters for which Landlord is or may be liable for consequential, punitive or indirect damages purportedly arising out of any loss of use of the Premises or the Common Areas or any loss of use of equipment or facilities therein by Tenant or any person claiming through or under Tenant; **(E)** related to any defect in the Premises or the Center; and/or **(F)** related to any injury or damage to person or property caused by fire, explosion, falling plaster, steam, gas, electricity, water, rain, flood, snow, or leaks from any part of the Premises or from the pipes, appliances, plumbing works, roof, or subsurface of any floor or ceiling, or from the street or any other place, or by dampness or by any other similar cause.

16.2 **Tenant Indemnification**. Subject to the provisions of **Section 15.5** (captioned "**Mutual Release and Waiver of Subrogation**"), Tenant hereby agrees to indemnify, defend, and

hold Landlord and its affiliates, owners, members, managers, partners, directors, officers, agents and employees (collectively, the "**Landlord Indemnified Parties**") harmless for, from and against any and all "**Losses**" (as defined in this Section), regardless of whether or not such Losses are caused in part by any Landlord Indemnified Parties, which arise from or are connected in any way with any or all of the following (collectively, "**Tenant's Indemnified Matters**"): **(A)** the conduct or management by Tenant or Tenant's officers, directors, members, partners, subtenants, invitees, agents, employees, contractors or representatives ("**Tenant Parties**") of the Premises or any business therein, or any work or Alterations done, or any condition created by Tenant or any Tenant Parties in or about the Premises during the Term or during the period of time, if any, prior to the Commencement Date that Tenant is given access to the Premises; **(B)** any act, omission or negligence of any or all of Tenant and Tenant Parties; **(C)** any accident, injury or damage whatsoever occurring in, at or upon either or both of the Center and the Premises and caused wholly or in part by Tenant and/or Tenant Parties; **(D)** any breach by Tenant of any of its warranties and representations under this Lease; **(E)** any actions necessary to protect Landlord's interest under this Lease in a bankruptcy proceeding or other proceeding under the Bankruptcy Code; **(F)** any violation or alleged violation by any or all of Tenant and/or any Tenant Parties of any law, code, ordinance or other governmental regulation; **(G)** any breach or default on the part of Tenant in the performance of any covenant or obligation contained in this Lease; **(H)** claims for work or labor performed for or materials supplied or furnished to Tenant and/or any Tenant Parties; and **(I)** the violation of any "**Environmental Law**" (as defined in **Article 32**) or any permit, application or consent required in connection with any Environmental Law by any or all of Tenant and Tenant Parties with respect to the Premises during the Term; excluding, however, any violation of any Environmental Law resulting directly from the acts or omissions of Landlord and Landlord's employees, agents and contractors. In case any action or proceeding is brought against any or all of Landlord and Landlord Indemnified Parties by reason of any of Tenant's Indemnified Matters, Tenant, upon notice from Landlord shall defend such action or proceeding by counsel reasonably satisfactory to, or selected by, Landlord. For purposes of this Article, the term "**Losses**" shall mean all claims, demands, expenses, actions, judgments, damages, penalties, fines, liabilities, losses of every kind and nature, suits, administrative proceedings, costs and fees, including, without limitation, attorneys' and consultants' reasonable fees and expenses, and the costs of cleanup, remediation, removal and restoration, that are in any way related to any matter covered by the foregoing obligations. The provisions of this Section shall survive the expiration or termination of this Lease.

16.3 **Landlord Indemnification**. To the extent permitted by law, Landlord hereby agrees to indemnify and save harmless Tenant, its officers, agents and servants, for, from and against any and all claims, actions, suits, judgments, decrees, orders, liability and expense in connection with loss of life, bodily injury and/or damage to property **(A)** arising from or out of any occurrence in or upon any of the Common Areas, except to the extent the same is caused by the willful misconduct or negligent act or omission of Tenant and/or Tenant Parties; and **(B)** occasioned wholly or in part by any willful misconduct or negligent act of Landlord, its agents, employees or servants. The provisions of this Section shall survive the expiration or earlier termination of this Lease with respect to any damage, injury or death occurring before such expiration or earlier termination.

16.4 **Third Party Claims**. Landlord shall have no liability to Tenant, Tenant Parties, or other third parties in the event of damage to or loss of personal property (including Tenant's Property) within the Premises or any other injury or damage arising from any act or omission of co-tenants or other occupants of the Center, or of their employees, or of other third parties, not including Landlord, its agents, contractors or employees.

16.5 **Tenant's Risk**. All personal property in the Premises shall be at Tenant's sole risk, and Landlord shall not be liable for any damage done to, or loss of, such personal property, or for damage or loss suffered by the business income or occupation of Tenant arising from any act of neglect of third parties, or from bursting, overflowing, or leaking of water, sewer or steam pipes, rain, wind, tornadoes, floor or other surface or subsurface water, from overflow of drainage facilities or backup or stoppage of any drain, sewer or other water runoff facility or device or from the heating or plumbing fixtures, noise, dust, or from electric wires, or from gas, odors, natural disaster, riot or act of violence, leaking roofs or caused in any other manner. Tenant shall give Landlord prompt notice of any accident to, defect in or problem in the Premises or Building of which Tenant has knowledge or notice. Tenant, for itself and its agents, employees, representatives, contractors, successors, assigns, invitees and licensees, expressly assumes all risks of injury or damage to person or property, whether proximate or remote, resulting from the condition of the Center or any part thereof.

ARTICLE 17

Assignment and Subletting

17.1 **Consent of Landlord**. Tenant shall not assign this Lease or sublet the Premises or any part thereof or mortgage, pledge or hypothecate its leasehold interest or grant any concession or license within the Premises or sublease any operating department therein, whether by sale, assignment, death, incompetency, mortgage, deed of trust, trust, operation of law or otherwise, and whether voluntary or involuntary, without the prior written consent of Landlord (which Landlord may grant or withhold in the exercise of its sole and absolute discretion) which consent shall be evidenced by the signature of the City Manager thereon. Any attempt to do any of the foregoing, without the prior written consent of Landlord, shall be void and of no force or effect. This prohibition shall be construed to include a prohibition against an assignment or subletting by operation of law.

17.2 **Corporate, Partnership or Limited Liability Company Transfer**. Any transfer of Tenant's interest in this Lease by merger, consolidation or dissolution or any change in ownership or power to vote a majority of the "**voting stock**" (as defined in this Section) or majority in interest in Tenant, if Tenant is a corporation or limited liability company, or any transfer of this Lease by transfer of any other ownership interest of Tenant, or any Guarantor, during the Term shall constitute an assignment for the purpose of this Lease, and shall not be permitted unless Tenant obtains the express consent of Landlord. For purposes of this Section, the term "**voting stock**" means shares of stock or interest of any kind, regularly entitled to vote for the election of directors, managing partners, or managers or their equivalent of the corporation, limited liability company, partnership or other entity involved.

17.3 **Assignment; Pledging**. If this Lease is assigned or if the Premises are subleased (whether in whole or in part) or in the event of the mortgage, pledge or hypothecation of the leasehold interest or grant of any concession or license within the Premises or if the Premises are occupied in whole or in part by anyone other than Tenant in violation of the terms of this Article, Landlord shall have the right to do the following: **(A)** collect rent from the assignee, sublessee, mortgagee, pledgee, party to whom the leasehold interest was hypothecated, concessionee or licensee or other occupant and apply the net amount collected to the Rent payable hereunder without being deemed to have approved or consented to such action by Tenant; and/or **(B)** re-enter the Premises, assume and take possession of the whole or any part thereof, and remove all persons or personal property therefrom, by direct or summary action, or in a different type of suit or

proceeding, by force, or otherwise, without being deemed guilty of trespass or other actionable wrong by reason thereof, and without being liable for damages therefor or in connection therewith, and after demand made therefor, Tenant or anyone in possession claiming under Tenant shall be deemed guilty of unlawful detainer and subject to such summary or other action as may be provided by law.

17.4 **Event of Assignment or Subletting**. If Tenant wishes to assign this Lease or sublet all or any part of the Premises, it shall first give written notice of such intention to Landlord, furnishing Landlord with a copy of the final proposed assignment or sublease document and with full information as to the identity and financial status of the proposed assignee or subtenant. Any proposed assignment document shall provide, without limitation, the following: **(A)** that the assignee thereunder shall be liable for all of the obligations of Tenant under this Lease (including, without limitation, the payment of any and all amounts paid or to be paid by Tenant under this Lease on an estimated basis and reconciled on an annual basis, regardless of whether such reconciliation occurs subsequent to such assignment); and **(B)** that any security deposit paid to Landlord under this Lease is transferred to such assignee. Within 60 days after receipt of such notice and documentation from Tenant, Landlord shall have the right, by notice to Tenant, to either: **(1)** terminate this Lease, in which case Tenant shall be relieved of further liability hereunder and under the proposed assignment or sublease; **(2)** approve or reject such assignment or subletting; or **(3)** convert the assignment or sublease into a direct lease between Landlord and such proposed assignee or sublessee and receive all of the rents. If no such response is given, Landlord shall be deemed to have elected to disapprove the assignment or subletting. Notwithstanding the foregoing, Tenant may not attempt to assign or sublease this Lease until 12 months after the commencement of this Lease.

17.5 **Permitted Transfer**. Notwithstanding anything contained in this Lease to the contrary, Tenant, without Landlord's prior consent but with 20 days prior written notice, may assign this Lease or sublet the whole of the Premises (a "**Permitted Transfer**") to a legal entity (a "**Permitted Transferee**") which is either: **(A)** the successor, by merger or otherwise, to all or substantially all of Tenant's assets and liabilities; or **(B)** controls or is controlled by or is under common control with Tenant. For purposes of this Section, the term "**control**" (including the terms "controls," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. Any such assignment or subletting shall be otherwise subject to and upon all of the terms, provisions and covenants of this Lease. However, any assignment, including a Permitted Transfer, shall not in any way relieve Tenant of liability as to any term or condition of this Lease without the express approval of Landlord.

17.6 **Miscellaneous Provisions**. Landlord agrees to give an estoppel letter to any assignee or sublessee to which Landlord consents or in the event of a Permitted Transfer, upon request from such assignee or sublessee. Any sale, assignment, mortgage, transfer or subletting of this Lease which is not in compliance with the provisions of this Article shall be void and of no further force or effect. All rentals paid to Tenant by an assignee or sublessee shall be received by Tenant in trust for Landlord and forwarded immediately to Landlord without offset or reduction, or, at Landlord's election, such rentals shall be paid directly to Landlord (to be applied as a credit and offset to Tenant's Rent obligations). All consideration paid to Tenant for an assignment, sublease or other right to use the Premises which is in excess of the amount required to be paid over to Landlord for the use of the Premises (or pro rata portion of the amount required to be paid to Landlord in the case of a sublease of a portion of the Premises) shall be paid to Landlord by Tenant upon receipt. Tenant shall pay all costs incurred by Landlord in connection with any proposed

assignment or sublease, including reasonable attorneys' fees, and shall pay any brokerage commission incurred by reason of any such proposed assignment or sublease.

17.7 **No Release or Waiver**. Notwithstanding anything contained in this Lease to the contrary, no consent or action by Landlord, and no assignment or subletting permitted by Landlord, shall be deemed a waiver or a release of Tenant from the performance by Tenant of its covenants, duties and obligations hereunder. All obligations and duties shall continue notwithstanding any such consent, assignment or subletting.

ARTICLE 18

Landlord Transfer

18.1 **Landlord Transfer**. Landlord reserves the right to sell or otherwise assign its interest in this Lease or the Premises and the acquisition of title or of Landlord's interest in this Lease by a subsequent owner shall not affect or impair this Lease. If Landlord conveys or transfers its interest in the Premises, upon such conveyance or transfer, Landlord (and in the case of any subsequent conveyances or transfers, the then grantor or transferor) shall be released from all liability with respect to the performance of any obligations on the part of Landlord to be performed hereunder from and after the date of such conveyance or transfer. Upon notice of such transfer, Tenant shall attorn to the new owner as landlord.

18.2 **Development Matters**. Tenant hereby acknowledges and agrees that Landlord shall have the right to improve or cause to be improved or to convey or lease to third parties for improvement (without the necessity of obtaining Tenant's consent) the outlots, if any, contiguous or adjacent to the Center to which legal or equitable title is acquired by Landlord at any time during the term hereof (individually, an "**Outlot**", collectively, the "**Outlots**"), as separate and independent developments from the remainder of the Center, and the same may (at Landlord's sole election) be excluded from the Center for purposes of this Lease. In the event of a sale, transfer or other conveyance of any of the Outlots, Landlord may enter into an agreement with the transferee granting appropriate easement and other rights, and containing such other matters as Landlord and such transferee may agree, to the extent not inconsistent with this Lease.

ARTICLE 19

Permitted Use; Prohibited Uses; Future Restriction; Rules and Regulations; Legal Requirements; Radius Restriction

19.1 **Permitted Use**. It is understood and agreed between the parties hereto that during the Term of this Lease, the Premises shall be used and occupied only for the Permitted Use as defined in **ITEM 3** of the Cover Sheet and for no other purpose or purposes without the prior written consent of Landlord (which may be withheld in Landlord's sole and absolute discretion). In the event Landlord elects (in the exercise of its sole and absolute discretion) to permit Tenant to use all

or any portion of the Premises for a use other than the Permitted Use described in **ITEM 3** of the Cover Sheet, then such approved use shall constitute a "**Permitted Use**" for purposes of this Lease.

19.2 **Prohibited Uses; Future Restrictions**. In addition to Tenant's agreement to operate only for the Permitted Use as provided above, Tenant expressly covenants and agrees that it shall not operate or permit any operation in the Premises so as to violate or permit the violation of, or cause Landlord to violate any future provision for exclusive use or other restriction negotiated by Landlord and applicable to the Premises or the Center after the Effective Date ("**Future Restriction**"); PROVIDED, HOWEVER, Landlord agrees that any Future Restriction which would in any way limit or restrict Tenant's right to use the Premises for the Permitted Use (or such other use as Landlord may have expressly approved in writing prior to the date of such Future Restriction) shall have no application whatsoever to Tenant's conduct of said Permitted Use or approved use in the Premises, so long as this Lease is in full force and effect. Additionally, Tenant shall promptly comply with all encumbrances of record affecting the Premises from time to time, all laws, ordinances and lawful orders, the rules adopted by the Declarant, or, if applicable, any rules and regulations of the Center, as may be amended or promulgated in the future, affecting the Premises and the cleanliness, safety, occupation and use of the same. In addition to other restrictions on the use of the Premises, Tenant shall not use or permit the Premises to be used for, and the Premises are subject to, and Tenant shall abide by, the "**Center Rules and Regulations**" (as defined in this Article). In the event that Tenant's use violates or causes Landlord to violate the provisions of any of the Exclusives or any Prohibited Use or Future Restriction, then and in any of such events, Landlord shall give Tenant written notice of such violation and Tenant shall immediately cease such violation within two days thereafter. In the event Tenant fails to remedy such violation, then in addition to Landlord's rights and remedies under this Lease and at law or in equity, Tenant shall indemnify, defend, and hold harmless Landlord for, from and against any and all claims, demands, actions, causes of action, losses (including, but not limited to, loss or abatements of rents resulting from the exercise of abatement or termination rights by another tenant pursuant to its lease), damages, costs, and expenses, including court costs and reasonable attorneys' fees, and including any cost or legal expenses of Landlord in enforcing the restriction as and against Tenant and otherwise arising from or related to wholly or in part, the use of the Premises in violation of any Exclusive, Prohibited Use or Future Restriction. In the event Tenant violates any of the provisions of this Section, Landlord shall have all rights and remedies provided in this Lease, in addition to all rights and remedies available to Landlord at law or in equity, including, but not limited to, injunctive relief.

19.3 **Center Rules and Regulations**. In addition to the restrictions contained in this Lease, Landlord may from time to time promulgate reasonable and non-discriminatory rules and regulations which further govern the operation of Tenant's business in the Premises and in and about the Center ("**Center Rules and Regulations**"). Tenant agrees to abide by and comply with all such reasonable and non-discriminatory rules and regulations. A copy of the Center Rules and Regulations currently in effect for the Center is attached hereto as **Exhibit C** and incorporated herein by this reference.

19.4 **Legal Requirements**. Tenant shall be obligated (and shall be responsible) to comply with any Legal Requirements, which pertain to Tenant's use and occupancy of the Premises, whether such Legal Requirements are structural or nonstructural in nature. The term "**Legal Requirements**" means all applicable current or future statutes, ordinances, orders, rules, regulations, judgments and requirements of public authorities with jurisdiction over the Center and/or the Premises, and all other matters of record affecting the Premises from time to time.

Tenant shall not do or permit anything to be done in or about the Premises, nor bring or keep anything therein which is not within the Permitted Use of the Premises which shall in any way increase the existing rate of or affect any fire or other insurance upon the Premises or the Center or any of its contents, or cause a cancellation of any insurance policy covering said Premises or the Center or any part thereof or any of its contents. Further, Tenant shall furnish and maintain an adequate number of fire extinguishers in good operating condition as may be reasonably required by Landlord or any governmental authority, and in any event, not less than one such extinguisher for each floor or level of the Premises.

19.5 **Radius Restriction**. Tenant agrees that if during the Term of this Lease (and irrespective of whether Tenant is open and operating for business in the Center), either Tenant or any person, corporation, partnership, joint stock association, trust or other firm or entity which controls Tenant or is controlled by Tenant or is under common control with Tenant (and also, in the event Tenant is a corporation, if any officer or director thereof or shareholder directly or indirectly owning more than 10% of the outstanding stock thereof, or parent, subsidiary or related or affiliated corporation) either directly or indirectly, **(A)** commences the operation of or operates any store for the Permitted Use and/or under the Trade Name (whether or not Tenant is open and operating for business in the Premises at such time), or **(B)** commences the operation of or operates any store for any use being conducted in the Premises from time to time, or **(C)** commences the operation of or operates any store selling or otherwise sells any merchandise or services of the type sold by Tenant in the Premises as permitted under this Lease or similar or related items, or **(D)** in any other manner competes with the business being conducted by Tenant at the Premises, within a radius of six air miles of the Premises, which Tenant acknowledges is a reasonable area for the purpose of this provision, with the exception of a microbrewery in Avondale near the intersection of 99th Avenue and McDowell Road, or in Goodyear in the vicinity of Pebble Creek Parkway and McDowell Road, then in any of such events, during the period of such other store's operation, the monthly Minimum Rent payable by Tenant hereunder shall be adjusted to 150% of the amount stipulated in this Lease for each calendar month during the Term hereof during which such operations are conducted. Such adjustment reflects the agreement of the parties as to the damages, which Landlord would likely incur by reason of the diversion of business and customer traffic from the Premises and the Center to such other store within such radius, as a proximate result of the operation of such other store. Tenant shall provide statements of Gross Sales with respect to sales from such other store in the manner and at the times set forth in this Lease, and Landlord shall have the same rights with respect to such statements as Landlord has under this Lease. Tenant acknowledges and agrees that the provisions of this Section shall apply irrespective of whether Tenant is open and operating for business in the Premises.

ARTICLE 20

Bankruptcy and Other Actions

Any Event of Default of the type described in **Subsection 23(D)** (captioned "**Bankruptcy**") under the Default provisions of this Lease (a "**Bankruptcy Event**") shall be deemed in material breach of Tenant's obligations hereunder and this Lease shall thereupon automatically terminate. Landlord does, in addition, reserve any and all other remedies provided in this Lease or in the law in connection with any Bankruptcy Event.

A. No default of this Lease by Tenant, either prior to or subsequent to the happening of any Bankruptcy Event, shall be deemed to have been waived unless expressly done so in writing by Landlord.

B. It is understood and agreed that this is a lease of real property in a shopping center as such a lease is described in Section 365(b)(3) of the Bankruptcy Code, that Landlord is entitled to all rights and benefits of a landlord thereunder, and that nothing contained herein shall be deemed a waiver of any such right or benefit.

C. Subject to applicable federal and state law, included within and in addition to any other conditions or obligations imposed upon Tenant or its successor in the event of assumption and/or assignment of this Lease in connection with any Bankruptcy Event are the following: **(1)** the cure of any monetary defaults and the reimbursement of pecuniary loss within not more than 30 days of assumption and/or assignment; **(2)** the deposit of an additional sum equal to three months of Minimum Rent and Additional Rent to be held as security; **(3)** the use of the Premises as set forth in this Lease with the quality and quantity of any goods or services required to be offered for sale unchanged with a covenant of continuous operation by Tenant or its successor; **(4)** the reorganized debtor or assignee of such debtor in possession or Tenant's trustee demonstrates in writing that it has retailing experience in shopping centers of comparable size and financial ability to operate a retail establishment out of the Premises in the manner contemplated in this Lease and meets all other reasonable criteria of Landlord as did Tenant upon execution of this Lease; **(5)** the prior written consent of any mortgagee to which this Lease has been assigned as collateral security; and **(6)** the Premises, at all times, remains a single store and no physical changes of any kind may be made to the Premises unless in compliance with the applicable provisions of this Lease.

ARTICLE 21

Tenant's Property; Personal Property Taxes; Leasehold Improvements

21.1 **Tenant's Property**. Upon the expiration or earlier termination of this Lease, Tenant shall remove from the Premises all of Tenant's furniture, trade fixtures, signage (including both interior and exterior signage, but excluding signage required by law [e.g., "EXIT" signage]), merchandise, inventory, displays and other personal property paid for by Tenant (i.e., excluding any property or improvements paid for by Landlord either directly or with the Construction Allowance) located in the Premises (collectively, "**Tenant's Property**"). Tenant shall use reasonable efforts to avoid or minimize any damage to the Premises or Center resulting from such removal and shall repair any damage to the Premises or Center caused by the removal of Tenant's Property, and all utility lines shall be professionally capped or plugged and Tenant shall leave the Premises in broom clean condition. Tenant hereby agrees that, in addition to any other work required to comply with the provisions of this Section, the foregoing shall require Tenant to repair all damage to the exterior of the Premises resulting from the removal of Tenant's signage and other improvements therefrom, and to repaint all areas beneath such signage and improvements to the extent required for such areas to match the color and materials of the remainder of the exterior of the Premises. If Tenant shall fail to remove any of Tenant's Property, such Property shall become the property of Landlord and Landlord shall have the right to dispose of such Property as it deems appropriate, and Tenant shall reimburse Landlord for any costs thereby incurred on demand. This requirement shall survive the Term of this Lease to the extent necessary to give effect hereto. Notwithstanding anything contained in this Lease to the contrary, in addition to Tenant's obligation to pay its Proportionate

Share of Real Estate Taxes as set forth in **Article 7** above, during the Term of this Lease Tenant acknowledges and agrees that it shall pay all taxes, impositions, assessments and similar charges levied or imposed by any governmental or taxing authority against Tenant's Property or any other property or fixtures located in the Premises and used in connection with the operation of Tenant's business therein that are not taxed as real property, whether owned by Landlord or Tenant (collectively, "**Personal Property Taxes**"). Tenant shall pay all Personal Property Taxes directly to the applicable governmental authority (or, if Landlord receives the bill with respect to any Personal Property Taxes, Tenant shall pay to Landlord within 20 days after receipt of an invoice therefor from time to time, in which event Landlord shall remit such Personal Property Taxes to the applicable governmental authority).

21.2 **Leasehold Improvements Remain**. Notwithstanding anything to the contrary set forth in this Lease, all alterations, decorations, installations, additions or improvements upon or to the Premises attached or affixed to the real estate by either party, including, but not limited to, all paneling, millwork, decorations, partitions, air conditioning units, heating equipment, hot water heaters, light fixtures, railings, mezzanine floor, galleries, elevators, stairways, vault doors, kitchen equipment and the like (collectively, the "**Leasehold Improvements**"), shall immediately become the property of Landlord upon installation and shall remain upon, and be surrendered with the Premises, as a part thereof, at the termination of this Lease. The value or cost of the Leasehold Improvements constructed by Tenant shall in no way constitute a substitute for or a credit against any obligation of Tenant under this Lease to pay Rent. Notwithstanding the foregoing, Landlord may, at its option, require, by giving notice to Tenant within a reasonable time after the expiration of the Term, earlier termination or cancellation of the Lease, default or otherwise, that any or all of the Leasehold Improvements made by Tenant upon or to the Premises be removed by Tenant, in which case such Leasehold Improvements shall be removed, and the Premises and Building shall be restored, to the condition in which it was delivered by Landlord. Tenant shall use reasonable efforts to avoid or minimize any damage to the Premises or Center resulting from such removal, and shall repair any damage to the Premises or Center caused by the removal of such Leasehold Improvements. If Tenant shall fail to either **(A)** properly remove any of Tenant's Property as required under this Lease; or **(B)** repair any damage caused by the removal of any alterations or property (including, without limitation, Tenant's Property) which Tenant is required or entitled to remove from the Premises pursuant to this Lease, and such failure shall continue for more than five days after Tenant's receipt of written notice of such failure, then and in either of such events, Landlord may (but shall not be obligated to) remove any such alterations or property and dispose of the same and/or repair such damage and restore the Premises to the condition required under this Lease, and Tenant shall reimburse Landlord for all costs and expenses incurred in connection with such disposal and/or repairs, together with an additional amount equal to 25% of such costs and expenses, within ten days after receipt of an invoice therefor from Landlord. In the event Tenant fails to pay Landlord all or any portion of the amount requested in such invoice within such ten-day period, the amount shall accrue interest at the Interest Rate from the expiration of such ten-day period.

ARTICLE 22

Eminent Domain

22.1 **Definition/General**. In the event of a taking of all or any part or of any interest in the Premises, the Building, the Center buildings, the Common Areas or any other part of the Property by reason of any exercise of the power of eminent domain, or if there is a transfer thereof or of any

interest therein, made in avoidance of an exercise of the power of eminent domain (all of the foregoing being hereinafter collectively referred to as a "**Taking**"), the following provisions shall apply. Landlord shall notify Tenant of any pending or threatened Taking and of all related proceedings including the settling of any award.

A. **Total Taking**. In the event of a Taking of all of the Premises, the Center, this Lease shall terminate as of the date of such Taking and all of Tenant's obligations hereunder, including its obligation to pay Rent accruing from and after the date of the Taking shall terminate as of the date of such Taking.

B. **Partial Taking**. In the event of a Taking of the following: **(1)** more than 20% of the Premises; **(2)** more than 40% of the Building or the Center buildings; **(3)** more than 35% of the Common Areas (including the parking areas); or **(4)** more than two of the accessways serving the Center without replacement thereof, then Tenant or Landlord may terminate this Lease by notice to the other within 60 days after possession is taken by the condemning authority; PROVIDED, HOWEVER, in the event Tenant elects to terminate this Lease pursuant to Clause (C) above, Landlord shall have the right to nullify such election by giving Tenant notice of its election to promptly restore the Common Areas so taken or furnish substitute facilities which are functionally equivalent to or better than the Common Areas so taken and within a reasonable distance from those portions taken.

22.2 **Restoration**. In the event this Lease is not canceled as herein provided, then Landlord shall: **(A)** restore, if the condemnation award proceeds are available and sufficient to do so, the affected portion and, if applicable, so much of the remainder of the Premises to a complete architectural unit to the extent that they existed on the date physical delivery thereof was initially delivered to Tenant prior to the Commencement Date (in any event subject to then existing code); and **(B)** turn over to Tenant (for restoration purposes by Tenant) that portion of Landlord's award applicable to Tenant's Work initially installed by Tenant and additional Tenant Improvements that was awarded to Landlord (rather than to Tenant) and not otherwise received by Tenant from the condemning authority or pursuant to **Section 22.3** (captioned "**Award**") for such element of damage; PROVIDED, HOWEVER, Landlord may terminate this Lease, if no condemnation award proceeds are available or the condemnation award proceeds are insufficient to restore such affected portion or remainder of the Premises as provided above, by written notice to Tenant within 60 days after the date the condemning authority notifies Landlord of the amount of the condemnation award proceeds (if any). Following the physical delivery of the Premises to Tenant, Tenant shall commence and complete restoration of the Premises to at least the extent of Tenant's Work initially installed by Tenant and additional Tenant Improvements. During the period of restoration in the Premises only, the Rent shall be equitably abated in accordance with the nature and extent that Tenant's use and enjoyment of the Premises has been affected. Notwithstanding anything contained in this Lease to the contrary, in the event Landlord restores the Premises, Tenant shall agree to waive any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right.

22.3 **Award**. All damages awarded for any Taking shall belong to and be the property of Landlord, Tenant hereby assigning to Landlord its interest, if any, in said award. Notwithstanding the foregoing, Tenant shall have the right to prove in any condemnation proceedings and to receive any separate award which may be made for damages to or condemnation of Tenant's movable trade fixtures and equipment and for moving expenses; PROVIDED, HOWEVER, Tenant shall in no event have any right to receive any award for its interest in this Lease or for loss of leasehold, and any such award shall not reduce amounts that would otherwise be available to Landlord.

Notwithstanding the foregoing provisions of this Article, Landlord may terminate this Lease with no further liability to Tenant in the event that following any Taking of any part of the Center, or any conveyance in lieu thereof, any party holding a mortgage, trust deed or similar lien on Landlord's interest in the Center elects to require the application of an award or payment for the taking or conveyance in lieu thereof to reduce the indebtedness secured by such mortgage, trust deed or similar lien.

ARTICLE 23

Default

23.1 **Default Definition**. The occurrence of all or any of the following shall constitute an "**Event of Default**" by Tenant:

A. **Non-payment of Rent or other sums**. Any installment of Minimum Rent, Additional Rent or any other sum(s) required to be paid by Tenant hereunder, or any part thereof, shall at any time be in arrears and unpaid following the due date thereof as herein provided.

B. **Vacation or Abandonment of Premises**. Tenant has "**vacated or abandoned**" (as defined in this Subsection) the Premises, and such conditions continues for a period of more than five days after Tenant's receipt of written notice thereof. For purposes of this subsection, the term "**vacated or abandoned**" shall mean that Tenant has: **(1)** ceased operating for business in the Premises, and **(2)** has either: **(a)** verbally or in writing expressed to Landlord or its agent its intention to cease performing all or any of its obligations under this Lease; or **(b)** removed such items of Tenant's Property from the Premises so as to render the Premises unsuitable for the operation of Tenant's business therein; or **(c)** tendered the keys to the Premises to Landlord or its agent; PROVIDED, HOWEVER, Tenant hereby agrees that no acceptance of notice or of the keys to the Premises by Landlord or any agent of Landlord shall constitute an acceptance of surrender of the Premises or terminate this Lease or Tenant's liability hereunder.

C. **Non-performance**. There is any default or breach on the part of Tenant in the observance or performance of any of the other covenants, agreements, or conditions of this Lease on the part of Tenant to be kept and performed, and said default or breach shall continue for a period of 25 days after notice thereof from Landlord to Tenant (or, if such default cannot reasonably be cured within 25 days, if Tenant shall fail to commence to cure the default within such 25-day period or thereafter fails to diligently pursue such cure to completion, but in no event shall cure period exceed 60 days).

D. **Bankruptcy**. If: **(1)** Tenant or any Guarantor of Tenant's obligations under this Lease shall become insolvent, or shall make a transfer in fraud of creditors, or shall make an assignment for the benefit of creditors; **(2)** Tenant or any Guarantor of Tenant's obligations under this Lease shall file a petition under any section or chapter of the United States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any State thereof, or an order for relief relating to Tenant or any Guarantor of Tenant's obligations under this Lease is granted in proceedings filed against Tenant or any guarantor of Tenant's obligations under this Lease; or **(3)** a receiver or trustee shall be appointed for the Premises or for all or substantially all of the assets of Tenant or any guarantor of Tenant's obligations under this Lease.

E. **Attachment**. This Lease or the Premises or any part of the Premises are taken upon execution or by other process of law directed against Tenant, or are taken upon or subject to any attachment at the instance of any creditor or claimant against Tenant, and the attachment is not discharged or disposed of within 15 days after its levy.

F. **Failure to Take Possession**. Tenant fails to take possession of the Premises on the Commencement Date as required hereunder.

23.2 **Remedies**. Upon an Event of Default of Tenant hereunder Landlord, at its option, may exercise any or all of the following remedies, which shall be in addition to the exercise of all rights and remedies of Landlord under this Lease, at law or in equity, with respect to such Event of Default:

A. **Terminate**. Cancel and terminate this Lease and all rights of Tenant hereunder and enter the Premises and take possession thereof.

B. **Take Possession**. Without terminating the Lease, re-enter and take possession of the Premises and remove all persons and property therefrom. Tenant hereby grants to Landlord a lien and security interest as security for payment of all Rent, Additional Rent, or any other charges now or hereafter payable by Tenant hereunder, upon all equipment, fixtures, and inventory (and the proceeds thereof within the Premises, including all improvements, equipment, fixtures, inventory, merchandise, and other personal property now or hereafter placed on or in the Premises, to the full extent of Tenant's and any assignee's, or subtenant's interest herein, and such lien shall include the right to prevent removal of the property from the Premises and may be enforced, upon nonpayment of rent or other charges as property from the Premises and may be enforced, upon nonpayment of rent to other charges as aforesaid, or any other default by Tenant hereunder, without any type of notice to Tenant, unless notice is required by some other provision of this Lease by the re-entry, taking and sale, lease or other disposition of such property. Landlord shall also have all other rights and remedies upon default provided by law, including those set forth in the Uniform Commercial Code. The sale, lease, or other disposition of the property shall be either public or private after at least ten days notice to Tenant at his last known address, and Landlord shall have the right and privilege to be a purchaser at any such sale. Landlord and Tenant agree that ten days notice of such sale, lease, or other disposition of the property is reasonable under the circumstances. Landlord shall not be deemed guilty of trespass or liable for any loss or damage occasioned thereby. Should Landlord elect to re-enter, as herein provided, or should Landlord take possession pursuant to legal proceedings or pursuant to any notice provided for by law or by this Lease, Landlord may either cancel this Lease pursuant to the rights reserved elsewhere in this Lease, or Landlord may, from time to time, without canceling this Lease, make such alterations and repairs as may be necessary in order to relet the Premises; and relet said Premises or any part thereof for such term or terms (which may be for a term extending beyond the Term of this Lease) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable; upon each such reletting all rentals received by Landlord from such reletting shall be applied first, to the payment of any indebtedness other than Rent due hereunder from Tenant to Landlord, second, to the payment of any costs and expenses of such reletting, including brokerage fees and reasonable attorneys' fees, third, to the payment of costs of any alterations and repairs necessary to relet the Premises, fourth, to the payment of Rent due and unpaid hereunder, and the residue, if any, shall be held by Landlord and applied in payment of future Rent or damage as such amounts may become due and payable hereunder during the entire term of the Lease. If such rentals received from such reletting during any month be less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such

deficiency to Landlord. No such re-entry or taking possession of said Premises by Landlord shall be construed as an election on its part to cancel this Lease unless a notice of such intention is given to Tenant or unless the cancellation thereof is decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to cancel this Lease for such previous Event of Default.

C. **Locks/Security Devices**. Alter locks and other security devices at the Premises in accordance with applicable law.

D. **Tenant Improvement Allowance**. Withhold payment of any unpaid portion of the Tenant Improvement Allowance, if any, regardless of whether Tenant has already paid for all or any portion of the cost of the work, materials or labor to be paid for with the Tenant Improvement Allowance.

E. **Broker's Commission**. Recover from Tenant the amount of any broker's or similar commission paid by Landlord to any broker or other party acting as Tenant's agent or on Tenant's behalf in connection with this Lease and the transaction contemplated hereunder.

F. **Injunctive Relief**. Without limitation, exercise any other right at law or in equity, including specifically, but not by way of limitation, the pursuit of temporary or permanent injunctive relief.

23.3 **Additional Provisions**. If Tenant shall after default voluntarily give up or tender possession of the Premises to Landlord, by delivering the keys to the Premises to Landlord or its agent or property manager, or both, such actions shall be deemed to be in compliance with Landlord's rights and the acceptance thereof by Landlord shall not be deemed to constitute a surrender of the Premises or otherwise affect Landlord's rights in connection with such default; it being understood and agreed that such surrender may be effected only by the written agreement of Landlord and Tenant. Tenant hereby waives (to the extent legally permissible) any and all notices otherwise required under common law, as same presently exist or may be hereafter amended (or any subsequent similar statute relating to notice prior to instituting such action or proceeding). In the event of termination of this Lease or of Tenant's right to possession of the Premises or repossession of the Premises for an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Premises, or any portion thereof, or to collect rental after reletting (if any); but Landlord shall have the option to relet or attempt to relet and in the event of reletting Landlord may relet the whole or any portion of the Premises for any period, to any tenant, and for any use and purpose. In the event that Landlord shall have taken possession of the Premises, Landlord shall have the right to use all the furniture, fixtures and equipment at the Premises, including that which is owned by or leased to Tenant, prior to any foreclosure thereon by Landlord or repossession thereof by a Landlord thereof or third party having a lien thereon. Landlord shall also have the right to remove from the Premises (without legal process) all or any portion of such furniture, fixtures, equipment and other property located thereon and place same in storage at any premises elected by Landlord, and in such event, Tenant shall be liable to Landlord for costs incurred by Landlord in connection with such removal and storage, together with interest thereon at the Interest Rate. Landlord shall also have the right to relinquish possession of all or any portion of such furniture, fixtures, equipment and other property to any person ("**Claimant**") claiming to be entitled to possession thereof, without the necessity of making any investigation or inquiry as to the basis upon which Claimant purports to act, and Tenant agrees to indemnify, defend and hold Landlord harmless from all cost, expense, loss, damage and liability incident to Landlord's relinquishment of

possession of all or any portion of such furniture, fixtures, equipment or other property. Tenant stipulates and agrees that the rights set forth in this Section are commercially reasonable.

ARTICLE 24

Subordination; Estoppels

24.1 **Subordination**. Tenant covenants and agrees that **(A)** this Lease is and shall automatically and without further act or deed by Tenant be and remain subject and subordinate to any mortgages, deeds of trust, security deeds or other security instruments, and any ground leases or underlying leases presently existing or hereafter placed upon all or any portion of the Center (each a "**Mortgage**") and to any and all advances to be made thereunder, and to any interest accrued thereon, and to all renewals, replacements, modifications, consolidations and extensions thereof or participation thereof, **(B)** any mortgagee, grantee, master lessor, beneficiary or trustee (each a "**Mortgagee**") may elect to have this Lease made a prior lien to its Mortgage, and in the event of such election and upon notification by Landlord or such Mortgagee to Tenant to that effect, this Lease shall without further act or deed by Tenant be deemed prior in lien to said Mortgage, whether this Lease is dated prior to or subsequent to the date of any such Mortgage, and **(C)** Tenant shall execute and deliver whatever instruments may reasonably be required by Landlord or any present or prospective Mortgagee to acknowledge such subordination or priority (as applicable) in recordable form. Tenant's failure to execute such instrument within 20 days after Tenant's receipt of same shall constitute a separate Event of Default for which no cure period applies. If any proceeding is brought for default under any Mortgage to which this Lease is subject, or in the event of foreclosure, deed in lieu of foreclosure or the exercise of the power of sale under any Mortgage covering the Premises (each a "**Foreclosure**") and if requested by Landlord's successor, Tenant shall attorn to such successor and shall recognize that successor as Landlord under this Lease. Tenant agrees that such successor shall not be **(1)** liable for any act or omission of Landlord under this Lease occurring prior to such Foreclosure, **(2)** subject to any offset accruing to Tenant against Landlord prior to such Foreclosure, or **(3)** bound by any previous prepayment of Rent or Security Deposit which have not been expressly delivered by Landlord to such successor. If so requested, Tenant shall enter into a new lease with such successor on the same terms and conditions as are contained in this Lease (for the unexpired Term of this Lease then remaining).

24.2 **Estoppel**. The parties agree that they shall rely solely upon the terms of this Lease to govern their relationship. They further agree that reliance upon any representation, act, or omission outside the terms of this Lease shall be deemed unreasonable, and shall not establish any rights or obligations on the part of either party. Within 20 days after the request of the other party at any time and from time to time, each of Landlord and Tenant agree to execute, acknowledge and deliver to the other party a written instrument in form reasonably acceptable to Landlord and Tenant, duly executed, acknowledged: **(A)** certifying that this Lease has not been modified except as set forth in such certificate and is in full force and effect as modified; **(B)** specifying the dates to which the Minimum Rent, Percentage Rent, Additional Rent and other charges hereunder have been paid; **(C)** stating whether or not, to the knowledge of the party executing such instrument, the other party is in default and, if so, stating the nature of such default; **(D)** stating the Commencement Date; **(E)** stating whether the option to extend the Term has been exercised; and **(F)** affirming such other factually accurate matters pertaining to the provisions or subject matter of this Lease as may be required by the other party.

ARTICLE 25

Notices

Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if **(A)** delivered to the party at the address set forth below, **(B)** deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below, **(C)** given to a recognized and reputable overnight delivery service, to the address set forth below or **(D)** delivered by facsimile transmission to the number set forth below:

If to Tenant:	Ground Control Coffee and Wine Bar, LLC 745 N. 114th Avenue, Suite 2 Avondale, Arizona 85323 Attn: _____
If to the City:	City of Avondale 11465 West Civic Center Drive Avondale, Arizona 85323 Facsimile: (623) 333-0100 Attn: Charles P. McClendon, City Manager
With copy to:	GUST ROSENFELD, P.L.C. 201 East Washington Street, Suite 800 Phoenix, Arizona 85004-2327 Facsimile: (602) 340-1538 Attn: Andrew J. McGuire, Esq.

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this subsection. Notices shall be deemed received **(1)** when delivered to the party, **(2)** three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, **(3)** the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day or **(4)** when received by facsimile transmission during the normal business hours of the recipient. If a copy of a notice is also given to a party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

ARTICLE 26

Surrender of Premises

Tenant shall surrender the Premises in broom clean condition and in good order, condition and repair, reasonable wear and tear and insured casualty damage excepted, and shall surrender all keys for the Premises to Landlord at the place then fixed for the payment of Rent and shall inform Landlord of all combinations on locks, safes and vaults, if any, in the Premises. Tenant's obligation to observe or perform this covenant shall survive the expiration or earlier termination of this Lease.

ARTICLE 27

Holding Over

If Tenant remains in possession of the Premises after the expiration of the Term or earlier termination of this Lease, without the execution of a new Lease, then, at Landlord's option, Tenant shall be deemed to be occupying the Premises as a month-to-month holdover Tenant, subject to all the provisions of this Lease insofar as they are applicable to a month-to-month tenancy, but at a daily rental of two times the per day Minimum Rent and Additional Rent provided under this Lease, computed on the basis of a 30 day month.

ARTICLE 28

Casualty

28.1 **Removal of Debris**. In the event of a casualty, Tenant shall be responsible for the prompt removal of all debris resulting from Tenant Improvements installed in the Premises by Tenant, including Tenant's furniture and fixtures.

28.2 **Termination**. If at any time during the Term, the Premises or any material portion of the Center should be destroyed or damaged by fire or other casualty, Landlord shall have the election to repair and reconstruct the damaged portion of the Premises and/or the Center to substantially the condition which existed at the time of Landlord's tender of possession of the Premises to Tenant or alternatively, to terminate this Lease. Landlord shall notify Tenant of its election within 90 days after receipt of notice from Tenant of such damage or destruction. In the event Landlord elects to terminate this Lease pursuant to this Section, Rent shall be apportioned on a per diem basis and be paid to the date of termination, such termination to be effective 30 days following the date of Landlord's notice and upon expiration of such 30-day period neither party shall have any further rights or obligations hereunder.

28.3 **Repair**. If Landlord elects to repair and restore the Premises: **(A)** this Lease shall continue in full force and effect; **(B)** such repairs shall be made by Landlord within a reasonable period of time; and **(C)** Minimum Rent shall abate proportionately only during the period and to the extent that the Premises are unfit for use, and are not otherwise used, by Tenant for any purpose. Notwithstanding the foregoing, if the damage is due to the fault or neglect of Tenant or its employees, there shall be no abatement of Rent. If Landlord elects to repair and restore the Premises, Tenant hereby covenants and agrees to restore the interior of the Premises, pursuant to Landlord's standard construction procedures, and reopen fully stocked and staffed in the Premises promptly thereafter. Notwithstanding anything contained in this Lease to the contrary, in the event Landlord elects to repair and restore the Premises, Tenant shall agree to waive any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right.

28.4 **Notice**. Tenant shall give notice to Landlord within two days after Tenant learns of any accident, damage or destruction at the Premises.

ARTICLE 29

Waiver

One or more waivers of any covenant or condition of this Lease by Landlord shall not be construed as a waiver of a further breach of the same covenant or condition, and the consent or approval by Landlord to or of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to any subsequent similar act by Tenant. No receipt of money by Landlord after a Tenant default has been declared shall, without the consent of Landlord, in any way reinstate, continue or extend the Term of this Lease. Receipt by Landlord of Tenant's keys to the Premises shall not constitute an acceptance of surrender of the Premises without Landlord's acknowledgment thereof.

ARTICLE 30

Quiet Possession

Landlord agrees that, so long as Tenant fully complies with all of the terms, covenants and conditions herein contained on Tenant's part to be kept and performed, Tenant shall peaceably and quietly have, hold and enjoy the Premises free from molestation by Landlord or any party claiming by, through or under Landlord.

ARTICLE 31

Broker's Commission

Each party hereto warrants to the other that there are no claims for brokerage commissions or finder’s fees in connection with the execution of this Lease. Each party agrees to indemnify the other against, and hold it harmless from, all liabilities arising from any such claim including, without limitation, the cost of counsel fees in connection therewith.

ARTICLE 32

Asbestos and Other Hazardous Materials

32.1 **Definitions**. For purposes of this Lease:

A. "**Environmental Laws**" means any federal, state or local statute, regulation or ordinance or any judicial or administrative decree or decision, whether now existing or hereinafter enacted, promulgated or issued, with respect to any Hazardous Materials, drinking water, groundwater, wetlands, landfills, open dumps, storage tanks, underground storage tanks, solid waste, waste water, storm water runoff, waste emissions or wells, including, without limiting the generality of the foregoing, the following statutes, and regulations, orders, decrees, permits, licenses and deed restrictions now or hereafter promulgated thereunder, and amendments and successors to such statutes and regulations as may be enacted and promulgated from time to time: Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601 et seq., as amended by the Superfund Amendments and Reauthorization Act; the Resource

Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; the Hazardous Material Transportation Act, 42 U.S.C. §1801 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.; the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.; the Emergency Planning and Community Right to Know Act, 42 U.S.C. §11001 et seq.; the Clean Air Act, 42 U.S.C. §7401 et seq.; the Uranium Mill Tailings Radiation Control Act (42 U.S.C. Section 7901 et seq.); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 et seq.); the Noise Control Act (42 U.S.C. § 4901 et seq.); the Safe Drinking Water Act (21 U.S.C. § 349, 42 U.S.C. § 201 and § 300f et seq.); and the National Environmental Policy Act (42 U.S.C. § 4321 et seq.).

B. "**Hazardous Materials**" means each and every element, compound, chemical mixture, contaminant, pollutant, material, waste or other substance which is defined, determined or identified as hazardous or toxic under any Environmental Law.

C. "**Release**" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, storing, escaping, leaking, dumping, discarding, burying, abandoning, using, generating, permitting, producing, introducing, maintaining, disposing or releasing into the Premises, the Center or the environment.

D. "**Environmental Authorities**" means the United States, the State and any political subdivision thereof, the United States Environmental Protection Agency and any and all governmental authorities and the agencies, departments, commissions, boards, bureaus, bodies, councils, offices, authorities, or instrumentality of any of them, of any nature whatsoever for any governmental unit (federal, state, county, district, municipal, city or otherwise) whether now or hereafter in existence having jurisdiction under any Environmental Law.

E. "**Notice**" means any communication, written or oral, actual or threatened, from any governmental authority or any other public or private entity or individual, concerning any violation of any Environmental Law, or any act or omission resulting or which may result in the Release of Hazardous Material, and shall include the imposition of any liens on the Center or revenues or assets of Landlord.

32.2 **Tenant Requirements**. Neither Tenant, nor its agents, employees, contractors, servants, subtenants, concessionaires or invitees, shall Release any Hazardous Materials in or about any portion of the Premises or the Center, or transport any Hazardous Materials to or from the Premises or the Center, except construction materials (other than asbestos or polychlorinated biphenyls), office equipment, cleaning solutions, other maintenance materials and oil and other petroleum products that are or contain Hazardous Materials may be used, handled or stored on the Premises, provided such materials, equipment, solutions and products are used is in de minimis amounts and are used only incidental to and as reasonably necessary for the operation and maintenance of the Premises for the Permitted Use hereunder and in compliance with all applicable Environmental Laws. In addition, neither Tenant, nor its agents, employees, contractors, servants or subtenants, shall install, use or permit the installation or use of storage tanks or other subterranean structures, on, under or adjacent to the Premises. Tenant shall, at Tenant's sole cost and expense, comply with all Environmental Laws applicable to Tenant's operations in the Premises and the Center, and make all submissions to, provide all information required by, and comply with all requirements of all Environmental Authorities. If there is any Release or transportation by Tenant of Hazardous Materials at or from the Premises or the Center, or which arises at any time from Tenant's use or occupancy of the Premises or the Center, and Landlord, any Environmental Authority or any third party demands that a remediation be undertaken, then Tenant, at Tenant's

sole cost and expense, shall prepare and submit remediation plans for the demanding party's approval, and Tenant shall carry out all such remediation in accordance with such approved plans. In addition, Tenant shall promptly provide all information regarding the Release or transportation of Hazardous Materials that is requested by Landlord. If remediation is required by Tenant pursuant to the provisions of this Article, then Tenant shall continue to pay any and all Rent that comes due during such remediation and no abatement of Rent shall apply. If Tenant fails to fulfill or begin to fulfill any obligation imposed under this Section within 30 days after receipt of written notice from Landlord, Landlord may, in its sole discretion, undertake the remediation of such Hazardous Materials from the Premises and/or the Center, in which event Tenant shall cooperate with Landlord in order to prepare all documents Landlord deems necessary or appropriate to determine the applicability of the Environmental Laws to the Premises and the Center, and Tenant's use thereof and for compliance therewith. In addition, Tenant shall execute all documents promptly upon Landlord's request, and reimburse Landlord for all reasonable expenses incurred by Landlord in fulfilling Tenant's obligations set forth in this Section, together with an additional amount equal to 25% of such expenses, within ten days after receipt of an invoice therefor. Notwithstanding the foregoing, Tenant shall have no obligation to undertake any remediation or incur any costs or expenses (as required in this Section) as a result of Hazardous Materials **(A)** existing in the Premises on or before the Delivery Date and not Released by Tenant, or its agents, employees, contractors, servants, subtenants, concessionaires or invitees; or **(B)** Released in the Premises or the Center by Landlord, its agents, contractors or employees.

32.3 **Tenant Indemnification**. Tenant shall indemnify, protect and save Landlord, its officers, members, managers, agents and servants, and any Encumbrance Holder and management company (collectively, "**Landlord's Indemnitees**"), harmless for, from and against any and all damages, losses, liabilities, obligations, penalties, claims, litigation, proceedings or expenses of any kind or of any nature whatsoever (including reasonable attorneys' and experts' fees and disbursements), which may at any time be imposed upon, incurred by or asserted or awarded against Landlord or any of the Landlord Indemnitees, arising out of, or in anyway connected with, any breach or violation of the requirements set forth in this Article by Tenant or any of its agents, employees, contractors, servants, subtenants, concessionaires or invitees. In connection with Tenant's indemnification hereunder: **(A)** upon receipt of written notice from Landlord, Tenant agrees to defend any claim or demand brought, or any action, petition, or order filed, against Landlord or the Landlord Indemnitees by counsel reasonably satisfactory to Landlord, whether any such claim or action is rightfully or wrongfully brought or filed; and Tenant shall pay all reasonable expenses incurred in connection with defending against such action or proceeding; and **(B)** Tenant shall pay, satisfy and discharge any judgments, liens, orders or decrees which may be recovered or filed against Landlord, or any of the Landlord Indemnitees, arising out of any such claim, demand, action, petition or order.

32.4 **Survival**. The provisions of this Article shall extend to and be enforceable by Landlord's liability, health, disability and worker's compensation insurers, and shall survive the expiration or sooner termination of the Term.

ARTICLE 33

Security Deposit; Conflicts; Access; Relationship; Headings & Miscellaneous

33.1 **Security Deposit**. On or before the Effective Date, Tenant shall deposit with Landlord the sum specified in **ITEM 13** of the Cover Sheet (the "**Security Deposit**"). The Security Deposit shall be held by Landlord without liability for interest as security for the faithful performance by

Tenant of all of its obligations under this Lease. The Security Deposit shall not be mortgaged, assigned, transferred or encumbered by Tenant without the prior written consent of Landlord and any such act on the part of Tenant shall be without force and effect and shall not be binding upon Landlord. If any of the Rent or any other sum payable by Tenant to Landlord hereunder shall be overdue and unpaid or paid by Landlord on behalf of Tenant, or if Tenant shall fail to perform any of its obligations under this Lease, then Landlord may, at its option and without prejudice to any other remedy which Landlord may have on account thereof, appropriate and apply said entire Security Deposit, or so much thereof as may be necessary to compensate Landlord for Minimum Rent, Percentage Rent, Additional Rent, loss or damage sustained by Landlord as a result thereof, and Tenant shall forthwith upon demand restore the Security Deposit to the original sum deposited. Should Tenant comply with all of said obligations and promptly pay all the rentals when due and all other sums payable by Tenant to Landlord, at the end of the first Lease Year said Security Deposit will be released by Landlord and applied toward the next month's Minimum Rental. In the event of bankruptcy or other debtor-creditor proceedings against Tenant, as specified in **Article 20**, the Security Deposit shall be deemed to be applied first to the payment of rental and other charges due Landlord for the earliest periods prior to the filing of such proceedings. Landlord may deliver the Security Deposit to the purchaser or assignee of Landlord's interest in the Premises in the event that such interest is transferred and thereupon Landlord shall be discharged from any further liability with respect to the Security Deposit. This Section shall also apply to any subsequent transfer of Landlord's interest in the Premises.

33.2 **Governing Item**. Notwithstanding anything contained in the Lease to the contrary, in the event of a conflict between Tenant's approved Construction Documents, as set forth in **Exhibit B-2**, and the terms and conditions of this Lease, including, but not limited to, **Exhibit B-2**, Tenant's approved Construction Documents, as approved by Landlord in accordance with **Exhibit B-2**, shall govern.

33.3 **Landlord Access to Rent**. Landlord may, at any time during the last 12 months of the Term, upon reasonable notice to Tenant, enter the Premises at all reasonable hours for the purpose of offering them for rent and may place and keep on the windows and doors of the Premises signs advertising the Premises for rent.

33.4 **Relationship**. Nothing contained herein shall be deemed or construed by the parties hereto, nor by any third party, as creating a relationship between the parties hereto other than the relationship of landlord and tenant.

33.5 **Submission**. The submission of this Lease for examination does not constitute a reservation or any option for the Premises and this Lease becomes effective only upon its execution and delivery by both parties hereto.

33.6 **Headings**. The Article headings used throughout this Lease are for convenience and reference only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Lease.

33.7 **Construction**. Whenever herein the singular number is used, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders. The captions, section numbers, article numbers, and index appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such sections or articles of this Lease nor in any way affect this Lease.

33.8 **Independent Covenants**. The doctrine of independent covenants shall apply in all matters relating to this Lease including, without limitation, all obligations of Landlord and Tenant to perform their respective obligations under this Lease. All obligations of Tenant which by their nature involve performance after the end of the Term, or which cannot be ascertained to have been performed until after the end of the Term of this Lease, shall survive the expiration or earlier termination of this Lease.

33.9 **Holiday Lights**. Tenant agrees to allow Landlord's representative to install and maintain holiday lights on the Premises during the holiday season, as long as such lights shall not interfere with Tenant's signs or obstruct Tenant's entrance. During the holiday season, holiday lights may be placed upon the outline of the roofline of the buildings located at the Center.

33.10 **Financial Statement**. Upon Landlord's request, Tenant agrees to provide Landlord with a true and correct "**Financial Statement**" (as defined in this Section) of Tenant and any Guarantors of the Lease within 15 days after Landlord's request of such a Financial Statement. If Landlord, in its reasonable discretion, determines that the creditworthiness or financial status of Tenant falls below a level then acceptable to Landlord at any time during that period following the Delivery Date but prior to Tenant's opening for business; or in the event that a bankruptcy proceeding is filed by or against Tenant; or if Tenant breaches the Lease; or, if Tenant dies (if an individual); then Landlord may, at any time and upon 30 days notice, terminate this Lease. For purposes of this Section, Tenant's "**Financial Statement**" shall include the following documents: **(A)** a balance sheet; **(B)** an income statement; **(C)** a statement of cash flows; and **(D)** a statement of owner's equity.

33.11 **Time of Essence & Binding Nature**. Time is of the essence of all of the terms and provisions of this Lease, and the terms and conditions hereof shall extend to and be binding upon the heirs, executors, successors and assigns of the parties hereto and mention of the singular shall include the plural and the plural shall include the singular.

33.12 **Memorandum of Lease**. Neither party shall record any memorandum of this Lease, except in accordance with the foregoing provisions. Tenant shall not record this Lease without the consent of the Landlord, which may be withheld for any reason whatsoever, in Landlord's absolute discretion. At the request of either party, the parties shall execute and deliver a recordable memorandum of lease in a form reasonably acceptable to Landlord and Tenant. The requesting party shall be responsible for all recording costs.

33.13 **Trial Waiver**.

THE PARTIES HERETO IRREVOCABLY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER PARTY AGAINST THE OTHER ON ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, OR TENANT'S USE AND OCCUPANCY OF THE PREMISES.

33.14 **Governing Law**. This Lease shall be subject to the laws of the State.

33.15 **Attorneys' Fees**. In the event either party to this Lease brings any legal action to enforce the provisions hereof, the prevailing party in any such action shall be entitled to recover from the non-prevailing party all attorneys' fees and other fees and costs incurred by such prevailing party in connection with any such action.

33.16 **Force Majeure**. In the event either party hereto shall be delayed or hindered in or prevented from the performance of any act required under this Lease by reason of strikes, lockouts, labor troubles, acts of God, inclement weather, including periods of rain, inability to procure materials, failure of power, restrictive governmental law or regulations, riots, insurrections, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease ("**Force Majeure**"), then performance of such act shall be excused for the number of calendar days of such delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. No delay under this Section shall be effective unless Landlord or Tenant shall have notified the other of the delay within 20 days after cessation of the event giving rise to such delay setting forth the nature of such Force Majeure and the duration of such delay. The provisions of this Section shall not: **(A)** operate to excuse Tenant from prompt payment of Minimum Rent, Additional Rent or any other payment required by the terms of this Lease; nor **(B)** be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds.

33.17 **Relocation**. At any time during the Term of this Lease, upon at least 30 days prior notice to Tenant ("**Notice of Relocation**"), Landlord may require Tenant to relocate to another lease space of approximately the same size as the Premises within the Center ("**Relocation Space**"). Landlord shall, at its cost and expense, complete construction of the Relocation Space on a "turn key" basis substantially similar to the then existing Premises. Landlord shall pay all reasonable out-of-pocket expenses of any such relocation, including the expenses of moving and reconstruction of all Tenant-furnished improvements (if any) and Landlord-furnished improvements (if any) at the Premises. In the event the Relocation Space is larger than the Premises, the Minimum Rent and additional charges due under this Lease shall not be altered; however, in the event the Relocation Space is smaller than the Premises, the Minimum Rent and all additional charges shall be proportionately reduced based upon the Floor Area of the Relocation Space. Except for the reduction (if any) in Minimum Rent and additional charges, upon Tenant's relocation to the Relocation Space, all of the terms, covenants and conditions of this Lease shall continue unchanged and in full force and effect, except that a drawing of the Relocation Space shall be substituted for the drawing of the Premises set forth on **Exhibit A**, and thenceforth the Relocation Space shall be deemed for all purposes to be the Premises. Failure by Tenant to relocate to the Relocation Space following construction of same by Landlord shall constitute an Event of Default hereunder and Landlord shall be entitled to all remedies available to it under the terms of this Lease or at law or equity and Tenant shall be liable for all costs incurred by Landlord in constructing the improvements at the Relocation Space.

33.18 **Guaranty**. This Lease is guaranteed by the parties set forth in **ITEM 12** of the Cover Sheet, and such Guarantor(s) shall execute a Guaranty in the form attached hereto as **Exhibit E** ("**Form of Lease Guaranty**"). If Landlord, in its sole discretion, determines that the creditworthiness or financial status of Guarantor falls below a level then acceptable to Landlord, or a bankruptcy proceeding is filed by or against a Guarantor, or if the Guarantor defaults under the Guaranty or if the Guarantor dies (if an individual), Landlord may at any time upon demand, require Tenant to deliver additional or different security for this Lease, and if Tenant fails to provide such additional or different security, Landlord may terminate this Lease with 30 days notice.

33.19 **Tenant Liability; Authority**. If this Lease is executed by more than one person or entity as "**Tenant**", each such person or entity shall be jointly and severally liable hereunder. It is expressly understood that any one of the parties who have executed this Lease as "**Tenant**" (herein individually referred to as "**Signatory**") shall be empowered to execute any modification,

amendment, exhibit, floor plan, or other document ("**Future Instrument**") and bind each such Signatory who has executed this Lease regardless of whether each Signatory, in fact, executes such Future Instrument. If Tenant is a corporation, limited liability company or partnership, each individual executing this Lease on behalf of such entity represents and warrants that he/she is duly authorized to execute and deliver this Lease on behalf of said entity, in accordance with the organizational documents of said entity, and that this Lease is binding upon said entity.

33.20 **Homeland Security**. Tenant represents, certifies and warrants to Landlord as follows: **(A)** Tenant is not named by, and is not acting, directly or indirectly, for or on behalf of any person, group, entity or nation named by, any Executive Order, including without limitation Executive Order 13224, or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person," or other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enacted, enforced or administered by the Office of Foreign Assets Control; **(B)** Tenant is not engaged in this transaction, directly or indirectly, for or on behalf of, or instigating or facilitating this transaction, directly or indirectly on behalf of, any such person, group, entity or nation; and **(C)** none of the proceeds used to pay Minimum Rent and Additional Rent have been or will be derived from a "specified unlawful activity" as defined in, and Tenant is not otherwise in violation of, the Money Laundering Control Act of 1986, as amended, or any other applicable laws regarding money laundering activities. Furthermore, Tenant agrees to immediately notify Landlord if Tenant was, is, or in the future becomes a "senior foreign political figure," or an immediate family member or close associate of a "senior foreign political figure," within the meaning of Section 312 of the USA PATRIOT Act of 2001. Notwithstanding anything in this Lease to the contrary, Tenant acknowledges and agrees that this Lease is a continuing transaction and that the foregoing representations, certifications and warranties are ongoing and shall be and remain true and in full force and effect on the date hereof and throughout the Term and that any breach thereof shall constitute an automatic Event of Default giving rise to Landlord's remedies and Tenant agrees to indemnify, defend and hold harmless Landlord and Landlord's management agent from and against all losses, damages, costs and expenses resulting from or relating to any breach of the foregoing representations, certification and warranties.

33.21 **Limitation of Landlord's Liability**. Notwithstanding any other provision of this Lease, Tenant agrees that neither Landlord nor any of Landlord's officers, directors, partners, shareholders, members or employees shall have any personal liability hereunder. Additionally, notwithstanding anything in this Lease to the contrary, in no event shall Landlord ever be liable to Tenant for consequential damages or special damages.

33.22 **Legal Representation of the Parties**. This Lease was negotiated by the Parties hereto with the benefit of legal representation and any rules of construction or interpretation otherwise requiring this Lease to be construed or interpreted against any party shall not apply to any construction or interpretation hereof or thereof.

33.23 **Agreement; Amendment**. This Lease (including all Riders, Exhibits, Addenda and Guaranty, if any) is the complete agreement between Landlord and Tenant concerning the Premises and the Center. There are no oral agreements, understandings, promises or representations between Landlord and Tenant affecting this Lease. All prior negotiations and understandings, if any, between the parties hereto with respect to the Premises and the Center, shall be of no force or effect and shall not be used to interpret this Lease. This Lease shall not be amended, changed or extended except by written instrument signed by both parties hereto. This Lease shall be considered to have been executed by a person if there exists a photocopy, facsimile copy, or a photocopy of a facsimile copy of an original hereof or of a counterpart hereof which has

been signed by such person. Any photocopy, facsimile copy, or photocopy of facsimile copy of this Lease or a counterpart hereof shall be admissible into evidence in any proceeding as though it were an original.

33.24 **Subsequent Commencement**. This Lease shall be effective as of the day and year first above written notwithstanding that the Term shall commence at a date subsequent thereto and Landlord and Tenant intend that each shall have vested rights immediately upon the full execution signing of this Lease and that this Lease shall be fully binding and in full force and effect from and after execution hereof by the last to sign of Landlord and Tenant.

33.25 **Severability**. If any provision of this Lease or the application of it to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease shall not be affected thereby and each provision of the Lease shall be valid and enforceable to the fullest extent permitted by law, and the remaining provisions of this Lease shall be interpreted so as to nearly as possible conform to the intent of the parties as indicated in this Lease.

33.26 **Conflict of Interest**. The Landlord may cancel this Lease pursuant to ARIZ. REV. STAT. § 38-511 without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting, or creating the Lease on behalf of the Landlord is, at any time while the Lease or any extension of the Lease is in effect, an employee of the Tenant in any capacity or a consultant to the Tenant with respect to the subject matter of the Lease. The cancellation shall be effective when written notice from the Landlord is received by the Tenant, unless the notice specifies a later time.

33.27 **Incorporation of Exhibits**. All Exhibits identified in this Lease, including, but not limited to the following listed Exhibits, shall be and are hereby incorporated into this Lease by this reference:

EXHIBIT A	SITE PLAN
EXHIBIT B-1	DELIVERY DATE CERTIFICATE
EXHIBIT B-2	CONSTRUCTION GUIDELINES
EXHIBIT C	CENTER RULES AND REGULATIONS
EXHIBIT D	FORM OF COMMENCEMENT DATE MEMORANDUM
EXHIBIT E	FORM OF LEASE GUARANTY

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the undersigned parties have executed this Lease the day and year first above written.

LANDLORD:

CITY OF AVONDALE,
an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Date Executed: _____

ATTEST:

_____
Carmen Martinez, City Clerk

TENANT:

GROUND CONTROL COFFEE AND WINE BAR, LLC,
an Arizona limited liability company

By: _____

Name: _____

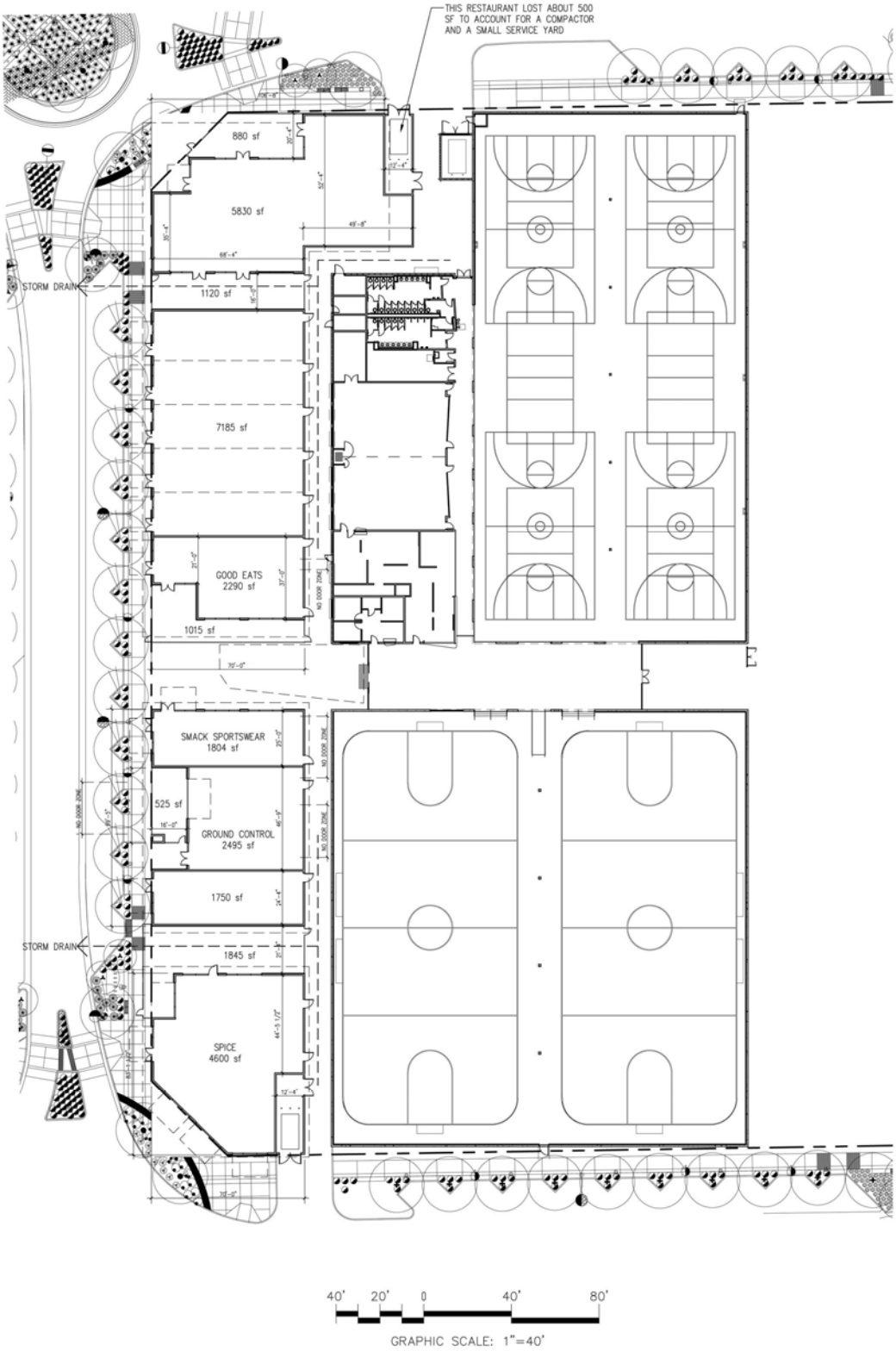
Title: _____

Date Executed: _____

EXHIBIT A

SITE PLAN

Tenant hereby acknowledges that the attached Site Plan is intended to show the approximate layout of the Center and location of the Premises, and Landlord has the right at any time to expand, reduce, remove, demolish, renovate or construct any existing or new improvements in the Center, including, without limitation, the right to change the shape, size, configuration, number, design or extent of such improvements, provided the approximate location, size and configuration of the Premises shall not be materially changed.



AVONDALE SPORTS CENTER RETAIL

16.FEBRUARY.2010

SMITHGROUP

RA2:smc 113463.9 12/30/2010

EXHIBIT B-1

DELIVERY DATE CERTIFICATE

[To Be Attached]

EXHIBIT B-2

CONSTRUCTION GUIDELINES

THIS **EXHIBIT B-2** (the "**Construction Guidelines**") supplements the Lease to which it is attached and is incorporated therein as if set out in full. In the event of a conflict between the terms of this **Exhibit B-2** and the Lease, this **Exhibit B-2** shall control. Capitalized terms not defined in this **Exhibit B-2** shall have the meanings given to such terms in the Lease.

1. **Landlord's Work.** Landlord shall, at its own cost and expense, perform only the work described as "**Landlord's Work**" in **ITEM 11** of the Lease. Landlord has made no representations or warranties regarding the condition of the Premises or the Center, except as expressly set forth in this Lease.

2. **Tenant's Work.** Tenant shall, at its own cost and expense, perform all work described as "**Tenant's Work**" in **ITEM 11** of the Lease in addition to all work not described as "**Landlord's Work**" in the Lease necessary to complete the Premises and to prepare them for the operation of Tenant's business therein (collectively, "**Tenant's Work**"). The parties acknowledge that Tenant will be required to comply with the public procurement laws for each contract to be entered into by Tenant in connection with the construction of Tenant Improvements, consistent with the obligations of ARIZ. REV. STAT. §§ 34-201 et seq. Tenant agrees that all Leasehold Improvements to the Premises shall, upon installation, become the property of Landlord and shall remain upon the Premises upon the expiration or earlier termination of this Lease. Tenant shall not do anything upon or in connection with the Premises or the construction of any part thereof which interferes in any way with, or results in a work stoppage in connection with, construction of any part of the Center or any other tenant's space.

3. **Plans and Specifications.**

3.1 **Tenant's Drawings.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of store finish drawings ("**Tenant's Drawings**") by December 1, 2010.

3.2 **Approval of Tenant's Drawings**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Drawings, specifying in detail any reasons for disapproval. If Tenant's Drawings are disapproved, Tenant shall incorporate Landlord's comments and resubmit Tenant's Drawings to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Drawings to approve or disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Drawings.

3.3 **Construction Documents.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of construction plans and specifications ("**Construction Documents**") by December 1, 2010. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.4 **Approval of Construction Documents**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Construction Documents, specifying in detail any reasons for disapproval. If Tenant's Construction Documents are disapproved, Tenant shall incorporate Landlord's comments and resubmit Tenant's Construction Documents to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Construction Documents to approve or

disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Construction Documents. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.5 **Tenant's Architect/Engineer.** Tenant shall cause all architects and engineers engaged by Tenant (each a "**Professional**") to obtain and keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), a policy of professional liability insurance covering all liability arising out of any negligent acts or errors and omissions committed by such Professional with limits of not less than $1,000,000.00 per claim and annual aggregate, with a retroactive date prior to the contract date. Each Professional shall maintain such policy for a minimum of two years after completion of work or shall obtain a two-year extended reporting period if the policy is canceled or non-renewed.

4. **Tenant's Contractor.** All contractors engaged by Tenant shall be bondable, licensed contractors, having good labor relations, and capable of performing quality workmanship and working in harmony with Landlord's contractors and other contractors on the job. The term "contractors" as used in this Section shall be deemed to include subcontractors. The City shall have the absolute right to review contractor plans, bids, and estimated costs and, in its reasonable discretion, the City may approve or disapprove Tenant's Contractor, specifying in detail any reasons for disapproval. If the Tenant's Contractor is not approved, the City has authority to solicit a different contractor to perform any and all work according to the specifications of this lease.

4.1 **Insurance.** On or before entry into the Premises, Tenant shall cause its contractor to obtain and to keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), until Tenant's Work is completed, all of the following insurance:

A. **Commercial General Liability Insurance.** Commercial general liability insurance to protect against claims for bodily injury and property damage arising out of premises operations, products, and completed operations, and advertising and personal injury liability, written on an occurrence basis using ISO Form CG0001 (or its equivalent) with no amendments to the definition of an insured contract, in limits of not less than $1,000,000.00 inclusive, per occurrence, and $1,000,000.00 annual aggregate per project, or such higher limits as Landlord may require from time to time during the Term. Completed Operations to remain in force for at least two years following project completion. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

B. **Commercial Automobile Liability Insurance.** Commercial automobile liability insurance to include contractual liability insurance for the indemnities set forth in this contract covering all owned, non-owned and hired automobiles, in limits of not less than $1,000,000.00 combined single limit (each accident), or such higher limits as Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

C. **Employer's Liability Insurance and Workers Compensation.** Employer's Liability insurance, with minimum limits of not less than $500,000 bodily injury each accident, $500,000.00 bodily injury by disease policy limit and $500,000.00 bodily injury by disease each employee, and Worker's Compensation, in form and amount as required by applicable state law. To the extent permitted by applicable law, such policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

D. **Umbrella Liability Insurance.** Umbrella liability insurance over the primary general liability, automobile liability and employer's liability insurance policies in limits of not less than $5,000,000.00 inclusive per occurrence, and $5,000,000.00 annual aggregate, per project, or such higher limits as Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

E. **Builder's Risk Insurance.** Builder's Risk insurance on a "Special Form" basis (including collapse) using a completed value (non-reporting) form for full replacement cost covering all work which Tenant contracts for or performs in the Center and all materials and equipment used or installed by Tenant in or about the Premises, off site and in transit. This insurance shall include: (1) interests of Tenant, Landlord, Landlord's property manager, all mortgagees of Landlord, Tenant's contractor, subcontractors and sub-subcontractors; and (2) a mutual release and waiver of subrogation for all parties.

F. **Insurance Changes.** Landlord may require, from time to time, changes or endorsements to Tenant's contractor insurance required herein.

4.2 **Policies of Insurance.** Tenant's contractor shall have right to satisfy the insurance required by this Section by means of blanket insurance policy(ies), provided that no other loss which may also be insured by the blanket insurance shall affect the insurance coverages required hereunder and further provided that Tenant's contractor delivers to Landlord a certificate specifically stating that such coverages apply to Landlord, Landlord's property manager, all mortgagees of Landlord, the Premises and the Center. All policies of insurance or certificates thereof, except with respect to workers compensation or professional liability, shall name Tenant, Landlord, Landlord's property manager, and all mortgagees of Landlord, as additional insureds, as their respective interests may appear, including products and completed operations. All self insured retentions and deductible amounts shall be subject to Landlord's prior written approval. Any and all deductibles or coinsurance in the above-described policies or inadequacy of limits for coverage shall be assumed by, for the account of, and at Tenant's contractor sole risk. Prior to commencing any work under this Agreement, Tenant will provide Landlord with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Tenant’s insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Landlord shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations

of this Agreement. Tenant agrees to further provide Landlord evidence of renewals of policies not later than 30 days prior to the end of the expiring term. All policies of insurance carried by Tenant's contractor shall be primary and non-contributing in the event of any loss or damage with any insurance required to be maintained by Tenant's contractor under the terms of this Lease. All policies and certificates shall notify Tenant, Landlord and any mortgagee of Landlord, in writing, not less than 30 days before any lapse, non-renewal or cancellation, including cancellation for nonpayment of premium, or other termination thereof and shall include a clause or endorsement denying the insurer any rights or subrogation against Tenant and Landlord, Landlord's property manager, and all mortgagees of Landlord. Landlord reserves the right to request and receive for review certified copies of any and all insurance policies to which the Lease is applicable. The required coverage and or limits referred to and set forth herein shall in no way affect or limit Tenant's contractor's liability with respect to its performance.

4.3 **Conditions to Commencement of Tenant's Work.** On or before entry into the Premises, Tenant shall cause its contractor to: **(A)** review the plans and specifications (including all exhibits, addendums or riders thereto); **(B)** review other related data including "**technical data**"; **(C)** inspect the Premises; and **(D)** obtain all governmental permits and approvals and pay any associated tax (including, but not limited to, excise tax) to complete Tenant's Work and forward copies to Landlord.

4.4 **Construction of Tenant's Work.** Tenant shall cause its contractor: **(A)** to construct Tenant's Work strictly in accordance with Landlord approved plans and specifications and changes thereto which are stamped approved by Landlord's architect; **(B)** to advise Landlord immediately of any requested change from the plans and specifications; **(C)** to keep a Landlord approved original set of plans and specifications at the job site at all times; and **(D)** not to leave the job site until Landlord's and Tenant's punchlist items are complete, all damage is repaired and the site is free of debris and all unused materials are removed. Daily site clean up is required.

4.5 **Contractor Deposit.** Prior to commencement of construction, Tenant or Tenant's contractor shall deposit with Landlord the amount of $5,000.00 for the Premises as a damage/repair/clean-up deposit (the "**Contractor Deposit**"). Landlord may utilize the Contractor Deposit if Tenant's contractor does not repair damage to the property, damages the property, does not complete punchlist items or does not clean-up their construction site as required or otherwise fulfill the obligations of this Section. Should Landlord be required to complete any work to be completed by Tenant's contractor, including, but not limited to, cleanup, painting, punchlist items, etc., Tenant shall pay Landlord the cost of such work, together with an amount equal to 25%, within 20 days after receipt of an invoice therefor. Any items borrowed from Landlord shall be documented.

4.6 **Damage to Equipment.** Tenant agrees that Landlord shall not be liable and Tenant shall indemnify Landlord against any damage to Tenant's contractor or contractor's employee's property, or any equipment entrusted to Tenant's contractor by others, and for the loss of or damage to any of Tenant's contractor's property or equipment by theft or otherwise, unless caused by Landlord's gross negligence or willful misconduct.

4.7 **Violations by Tenant's Contractors**. In addition to application of the Contractor Deposit, and any and all remedies at law or equity, in the event Tenant's contractor violates the requirements of this Exhibit, Landlord, upon five days notice, may order Tenant's contractors to remove themselves, their equipment and their employees from Landlord's

property. Notwithstanding the foregoing, in the event Tenant's contractor violates the requirements of this Exhibit on two occasions, as to the third such occasion, Landlord shall not be required to give notice to Tenant and may order Tenant's contractors to remove themselves, their equipment and their employees from the Center.

5. **Allowance**. In consideration of the performance by Tenant of Tenant's Work in the Premises and the timely fulfillment of all of the terms of this Lease, Landlord agrees to pay to Tenant the Construction Allowance, up to a maximum of $270,000, applicable to the "**hard costs**" (as defined below) for Tenant's permanent leasehold improvements for the Premises. For this purpose, "**hard costs**" shall mean and refer only to the cost of labor and materials incorporated into the Premises as permanent leasehold improvements, and shall not include, without limitation, any so called "**soft costs**," design/architectural/engineering fees or the cost of Tenant's trade fixtures, inventory, personal property or any other property constituting "**Tenant's Property**" (as defined in the Lease). The Construction Allowance shall be applicable only to Tenant's Work actually performed and completed to the Premises and shall be paid within 30 days after **all** of the flowing:

5.1 **Opened.** Tenant has opened for business in the Premises as required by this Lease and has paid to Landlord the first and any subsequently owed Rent payment(s) or other amounts due under this Lease.

5.2 **Commencement Date Memorandum.** Tenant has executed and delivered to Landlord a Commencement Date Memorandum in the form attached to the Lease as **Exhibit D**;

5.3 **No Default.** Tenant is not in default after notice and the lapse of any applicable cure period.

5.4 **Work Completed**. Tenant's Work is completed in accordance with approved Construction Documents.

5.5 **Debris.** The Premises and the Common Areas surrounding the Premises are free of Tenant's debris, all contractor equipment and materials have been removed from the Premises, and any damage to the Center or the Common Areas caused by Tenant, its agents or contractors, has been repaired.

5.6 **Liens, Judgments, Levies, or Tax Liens**. The Premises, including all installations therein, are free and clear of all liens and there are no judgments, levies, attachments, liens or tax liens pending or in effect with respect to Tenant's Work in the Premises.

5.7 **Required Documentation.** Tenant has submitted the following completed documentation to Landlord:

A. **Lien Waivers.** Full, final and unconditional lien waivers and releases in favor of Landlord, Landlord's lender, any proposed purchaser, or any other person/entity reasonably requested by Landlord, from Tenant's general contractor and from all Tenant's subcontractors having contracts in excess of $5,000.00.

B. **Certificates.** A copy of the permanent Certificate of Occupancy and any temporary Certificates of Occupancy.

C. **Contractor's Final Billing.** A copy of the final billing from Tenant's general contractor (broken down in reasonable detail and showing the cost of work performed at the Premises adequate to componentized for tax purposes under either generally accepted accounting principles or Internal Revenue guidelines).

D. **Architect Certificate.** Tenant's architect's certificate certifying that Tenant's Work is completed in accordance with the approved Construction Documents, including all items on Landlord's representative's punch list.

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EXHIBIT C

CENTER RULES AND REGULATIONS

Landlord agrees to use its reasonable efforts to cause compliance by tenants of the Center with these Rules and Regulations, as they may be revised or amended by Landlord from time to time in its commercially reasonable discretion (as amended, the "**Rules and Regulations**"), but in no event shall Landlord be responsible for the violation or nonperformance of any of these Rules and Regulations by any other tenant. Unless otherwise provided, all terms used in these Rules and Regulations shall have the same meaning as set forth in this Lease. To the extent that the provisions of these Rules and Regulations are inconsistent with the provisions of this Lease, the provisions of the Lease shall control. In the event Tenant violates any of the Rules and Regulations and such violation continues for more than 24 hours after Tenant's receipt of notice thereof from Landlord, then Tenant shall pay Landlord, as liquidated damages, an amount equal to $50.00 per day so long as such violation continues. Tenant recognizes that its violation of the Rules and Regulations will result in damages to Landlord and that the nature and amount of such damages is difficult or impossible to quantify, and that the foregoing amount represents a reasonable approximation of the actual damages Landlord would suffer in the event Tenant violates the Rules and Regulations.

1. **Business Hours.** Unless otherwise specified in this Lease, Tenant agrees to remain open for the standard Center business hours as determined by Landlord from time to time.

2. **Common Areas.** Tenant shall not use the Common Areas, including areas adjacent to the Premises (except any outdoor seating area approved by Landlord pursuant to Section 9 below), for any purpose other than ingress and egress, and in accordance with all other applicable provisions of this Lease, including these Rules and Regulations. Without limiting the generality of the foregoing, Tenant shall not use the Common Areas to canvass, solicit business or information from, or distribute any article or material to, other tenants, occupants or invitees of the Center, without the express written consent of Landlord. Tenant shall not allow anything to remain in or to obstruct any passageway, sidewalk, court, corridor, stairway, entrance, exit, elevator, shipping area, or other area outside the Premises (except as set forth in Section 9 below). Janitorial closets, utility closets, telephone closets, broom closets, electrical closets, storage closets, and other such closets, rooms and areas shall be used only for the purposes and in the manner designated by Landlord, and may not be used by Tenant, or its contractors, agents, employees, or other parties without Landlord's prior written consent.

3. **No Outside Sales; Loading Areas.** Tenant agrees not to use any portion of the Common Areas for sale or display of any merchandise or any other business, occupation, undertaking or solicitation of customers and further agrees to receive or ship articles of any kind only through loading areas as designated by Landlord.

4. **Deliveries.** Deliveries of furniture, inventory and all other items shall be brought into the Center in compliance with all Legal Requirements and at Tenant's sole risk. All such deliveries shall be made prior to 10:00 am and only through the service entrances of Tenant's Premises and service entrances of the Center, when available. Landlord may inspect items brought into the Center or Premises with respect to weight or dangerous nature or compliance with this Lease or applicable laws. Tenant shall move all inventories, supplies, furniture, equipment and other items directly into the Premises immediately upon receipt.

5. **Trash; Recycling Program.** All garbage, refuse, trash and other waste shall be kept in the kind of container, placed in the areas, and prepared for collection in the manner and at the times and places specified by Landlord, subject to the Section in the Lease concerning Hazardous Substances. Tenant shall not burn any trash or garbage of any kind in or about the Premises or Center. Landlord reserves the right to require that Tenant participate in any recycling program designated by Landlord. If Tenant is permitted under this Lease to handle foodstuffs, garbage and refuse shall be stored and daily removed from the Premises in leak proof, airtight containers. If any leakage occurs, Tenant shall promptly clean and remove any evidence of such leakage at its expense. Tenant shall immediately clean up and remove spills and debris in connection with its disposal of waste at or from the Premises.

6. **Pest Control.** Tenant shall, at its sole cost, arrange for pest control at such intervals as may reasonably be required by Landlord. Tenant shall provide Landlord with evidence of Tenant's compliance with this provision within five days after Landlord's written request. If, however, Landlord shall provide or arrange for such pest control, Tenant shall pay to Landlord Tenant's Proportionate Share of the cost thereof (or such other share as Landlord may fairly and reasonably determine) on or before the first day of each calendar month in advance, or Landlord may include such charges in Operating Costs**.**

7. **Sign and Display Windows.** Tenant shall not place any sign or any other item outside the Premises (including, without limitation, on the exterior walls and roof), or on the interior or exterior surfaces of doors or glass panes or windows, without the express written consent of Landlord. Tenant shall not install within the Premises any sign that is visible from outside the Premises or that is illuminated, without Landlord's prior written approval. If Landlord approves or requires illuminated signs, Tenant shall keep them illuminated each day during the hours designated by Landlord from time to time. All Tenant's signs shall be professionally designed, prepared and installed and in good taste so as not to detract from the general appearance of the Premises or the Center and shall comply with the sign criteria developed by Landlord as set forth in the Lease. The term "**sign**" for purposes of this Section shall mean any sign, placard, picture, name, direction, lettering, insignia, trademark, advertising material, advertising display, awning or other similar item, including Tenant's storefront sign. Blinds, shades, drapes and other such items shall not be placed in or about the windows in the Premises except to the extent, if any, that the character, shape, designs, color, material and make thereof is first approved by Landlord in writing. During such periods as Tenant is required to operate its store hereunder, Tenant shall keep the display window(s) and signs, if any, in the Premises well lit during business hours and daily until at least 11:00 p.m., at Landlord's discretion.

8. **Display of Merchandise.** Tenant shall not place or maintain any permanent or temporary fixture or other item or display any merchandise: **(A)** outside of the Premises; or **(B)** anywhere inside the Premises within six feet of any entrance to the Premises (except that, with respect to any recessed entry of the Premises, Tenant shall not place or maintain any such fixtures or other item within three feet of any entrance). All displays of merchandise shall be tasteful and professional.

9. **Outdoor Seating.** Tenant is not permitted to maintain outdoor seating without the express written consent of Landlord. Any outdoor seating area (the "**Outdoor Seating Area**"), including the placement and quantity of furniture, fixtures and equipment in, and the design and materials of, the Outdoor Seating Area, must be approved by Landlord. The Outdoor Seating Area shall be installed and maintained at Tenant's sole cost and expense, in accordance with all applicable laws and at all times clean and free of debris. When not in use, Tenant shall store the Outdoor

Seating Area furniture, fixtures and equipment in an appropriate location, which, if on the Premises, shall be approved by Landlord in the exercise of its sole and absolute discretion.

10. **Plumbing Equipment.** The toilet rooms, urinals, wash bowls, drains and sewers and other plumbing fixtures, equipment and lines shall not be misused or used for any purpose other than that for which they were constructed, and no foreign substance of any kind shall be deposited therein. The expense incurred due to any breakage, stoppage or damage resulting from a violation of this provision shall be borne by Tenant, who shall, or whose employees, invitees or agents shall, have caused such breakage, stoppage or damage.

11. **Exhaust System; Grease Traps; Odor Control.** If Tenant operates a business on the Premises in which smoke and/or odor cannot be avoided by an exhaust termination location design, Tenant shall, at Tenant's sole cost and expense, provide an exhaust air pollution control system approved by Landlord. If Tenant operates a restaurant, prior to opening for business, Tenant shall install and thereafter maintain, at Tenant's sole cost and expense, a grease containment system, approved by Landlord, and in compliance with Legal Requirements, on all roof exhaust fans serving the Premises. In addition, Tenant shall properly maintain, clean, repair and replace adequate grease traps. Landlord will install a 1100 gallon grease trap interceptor. Tenant shall clean all grease interceptors no less than four times per year. Notwithstanding anything to the contrary contained in these Rules and Regulations and the Lease, Tenant shall use reasonable and diligent efforts to promptly resolve any odor problems arising from its use of the Premises during the Term.

12. **Roof; Awnings and Projections.** Tenant shall not install any aerial, antennae, satellite dish or any other device on the roof, exterior walls or Common Areas of the Center without obtaining Landlord's prior written consent, provided that Tenant shall be permitted to install, at Tenant's sole cost and expense, cable television service to the Premises. Tenant may install and have access to the HVAC System only to the extent approved in writing or required by Landlord from time to time in connection with Tenant's obligations under this Lease. No awning or other projection shall be attached by or for Tenant to the exterior walls of the Premises or the Building. Any item set forth in this Section installed without the prior written consent of Landlord shall be subject to removal by Landlord without notice to Tenant all at Tenant's sole cost and expense.

13. **Overloading Floors.** Tenant shall not overload any floor or part thereof in the Premises, Building or Center, including any public corridors or elevators therein, and Landlord may designate the location of safes, vaults and all other heavy articles and require supplementary supports of such material and dimensions as Landlord may deem necessary to properly distribute the weight at Tenant's expense (including expenses for structural review and engineering).

14. **Locks and Keys.** Upon termination of this Lease or Tenant's right to possession, Tenant shall: **(A)** return to Landlord all keys, parking stickers or key cards, and in the event of loss of any such items, shall pay Landlord therefor; and **(B)** advise Landlord as to the combination of any vaults or locks that Landlord permits to remain in the Premises.

15. **Unattended Premises.** Before leaving the Premises unattended, Tenant shall close and securely lock all doors or other means of entry to the Premises and shut off all lights (except signs required to be illuminated hereunder), water faucets and other utilities in the Premises (except heat to the extent necessary to prevent the freezing or bursting of pipes). This provision shall not imply that Tenant may leave the Premises unattended in violation of the operating requirements set forth elsewhere in this Lease.

16. **Heating Facilities.** If the Premises are equipped with heating facilities separate from those in the remainder of the Center, Tenant shall keep the Premises at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.

17. **Food and Beverages; Game and Vending Machines.** Except to the extent expressly permitted under this Lease, Tenant shall not: **(A)** use the Premises for the manufacture, preparation, display, sale, barter, trade, gift or service of food or beverages, including, without limitation, intoxicating liquors; or **(B)** install, operate or use any video, electronic or pinball game or machine, or any coin or token operated vending machine or device to provide products, merchandise, food, beverages, candy, cigarettes or other commodities or services, including, but not limited to, pay lockers, pay toilets, scales and amusement devices; PROVIDED, HOWEVER, that Tenant may install vending machines for the sale of non-alcoholic beverages, food and candy in an area not visible from the sale area or exterior of the Premises for the exclusive use of Tenant's employees.

18. **Labor Relations.** Tenant shall conduct its labor relations and relations with employees so as to avoid strikes, picketing and boycotts of, on or about the Premises or Center. If any of Tenant's employees strike, or if picket lines or boycotts or other visible activities objectionable to Landlord are established, conducted or carried out against Tenant, its employees, agents, contractors or subcontractors in or about the Premises or Center, Tenant shall remove or cause to be removed all such employees, agents, contractors and subcontractors until the dispute has been settled.

19. **Landlord's Trade Name and Trademarks.** No symbol, design, name (other than the name of the Center in Tenant's advertising as permitted or required by this Lease), mark or insignia adopted by Landlord for the Center or picture or likeness of the Center shall be used by Tenant without the prior written consent of Landlord.

20. **Prohibited Activities.** Tenant shall not: **(A)** use strobe, flashing lights or rotating spotlights in or on the Premises (or other areas of the Center) or in any signs for the Premises; **(B)** use, sell or distribute leaflets, handbills, bumper stickers, other stickers or decals, balloons or other such articles in the Premises (or other areas of the Center); **(C)** operate any loudspeaker, telephone set, phonograph, radio, CD player or other musical or sound producing instrument or devise that can be heard outside the Premises; **(D)** operate any electrical or other device which interferes with or impairs radio, television, microwave, or other broadcasting or reception from or in the Center or elsewhere; **(E)** make or permit objectionable noise, vibration, smoke, fumes, vapors or odors to emanate from the Premises unless, in the case of smoke, fumes, vapors, or odors, Tenant installs and maintains a grease containment system or, if applicable, skin and hair salon odor control system, approved by Landlord in writing; **(F)** do or permit anything in or about the Premises or any other areas of the Center that is unlawful, immoral, obscene, pornographic, or which tends to create or maintain a nuisance or do any act tending to injure the reputation of the Center; **(G)** use or permit upon the Premises or other areas of the Center anything that violates the certificates of occupancy issued for the Premises or the Center, or causes a cancellation of Landlord's insurance policies or increases Landlord's insurance premiums (and Tenant shall comply with all requirements of Landlord's insurance carriers, the American Insurance Association, and any board of fire underwriters); **(H)** use the Premises for any purpose, or permit upon the Premises or any areas of the Center anything that may be dangerous to parties or property (including, but not limited to, flammable oils, fluids, paints, chemicals, firearms or any explosive articles or material(s); **(I)** cause, conduct, permit or advertise any auction or closing-out or wholesale business in the Premises; or any distress sale, fire sale, bankruptcy sale, liquidation, relocation sale, closing sale, going-out-of-business sale, sheriff's sale, receiver's sale, or any other sale that, in Landlord's opinion, adversely affects the reputation of the

Center or suggests that the business operations are to be discontinued in the Premises; nor **(J)** do or permit anything to be done upon the Premises or any other areas of the Center in any way tending to disturb, bother or annoy any other tenant at the Center or the occupants of neighboring property.

21. **Responsibility for Compliance.** Tenant shall be responsible for ensuring compliance with these Rules and Regulations, as they may be amended from time to time, by Tenant's employees and, as applicable, by Tenant's agents, invitees, contractors, subcontractors and suppliers.

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EXHIBIT D

FORM OF COMMENCEMENT DATE MEMORANDUM

THIS COMMENCEMENT DATE MEMORANDUM ("**Memorandum**") dated as of _____, 20__, by and between, **CITY OF AVONDALE, an Arizona municipal corporation** ("**Landlord**"), and, **GROUND CONTROL COFFEE AND WINE BAR, LLC, an Arizona limited liability company** ("**Tenant**").

RECITALS:

A. By that certain Center Lease dated as of _____ between Landlord and Tenant (the "**Lease**"), Landlord leased to Tenant and Tenant leased from Landlord the Premises, subject to the conditions and limitations therein contained.

B. **ITEM 7** of the Cover Sheet of the Lease provides that, upon determination of the Commencement Date, Landlord and Tenant shall execute a memorandum which shall set forth, among other things, the Commencement Date, the exact Floor Area of the Premises, the date when Tenant may exercise its Option Term pursuant to **ITEM 8** of the Cover Sheet of the Lease, and the date on which the initial term of the Lease shall expire (subject to Tenant's right, if any, to extend the Term of the Lease as provided therein), and shall evidence Tenant's acceptance of the Premises and agreement that Landlord has fully complied with Landlord's covenants and obligations.

C. The Commencement Date and such other dates have been determined and, accordingly, the parties desire to enter into this Memorandum.

D. Unless otherwise provided herein, all capitalized words and terms in this Memorandum shall have the same meanings ascribed to such words and terms in the Lease.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Delivery Date was _____.

2. The Commencement Date is _____. Tenant's obligation to pay Minimum Rent and other charges payable by Tenant under the Lease shall commence as of the Commencement Date set forth above.

3. The Floor Area of the Premises is _____ square feet.

4. Tenant shall exercise its right to the Option Term, if at all, before _____, subject to the conditions and limitations set forth in _____ of the Lease.

5. The date on which the initial Term of the Lease shall expire, unless such Term is extended by Tenant as provided in the Lease, is _____.

6. Tenant hereby acknowledges Tenant's acceptance of possession of the Premises and agrees that Landlord has fully complied with Landlord's covenants and obligations under the Lease.

7. Tenant acknowledges that all Rent is payable to Landlord at the following address, unless further notified:

City of Avondale
11465 W. Civic Center Drive, Suite 250
Avondale, Arizona 85323
Attn: Accounts Receivable

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

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum as of the day and year first above written.

LANDLORD:

CITY OF AVONDALE,
an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Date Executed: _____

ATTEST:

_____
Carmen Martinez, City Clerk

TENANT:

GROUND CONTROL COFFEE AND WINE BAR, LLC,
an Arizona limited liability company

By: _____

Name: _____

Title: _____

Date Executed: _____

EXHIBIT E

FORM OF LEASE GUARANTY

In order to induce _____, its successors and assigns, ("**Landlord**") to enter into that certain Lease Agreement dated _____, (the "**Lease**") between Landlord and _____, a _____, ("**Tenant**"), and in consideration of the benefits inuring to the undersigned (the "**Guarantor**") under said Lease, the receipt and sufficiency of which are represented by the Guarantor to Landlord to be sufficient and adequate, the Guarantor hereby unconditionally guarantees the performance of all of Tenant's obligations under the Lease, including, without limitation, the payment of rental as provided therein. This Guaranty shall remain in full force throughout the original lease term and any renewals thereof and any extension or renewal hereinafter agreed upon by Tenant and Landlord.

Guarantor hereby waives notice of acceptance of this Guaranty agreement and all other notices in connection herewith or in connection with the liabilities, obligations and duties guaranteed hereby, including notices to it of default by Tenant under the Lease, and hereby waives diligence, presentment, protest and suit on the part of Landlord in the enforcement of any liability, obligation or duty guaranteed hereby. Guarantor(s) hereby waive the provisions of Section 12-1641 et. seq. of the Arizona Revised Statutes.

Guarantor further agrees that Landlord shall not be first or concurrently required to enforce against Tenant or any other person, any liability, obligation or duty guaranteed hereby before seeking enforcement thereof against Guarantor. The liability of Guarantor shall not be affected by any indulgence, compromise, settlement, or variation of terms which may be extended to Tenant by Landlord, or agreed upon by Landlord or Tenant, and shall not be affected by any assignment or sublease by Tenant of its interest in the Lease, nor shall the liability of the Guarantor be affected by the insolvency, bankruptcy (voluntary or involuntary), or reorganization of Tenant, nor by the voluntary or involuntary liquidation, sale or other disposition of all or substantially all of the assets of Tenant or by action of Landlord, including but not limited to any assignment, pledge, conveyance or transfer of the Lease. Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments, or other covenants respecting the Lease as they may deem appropriate and Guarantor shall not be released thereby, but shall continue to be fully liable for the performance of all obligations and duties of Tenant under the Lease as so modified, extended or amended.

Guarantor further agrees: **(A)** to indemnify, defend and hold Landlord harmless from and against any claims, damages, expenses or losses, including to the extent permitted by law, the reasonable fees of an attorney, resulting from or arising out of any breach of the Lease or any term of the Lease by Tenant or by reason of Tenant's failure to perform any of its obligations thereunder; and **(B)** to the extent permitted by law, to pay any costs or expenses, including the reasonable fees of an attorney, incurred by Landlord in enforcing this Guaranty or the Lease. The Guarantor acknowledges that Landlord shall or may assign its rights under the Lease to anyone as security for a loan to be made by such institutional investor to Landlord OR FOR ANY OTHER REASON, and as long as any indebtedness of Landlord shall be outstanding AND/OR such assignment of the Lease shall exist, such lender or any assignee shall be entitled to bring any suit, action or proceeding against the undersigned for the enforcement of any provision of this Guaranty and it shall not be necessary in any such suit, action or proceeding to make Landlord a party thereto. This Guaranty may not be modified or amended without the prior written consent of such assignee of Landlord's interest in the Lease and any attempted modification or amendment without such consent shall be void. This Guaranty shall be

binding upon Guarantor, his heirs, legal representatives, successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns. This Guaranty shall be governed by and construed and enforced in accordance with the laws of the State of Arizona. If there is more than one Guarantor, the liability of each Guarantor shall be joint and several.

IN WITNESS WHEREOF, **Guarantor** has caused this instrument to be executed this _____ day of _____, 20__.

"**GUARANTOR**"

_____

By: _____

Address: _____

_____

SSN: _____

Date Executed: _____

CITY COUNCIL REPORT

SUBJECT:
Ordinance 1441-111 - Authorizing the Acquisition of Real Property for Public Use

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Daniel Davis, Economic Development Director (623)333-1411

THROUGH: Charlie McClendon, City Manager

PURPOSE:

To request that city council adopt an ordinance authorizing the purchase of approximately 15.36 acres of real property generally located south of City Center Drive, north of Van Buren Street and east of Avondale Boulevard from Carlos O'Brien's Scottsdale, LLC in the amount of $3,100,000 and authorize the use of General Fund Cash Balance and an interfund transfer of appropriation from the Improvement District Fund to the General Fund.

DISCUSSION:

The implementation and development of the Avondale City Center continues to be a primary Economic Development focus. The successful beginning for the American Sports Center facility is creating additional development opportunities for the city.

Staff has negotiated a Purchase and Sale Agreement for approximately 15.36 acres of property from Carlos O'Brien's Scottsdale, LLC on the adjacent property south of the American Sports Center. The agreement creates a win-win scenario for both Mr. O'Brien's and the City of Avondale. Mr. O'Brien will lease and operate a 5,600 sf Mexican Restaurant with a 1,178 sf outdoor dining patio. The restaurant will be located in the retail space in the north end-cap adjacent to American Sports Centers along 114th Avenue. The specific details of the lease agreement are summarized in a separate council report.

The proposed property acquisition will be divided into three separate parcels. The purchase of the property will secure the rights-of-way for future roadways and infrastructure improvements for the entire property. The agreement provides Mr. O'Brien the option to purchase Block A and Block C for the same cost per square foot with an annual option payment of $70,650.00. The purchase amount for Blocks A & C is $1,529,987.00 The city would retain Block B for future City Center development. As a condition of the purchase agreement, Mr. O'Brien has agreed to open and operate a second full service 6,000 sf restaurant within twelve months of the completion of the retail space on Block B.

BUDGETARY IMPACT:

The purchase of the property will require the use of general fund cash balance and an interfund transfer of $3,100,000 of appropriation from the Improvement District Fund.

RECOMMENDATION:

Staff recommends that city council adopt an ordinance authorizing the purchase of approximately 15.36 acres of real property generally located south of City Center Drive, north of Van Buren Street and east of Avondale Boulevard in the amount of $3,100,000 for municipal purposes and authorizes the use of general fund cash balance and the transfer of appropriation from the Improvement District Fund (320).

ATTACHMENTS:

Click to download

- Ordinance 1441-111

ORDINANCE NO. 1441-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, AUTHORIZING THE ACQUISITION OF REAL PROPERTY FOR PUBLIC USE.

WHEREAS, Article I, Section 3 of the Avondale City Charter authorizes the City of Avondale (the "City") to acquire real property in fee simple or any lesser interest, inside or outside its corporate limits for any City purpose, when the public convenience requires it and in accordance with the provisions of State law; and

WHEREAS, the City desires to acquire land within the Avondale City Center area to be used for future construction of public roadways and other public uses; and

WHEREAS, the City Council desires to authorize the acquisition of certain real property necessary for such public use in the Avondale City Center area.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. The recitals above are hereby incorporated as if fully set forth herein.

SECTION 2. The acquisition, by purchase, condemnation or dedication of a ± 15.363 acre parcel of real property, generally located east of Avondale Boulevard, south of Roosevelt Street, in Avondale, Arizona (the "Property"), as more particularly described and depicted in Exhibit A, attached hereto and incorporated herein by reference, is hereby authorized.

SECTION 3. In the event that a negotiated purchase cannot be reached for the Property, the City Attorney is hereby authorized to immediately initiate condemnation proceedings, including all actions necessary to enable the City to take possession of said property at the earliest possible date.

SECTION 4. If any provision of this Ordinance is for any reason held by any court of competent jurisdiction to be unenforceable, such provision of portion hereof shall be deemed separate, distinct and independent of all other provisions and such holding shall not affect the validity of the remaining portions of this Ordinance.

SECTION 5. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to take all steps and to execute all documents necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Lopez Rogers, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED AS TO FORM:

_____
Andrew J. McGuire, City Attorney

EXHIBIT A
TO
ORDINANCE NO. 1441-111

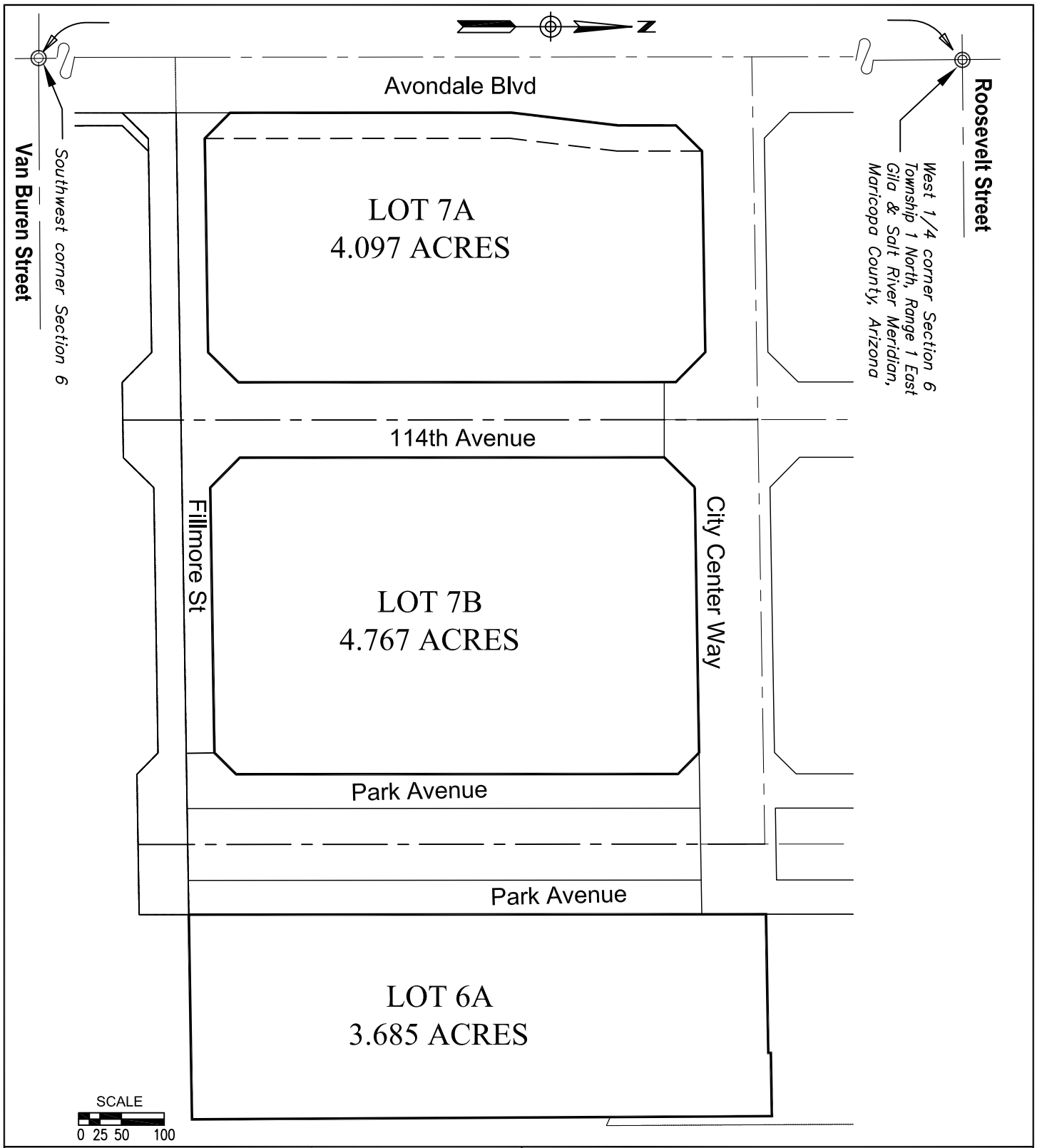
[Legal description and map of Property]

See following pages.

Avondale City Center Phase 2
O'Brien Parcels

Legal Description

Lot 6 and Lot 7 of Avondale City Center Phase 1, as recorded in Book 1027 page 31 of the Official Records of Maricopa County Recorder, Maricopa County, Arizona being situated in the Southwest Quarter of Section 6, Township 1 North Range 1 East of the Gila and Salt River Meridian, Maricopa County, Arizona.



City of Avondale

ENGINEERING DEPARTMENT

EXHIBIT MAP
Avondale City Center Phase 2
O'Brian's Net Parcel Areas

DATE: 11-10-2010
DSN:
DRN. LS
CHK:

PROJECT NAME
Avondale City Center

PAGE
1 OF 1

CITY COUNCIL REPORT

SUBJECT:
Lease Agreement - Carlos O'Brien's Scottsdale, LLC

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Daniel Davis

THROUGH: Charlie McClendon, City Manager

PURPOSE:

Staff is requesting that the City Council approve a Lease Agreement with Carlos O'Brien's Scottsdale, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents and authorize the use and transfer of contingency funds.

BACKGROUND:

The City of Avondale initiated the development of City Center with the construction of the American Sports Centers-Avondale at the Randall McDaniel Sports Complex. The new recreation facility opened on November 1, 2010. On July 5, 2010 Council approved the construction of 24,000 sf of retail space adjacent to the sports facility. The scope of work includes the construction of the core and shell of the building. The interior finishes of the buildings will be completed in conjunction of the tenant improvements associated with each tenant lease. The retail buildings are scheduled to be completed by February 28, 2011.

DISCUSSION:

During the past year, staff has identified potential businesses that were looking for expansion opportunities and would complement the City Center. Staff has negotiated a lease agreement with Carlos O'Brien's Scottsdale, LLC for approximately 5,609 sf of floor space, along with 1178 sf of patio space. Carlos O'Brien's will utilize the premises for a full service Mexican restaurant. The initial term of the lease will be seven (7) years with the option to extend the lease for two additional five (5) year periods. The annual lease for the tenant is a base lease amount of $102,000 plus 7% percent of the adjusted gross sales in excess of $2 million.

The City will provide the tenant an allowance in the amount of $300,000 related to the dining and public area improvements. The City will also contribute a maximum of $300,000 for the purchase and installation of all necessary kitchen equipment needed for the proper operation of the restaurant. The city will retain ownership of all kitchen equipment and fixed dining room and public area. Any costs above the $600,000 will be the responsibility of the tenant. The tenant will provide a minimum of $500,000 that will be used for furniture, fixtures & equipment and will be responsible for all professional design fees associated with the improvements.

BUDGETARY IMPACT:

The funding of the tenant improvements will require the transfer of $600,000 of general fund contingency appropriation and cash to the Parkland Development Fund (310).

RECOMMENDATION:

Staff recommends that the City Council approve a Lease Agreement with Carlos O'Brien's Scottsdale, LLC and authorize the Mayor or City Manager and City Clerk to execute the necessary documents and authorize the use and transfer of general fund contingency.

ATTACHMENTS:

Click to download

- Lease Agreement

December ___, 2010

LEASE AGREEMENT
By and Between

THE CITY OF AVONDALE,
an Arizona municipal corporation, as Landlord

and

CARLOS O'BRIEN'S SCOTTSDALE, L.L.C.,
an Arizona limited liability company, as Tenant

MAIN STREET RETAIL AT AVONDALE CITY CENTER
Avondale, Arizona

LEASE AGREEMENT

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EXHIBIT D	FORM OF COMMENCEMENT DATE MEMORANDUM
EXHIBIT E	FORM OF LEASE GUARANTY
EXHIBIT F	FORM OF SUBSTITUTE GUARANTY

LEASE AGREEMENT

This Cover Sheet (this "**Cover Sheet**") is hereby incorporated by reference into and made a part of the attached Lease. Each reference in the Lease to any term of this Cover Sheet shall have the meaning as set forth in this Cover Sheet for such term. In the event of a conflict between the terms of this Cover Sheet and the Lease, the terms of the Lease shall prevail. Any initially capitalized terms used herein and not otherwise defined herein shall have the meaning as set forth in the Lease.

COVER SHEET

LANDLORD NAME: THE CITY OF AVONDALE
an Arizona municipal corporation

TENANT NAME: **CARLOS O'BRIEN'S SCOTTSDALE, L.L.C.**
an Arizona limited liability company
Federal Tax I.D. number is _____

TENANT ADDRESS: 735 N. 114th Avenue
Avondale, Arizona, 85323

TRADE NAME: **CARLOS O'BRIEN'S MEXICAN RESTAURANT**

ITEM 1. **PREMISES:** Those certain premises (the "**Premises**") contemplated to contain approximately 5,609 square feet of "**Floor Area**" (as defined in **ITEM 2** of the Cover Sheet), and approximately 1,178 square feet of patio space located at Corporate Drive and 114th Avenue, in the retail component of the mixed-use development associated with the amateur sports facility being constructed by the City of Avondale (the "**Sports Facility**") between Corporate Drive and City Center Drive at the east side of 114th Avenue, Avondale, Arizona (hereafter referred to as the "**Center**"). The approximate layout of the Center and location of the Premises therein are shown on the site plan attached hereto as **Exhibit A** (the "**Site Plan**"). The Floor Area of the Premises is subject to remeasurement as provided in **Section 1.1** of the Lease. Landlord may, from time to time, designate additions, deletions and other changes to the Center. For purposes of this Lease, the "**Center**" shall initially consist of the portion of the Sports Facility development shown on the Site Plan, all improvements constructed thereon, together with such additions, deletions and other changes as Landlord may from time to time designate for the Center, subject to and in accordance with the terms of this Lease. Tenant acknowledges that the scope and configuration of the Center may change from time to time as portions thereof are developed, and that portions thereof may be converted to condominiums, parcelized or otherwise sold separate and apart from other portions thereof, and that as a result thereof, notwithstanding anything to the contrary contained in this Lease, Landlord may elect to exclude such portions of the Sports Facility development from the "**Center**." The "**Center**" shall consist of those portions of the Sports Facility development that Landlord may elect, in Landlord's sole discretion, to include in such term from time to time.

ITEM 2. **FLOOR AREA:** With respect to each building or structure in the Center, the number of square feet of floor space intended for exclusive occupancy at each level or story lying within the exterior faces of exterior walls thereof (except party walls, as to which the

center line, not the exterior faces, shall be used), whether or not leased or occupied ("**Floor Area**"). If such space is office space, "**Floor Area**" shall refer to the rentable area of the space in question.

ITEM 3. **PERMITTED USE:** Subject to the other provisions of this Lease, Tenant shall use the Premises only for a full service restaurant and bar, however, Tenant shall not be permitted to sell pizza or coffee in an amount greater than 10% of Tenant's total net sales ("**Permitted Use**"), and for no other use or purpose, and under the Trade Name set forth above and under no other trade name, without Landlord's prior written consent. Tenant will not commit, omit or permit any act, condition or event that is contrary to any Legal Requirement or Insurance Requirement, as defined below.

ITEM 4. Intentionally Left Blank

ITEM 5. **INITIAL TERM:** The term of this Lease (the "**Initial Term**") shall commence on the Commencement Date (as defined in **ITEM 7** below) and shall end on the date that is 84 months from the Commencement Date. The term "**Lease Years**" is defined in **Article 2**, which also sets forth the calculation thereof.

OPTION TERM: The tenant has two (2) options to extend the lease for five (5) years each (the "**Option Term**").

The Initial Term of this Lease, and any Option Term exercised by Tenant, are sometimes herein referred to as the "**Term.**"

ITEM 6. **DELIVERY DATE:** The "**Delivery Date**" shall be the date on which Landlord delivers possession of the Premises to Tenant with all of "**Landlord's Work**" (as described in **ITEM 11**) "**substantially complete**" (i.e., complete to the extent that Tenant may commence "**Tenant's Work**" (as defined in **Exhibit B-2**) in the Premises without substantial interference from Landlord or its contractor), which will be no later than March 1, 2011. Tenant shall acknowledge delivery of the Premises by executing the Delivery Date Certificate in the form attached hereto as **Exhibit B-1**.

ITEM 7. **COMMENCEMENT DATE:** Subject to the provisions of this Lease, the Initial Term of this Lease and Tenant's obligation to pay "**Rent**" (as defined in **Article 3**) shall commence on the date (the "**Commencement Date**") that is the earlier of the following: **(A)** the date that Tenant opens for business to the public in the Premises; or **(B)** September 15, 2011; provided, however, that the Commencement Date may be extended in the event the Delivery Date is delayed as described Item 11 below. Within 30 days after the Commencement Date has been determined, Landlord and Tenant shall execute and deliver to each other a commencement date memorandum in the form attached hereto as **Exhibit D** and incorporated herein by this reference ("**Form of Commencement Date Memorandum**").

ITEM 8. **MINIMUM RENT:** The Minimum Rent payable by Tenant pursuant to this Lease shall include all of the following:

A. During the Initial Term, an amount, per annum, equal to $102,000.00, plus a percentage of annual adjusted gross sales as set forth in **ITEM 9** below.

B. During the Option Term (if exercised by Tenant), an amount, per annum, equal to $125,000.00, plus a percentage of adjusted gross sales as set forth in **ITEM 9** below.

ITEM 9. **PERCENTAGE RENT:** The Tenant agrees to pay the Landlord 7% of adjusted gross sales over $2,000,000. The Percentage Rent will be paid quarterly, on the first day of each calendar quarter during each Lease Year, with a five business day grace period, commencing on the first day of the first calendar quarter during a Lease Year that Tenant's adjusted gross sales exceed $2,000,000. If Tenant fails to timely pay Percentage Rent as detailed above, then Tenant agrees Percentage Rent will immediately become due on a monthly basis. Thereafter, for the remainder of the Lease Term, including all remaining Lease Years and the Option Term, Percentage Rent must be paid no later than 30 days after the end of each month with a five business day grace period. Tenant further agrees to provide Landlord with quarterly financial statements within 30 days from the end of each quarter during the entirety of the Lease Term. Notwithstanding anything herein to the contrary, Tenant's obligation to pay Percentage Rent during any Lease Year will commence if and only if Tenant's adjusted gross sales during the applicable Lease Year exceed $2,000,000.

ITEM 10. **CENTER FLOOR AREA:** The total Floor Area of all buildings and structures in the Center from time to time (including the Premises) ("**Center Floor Area**"), which is approximately 116,500 square feet.

ITEM 11. **IMPROVEMENTS BY LANDLORD AND TENANT:**

A. **Landlord's Work**.

1. Landlord shall deliver the Premises to Tenant as a "cold dark shell," with: **(a)** the exterior of the building completed in accordance with the design concepts, including all glazing, doors, building skin, patio areas, if any, and all related site improvements; **(b)** the exterior walls of the Premises demised, but the interior of which shall not include drywall; **(c)** the floor of the Premises as unfinished graded dirt; **(d)** utilities in capacities determined by Landlord, and approved in Tenant's reasonable discretion, stubbed to the exterior walls of the Premises; **(e)** HVAC units (excluding distribution equipment) to serve the Premises in a 30 ton capacity, such units to penetrate the roof and be capped; provided, however, that if Tenant provides sufficient evidence to the satisfaction of Landlord which shall include, at a minimum, an engineer's data report, that the HVAC units capacity output should be increased, then Landlord shall adjust the output appropriately; **(f)** HVAC control unit and wiring from control to HVAC units and **(g)** communications lines brought into the suite and terminated at the demark panel (the "**Landlord's Work**"). Landlord shall deliver (or has previously delivered) to Tenant the plans and specifications for Landlord's Work. Landlord is not required to perform any additional improvements to the Premises prior to the Commencement of the Lease. Subject to Landlord's completion of Landlord's Work in a good and workmanlike manner, Tenant agrees to accept the Premises in its "AS IS" condition. All other work done by Landlord at Tenant's request shall be at Tenant's expense and shall be paid for within ten days after the completion of such other work and presentation to Tenant of a bill for such work.

2. Landlord shall have delivered possession of the Premises to Tenant on or before the Delivery Date, which is at least 100 days but not more than 120 days before the Commencement Date. If for any reason, Landlord cannot deliver possession of the Premises to Tenant on or before 100 days prior to the Commencement Date, (a) this Lease will not be void or voidable and Landlord will not be liable to Tenant for any resultant loss or damage and (b) the Delivery Date and Expiration Date shall each be delayed by one day for each day of such delay; provided, however, if the Commencement Date is delayed by more than 90 days, Tenant, by written notice to Landlord prior to the Commencement Date, may terminate this Lease. Tenant will execute the Form of Commencement Date Memorandum attached to this Lease as Exhibit D within 15 days of Landlord's request.

B. **Tenant's Work**.

1. Tenant shall, at its sole cost and expense, fixturize and stock the Premises and perform all work designated as "**Tenant's Work**" in **Exhibit B-2** in the manner set forth in this Lease. Tenant shall, at its sole cost and expense, cause an architect licensed in the state to prepare interior plans and specifications for Tenant's Work.

2. Tenant agrees to furnish to Landlord, for Landlord's prior review and approval, the Plans and Specifications (as such term is referred to in **Exhibit B-2**) with respect to the Premises prepared in the manner and within the time periods required in the Construction Guidelines. If such Plans and Specifications are not furnished by Tenant to Landlord within the required time period in a form to permit approval by Landlord, then Landlord may avail itself of its options under the Construction Guidelines. Once Landlord receives the Plans and Specifications, Landlord may not unreasonably withhold its approval of the same. Landlord's approval of Tenant's Plans and Specifications or any modifications thereof shall not constitute the assumption of any responsibility by Landlord for their accuracy or sufficiency or their conformity with applicable laws, and Tenant shall be solely responsible therefor. In addition to conforming to the requirements specified in the Construction Guidelines, all work performed by Tenant shall comply with such reasonable rules and regulations as Landlord and its representatives may make and Tenant shall schedule its work so as not to unreasonably interfere with any work being performed by Landlord or by any other tenant in the Center, or with the operation of the Center and its tenants. It is further understood and agreed that: **(a)** Landlord shall have no responsibility or liability whatsoever for any loss of, or damage to, any fixtures, equipment, merchandise, or other property belonging to Tenant or its agents, employees and contractors, installed or left in the Premises, unless such loss or damage is caused by Landlord or its agents, employees or contractors, in which case Landlord shall be solely liable; and **(b)** Tenant's entry upon and occupancy of the Premises prior to the Commencement Date shall be governed by and subject to all the provisions, covenants and conditions of this Lease.

3. Additional alterations to the interior and/or exterior of the Premises shall be approved by the Landlord in writing. The Tenant shall submit any proposed improvements and/or alterations to the Landlord in writing and drawings, at the request of the Landlord. After the submittal of the proposed improvements and/or

alterations, Landlord shall have a maximum of 30 days to review the proposed improvements and approve or deny them. If Landlord denies the proposed improvements, Tenant may revise the same and resubmit to the Landlord. Provided the resubmission addresses all of the prior concerns expressed by Landlord, Landlord shall have a maximum of 15 days to review the subsequent submissions and either approve or deny the plans. Tenant is responsible for the cost of any such improvements including all applicable fees and charges by City. Tenant shall be responsible for repairing any damage caused to the Premises by virtue of any improvements and/or alterations installed by or on behalf of Tenant.

C. **Performance of Tenant's Work and Other Alterations**.

1. Tenant shall not perform Tenant's Work or make or cause to be made any other alterations, repairs, additions or improvements in or to the Premises (other than painting), including the installation of floor covering (other than carpeting), interior or exterior lighting, plumbing fixtures, shades, canopies or awnings, or make any changes to the counter or soffit face or the mechanical, electrical, plumbing or sprinkler systems without providing to Landlord, according to the time requirements set forth in the Construction Guidelines, any drawings or specifications required by Landlord, and without Landlord's prior written consent, which Landlord may grant or deny in its sole and absolute discretion. In the event Landlord grants such consent, such repairs, alterations, additions or improvements shall be performed in a good and workmanlike manner and in accordance with all applicable legal and insurance requirements and all drawings or specifications approved by Landlord. Any work performed by Tenant shall be subject to Landlord's inspection and approval after completion.

2. Tenant shall timely obtain at its sole cost all certificates and approvals with respect to work done and installations made by Tenant that may be required for the issuance of a non-temporary certificate of occupancy for the Premises, and shall immediately deliver to Landlord a copy of all such certificates and approvals. Promptly upon the completion of its work, Tenant shall repair, clean and restore to their prior condition all portions of the Center affected by any work of Tenant. In the event that any mechanic's, materialman's or other lien is filed against the Premises or the Center as a result of any work or act of or on behalf of Tenant, Tenant, at its expense, shall discharge or bond off the same within thirty days from the filing thereof. If Tenant fails to discharge said mechanic's, materialman's or other lien, Landlord may bond or pay the same without inquiring into the validity or merits of such lien and all sums so advanced and fees incurred (including legal fees) shall be paid by Tenant on demand as Additional Rent. It shall be Tenant's continuing obligation to keep and maintain the Premises and all other parts of the Center free from any and all liens arising out of any work performed, materials furnished or obligations incurred by or for Tenant. In addition, Tenant shall replace any bonds posted by Landlord pursuant hereto with a suitable bond of equivalent amount within ten days after Landlord's demand therefor. Tenant shall have the right to contest the correctness or the validity of any such lien provided Tenant is diligently pursuing the matter to resolution and further provided that Landlord, in its reasonable judgment, concludes that there is no jeopardy to Landlord's title to the Premises or the Center. In the event Landlord concludes that its title to the Premises or the Center is jeopardized hereunder, Tenant

shall, within thirty days of notice from Landlord, procure and record a lien release bond meeting the requirements of Ariz. Rev. Stat. § 33-1004, as amended, or any successor statute.

D. **Removal by Tenant**. All repairs, alterations, decorations, additions and improvements made by Tenant shall at once when made become part of the leasehold and become property of Landlord. Upon the expiration or sooner termination of this Lease, Tenant shall not remove any of such alterations, decorations, additions and improvements, except that trade fixtures, furniture and equipment installed by Tenant may be removed if: **(1)** such trade fixtures, furniture and equipment are not integral to the operation of the Building or the Premises as an on-going restaurant (by way of example only and not a limitation, HVAC and plumbing systems may not be removed); **(2)** all Rents hereunder are paid in full; and **(3)** Tenant has performed all of its other obligations hereunder. Notwithstanding the foregoing, prior to the expiration of the Term, Landlord may designate by written notice to Tenant those alterations, decorations, additions and improvements which shall be removed by Tenant at the expiration or termination of this Lease and Tenant shall promptly remove same and repair any damage to the Premises caused by such removal. Tenant hereby acknowledges and agrees that any property remaining in the Premises after the expiration or earlier termination of this Lease, shall be deemed abandoned by Tenant and Landlord may dispose of such personal property as it deems appropriate, at Tenant's cost, and Tenant shall reimburse Landlord for such costs within fifteen (15) days after being billed for the same.

E. **Allowance for Tenant Improvement Costs**. Landlord's Work, Tenant's Work and together with all architectural and engineering fees shall be referred to herein as "**Tenant Improvements**". Landlord and Tenant agree that Landlord will provide Tenant a maximum of $300,000.00 related to dining and public area improvements (the "**Dining Maximum Allowance**"). Any cost for the Tenant Improvements above $300,000.00 shall be solely borne by Tenant. Landlord and Tenant agree the Tenant will make a minimum contribution of $500,000 for furniture, fixtures & equipment and opening materials needed for the proper functioning of the restaurant. Landlord shall pay Tenant (i) according to a monthly drawdown of work completed and materials delivered to and secured on site for the benefit of the Premises only, subject to the any retention amounts in the applicable construction contract, and (ii) after invoices evidencing the foregoing are delivered to the Landlord. The monthly payments will be based on Tenant's schedule of values for the Tenant Improvement plans. The schedule of values shall be the basis for the allocation of the Tenant Improvement allowance to the activities shown on the construction schedule. The City shall approve the schedule of values before acceptance of progress billings. The construction schedule shall have the total Tenant Improvement allowance allocated among the scheduled activities so that each of the activities shall be allocated a price and the sum of the prices of the activities shall be equal to or less than the Dining Maximum Allowance. Progress payments to Tenant shall be based on the Tenant's percentage of completion of the scheduled activities. In order to receive the monthly progress payment, on or before the 15th day of each month after the construction phase has commenced, Tenant shall submit to the City an "Application for Payment" consisting of the cost of the work performed up to the end of the prior month and invoices evidencing said work performed. Subject to the Dining Maximum Allowance

and the terms and conditions in this Lease, the City shall pay directly to the Tenant the appropriate amount for which Application for Payment is made, less amounts **(1)** previously paid by the City, **(2)** sufficient to pay expenses the City reasonably expects to incur in correcting deficiencies which are set forth in writing and provided to the Tenant and **(3)** the ten percent retainage as set forth above. Landlord will pay the retainage to Tenant within 21 days of the Certificate of Occupancy.

F. **Kitchen Equipment and Improvement Costs**. Landlord and Tenant agree that as in addition to the Dining Maximum Allowance, the Landlord will contribute a maximum of $300,000 for the supply and installation of all necessary kitchen equipment needed for the proper functioning of the restaurant (the "**Kitchen Allowance**" together with the Dining Maximum Allowance are collectively referred to as the "**Tenant Improvement Allowance**" or the "**Construction Allowance**"). The Landlord will retain ownership of all kitchen equipment and fixed dining room and public area Tenant Improvements.

G. **Design Services and Fees**. The Tenant will pay for all professional fees associated with the design and review of the Tenant Improvements. The Landlord will pay for all professional fees associated with the cold dark shell design and construction of Landlord's Work.

H. **Development Services and Fees**. The Landlord will pay for all municipal development and infrastructure hookup and impact fees associated with the Premises.

ITEM 12. **GUARANTOR (subject to the limitations set forth in Exhibit E):**

Name: SEAN O'BRIEN

Address: 7111 East Bell Road
Scottsdale, Arizona 85254

Telephone: 480-363-3685

ITEM 13. **SECURITY DEPOSIT:** An amount equal to $5,000.00, to be paid on or before the Delivery Date ("**Security Deposit**"). See **Article 33**.

ITEM 14. **TENANT'S STORE PLANNING CONTACT PERSON:**

Name: **Carlos O'Brien's Scottsdale, L.L.C.**

Address: 7111 East Bell Road
Scottsdale, Arizona 85254

Telephone: 480-363-3685

Email: seanob13@aol.com

ITEM 15. Intentionally Left Blank

ITEM 16. Intentionally Left Blank

ITEM 17. **CITY:** The City of Avondale, an Arizona municipal corporation (the "**City**").

ITEM 18. **STATE:** The State of Arizona (the "**State**").

ITEM 19. **BUILDING:** the building in the Center in which the Premises are located, or the retail portion of the building in the Center in which the Premises are located.

LEASE AGREEMENT

This Lease Agreement ("**Lease**") is made and entered into as of the Effective Date by and between the City of Avondale, an Arizona municipal corporation ("**Landlord**") and Carlos O'Brien's Scottsdale, L.L.C., an Arizona limited liability company ("**Tenant**"). The "Effective Date" shall be the date upon which the last of Landlord and Tenant executed this Lease, as indicated on the signature pages of this Lease.

ARTICLE 1

Lease of Premises; Right to Remeasure; Use of Common Areas; Reservation of Rights

1.1 **Lease of Premises; Right to Remeasure**. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises.

1.2 **Use of Common Areas**. Except as otherwise specifically set forth by the Landlord in subsequent documents governing the use of the Center Common Areas, Landlord grants to Tenants and its agents, employees and invitees, the non-exclusive right, together with all of the occupants of the Center and their agents, employees and invitees, to use the Common Areas.

1.3 **Landlord's Reservation of Rights**. Landlord reserves "as-is": **(A)** the exclusive use of the exterior walls (other than the storefront), the roof, the airspace above the roof and the space below the floor slab; and **(B)** the right to install, maintain, use, repair and/or replace pipes, ducts, conduits, utility lines and wires in the space above the interior surfaces of the ceilings, below the finished floor, within the demising walls of the Premises and in all of the "**Common Areas**" (as defined in **Article 4**) of the Center. Landlord reserves the right to affect such other tenants in the Center as Landlord may elect in its sole business judgment.

ARTICLE 2

Lease Year; Option Term; Obligation to Open and Continuously Operate

2.1 **Lease Year**. For purposes of this Lease, the term "**Lease Year**" shall mean a period of 12 full, consecutive calendar months. The first Lease Year shall commence on the Commencement Date and end on the last day of the twelfth full calendar month following the Commencement Date. If the Commencement Date occurs on a date other than the first day of the month, then the first Lease Year shall include the partial month between the Commencement Date and the last day of the month during which the Commencement Date occurs, and the Minimum Rent and other charges payable during such partial month shall be appropriately prorated based on the number of days in such month. Notwithstanding anything in this Lease to the contrary, in the event the last day of the final Lease Year of the Initial Term would otherwise occur on a date other than December 31st, then such final Lease Year shall automatically be extended to include the period between the date on which the Initial Term would otherwise expire and the next succeeding December 31 (such period being herein referred to as the "**Extended Period**") and the Minimum Rent and other charges payable during the Extended Period shall be the same as the Minimum Rent and other charges payable during such final Lease Year. Any Lease Year which is for any reason shorter than a full 12-month calendar year is sometimes herein referred to as a "**partial**" Lease Year. For purposes of calculating and paying the Minimum Rent, Percentage Rent and all recurring "**Additional Rent**" (as defined in **Article 3**) payable under this Lease during any partial

Lease Year, such charges shall be appropriately prorated based on the number of days in such partial Lease Year.

2.2 **Option Term**. Provided, **(A)** Tenant is fully operating its business for the Permitted Use in all portions of the Premises; and **(B)** no "**Event of Default**" (as defined in **Article 23**) exists on the date Tenant exercises its right or on the date that the Option Term would otherwise commence, Tenant shall have the right to extend the Initial Term for the Option Term by delivering written notice (the "**Option Notice**") to Landlord not less than 180 days prior to expiration of the Initial Term (the "**Exercise Window**"). The right to exercise the Option Term is personal to the named Tenant herein and may not be exercised by any person or entity other than Tenant or a permitted assignee. Provided Tenant has properly and timely exercised the applicable Option Term, prior to the expiration of the Exercise Window, the Term shall be extended for the period of the Option Term, and all terms, covenants and conditions of the Lease shall remain unmodified and in full force and effect, except that Minimum Rent payable by Tenant during the Option Term shall be as set forth in **ITEM 8** of the Cover Sheet. Notwithstanding anything contained in this Lease to the contrary, in the event Tenant properly exercises its option to extend the Term, Tenant shall be deemed to have waived any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right as of the date of Tenant's Option Notice.

2.3 **Tenant Obligation to Open and Continuously Operate**. Tenant agrees to open for business to the public in the Premises on the Commencement Date and to continuously operate thereafter throughout the remainder of the Term and on all business days during the Center business hours except for major holidays including Christmas, New Years Day, and Thanksgiving (as reasonably adjusted by Landlord from time to time). If Tenant fails to open for business by the Commencement Date, or "**ceases operating**" (as defined in this Section) at any time during the Term (including an Option Term exercised by Tenant), then and in either of such events, in addition to Landlord's other rights and remedies with respect to such default, Tenant shall pay to Landlord, in addition to the Minimum Rent, Percentage Rent and Additional Rent payable hereunder, as liquidated damages ("**Liquidated Damages**"), an additional amount equal to 25% of the total Rent due from Tenant hereunder (calculated at a daily rate based on a 30-day month) for each day between the Commencement Date and the date Tenant opens for business in the Premises as required under this Lease, or between the date Tenant ceases operating for business in the Premises and the date Tenant resumes operating for business in the Premises as required under this Lease (as applicable). Tenant shall pay Landlord the Liquidated Damages together with the monthly installments of Minimum Rent and other charges payable under this Lease. Tenant agrees that the forgoing amount of Liquidated Damages is a reasonable estimate of the damage to Landlord that would be caused by Tenant's failure to open or continuously operate the Premises for business as required under this Lease. Tenant covenants that it shall, from and after the Commencement Date, continually operate in the Premises for the Permitted Use and under the name as approved by Landlord. Tenant agrees to operate with diligence and in accordance with the best standards of operation for retail businesses. Tenant acknowledges that the Center is an interdependent enterprise and its success is dependent upon the opening and continued operation of Tenant's business in accordance with the terms of this Lease. Tenant shall maintain in the Premises all suitable furniture, fixtures, equipment and other personal property necessary for the conduct of Tenant's business therein. For purposes of this Section, the term "**ceases operating**" shall mean and refer to any period when Tenant has not been open for business with the public in the Premises in accordance with the provisions of this Lease for 15 or more consecutive days (exclusive of reasonable periods during which the Premises are being restored following casualty damage thereto or a "**Taking**" (as defined in **Article 22**) thereof, and periods during which the

Premises are being remodeled (such periods of remodeling not to exceed a total of 20 days in the aggregate during any single Lease Year)); PROVIDED, HOWEVER, in the event Tenant resumes operating for business in the Premises as required hereunder following any period during which Tenant ceases operating, but fails thereafter to remain open for a period of at least 180 consecutive days following such resumption of operations, then Tenant shall be deemed not to have resumed operating for business in the Premises for purposes of this Section and, without limiting the foregoing provisions of this Section, Tenant shall pay Landlord Liquidated Damages, retroactively, for the period between the date Tenant resumed operating for business in the Premises and the date Tenant is deemed to have resumed operating for business in the Premises as provided in this Section (i.e., the date on which Tenant has resumed operating for a period of not less than 180 consecutive days).

ARTICLE 3

Rent; Payment of Rent; Late Charge

3.1 **Rent.** The term "**Rent**" shall mean all amounts required to be paid by Tenant to Landlord under this Lease. Tenant shall pay Landlord the following amounts as Rent:

A. **Minimum Rent**. Commencing as of the Commencement Date and continuing throughout the Term, Tenant shall pay to Landlord Minimum Rent in equal monthly installments (as set forth in **ITEM 8** of the Cover Sheet), in advance, on the first day of each month, without prior notice or demand, setoff or deduction. Minimum Rent shall be prorated for any partial calendar month. If the Commencement Date is a date other than the first day of a calendar month: **(1)** Minimum Rent for the month containing the Commencement Date shall be prorated based upon the ratio that the number of days in the Term within such month bears to the total number of days in such month; and **(2)** the initial monthly rental period shall include the month in which the Commencement Date occurs and the following full calendar month (unless the Commencement Date is the first day of a calendar month, in which event the initial monthly rental period shall include only the month containing the Commencement Date).

B. **Percentage Rent**. In addition to the Minimum Rent, Tenant covenants and agrees to pay to Landlord, without prior notice, demand, setoff or deduction, for each Lease Year, Percentage Rent in an amount equal to the difference between the Minimum Rent and 7% of adjusted gross sales (as set forth in **ITEM 9** of the Cover Sheet and according to the definitions in **Article 6**). The Percentage Rent will be paid in accordance with the provisions of **ITEM 9** of the Cover Sheet.

C. **Additional Rent**. The term "**Additional Rent**" means all amounts required to be paid by Tenant to Landlord hereunder, other than Minimum and Percentage Rent, whether or not such amount is specifically designated Additional Rent.

3.2 **Payment of Rent**. Tenant shall pay all sums required to be paid to Landlord, without prior notice, demand, setoff or deduction, at the office of Landlord, City of Avondale, 11465 W. Civic Center Drive, Suite 250, Avondale, Arizona 85323, Attention: Accounts Receivable, or at such other place or places as Landlord may designate from time to time. The obligation of Tenant to pay any amount due to Landlord hereunder shall be independent of any obligation of Landlord under this Lease.

3.3 **Late Charge**. Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent shall cause Landlord to incur various expenses not contemplated by this Lease, the exact amount of which is presently difficult to ascertain. Accordingly, if any payment of Rent due from Tenant under this Lease is not received by Landlord when due, then, in addition to the required payment, Tenant shall also pay to Landlord a "**Late Charge**" equal to $25.00 per day after a seven calendar day grace period, plus interest from the end of the grace period to the date of payment at the rate of 12% per annum unless prohibited by law, in which event the rate shall be the maximum rate permitted by law (the "**Interest Rate**"). Tenant agrees that the Late Charge represents a fair and reasonable estimate of the expenses that Landlord shall incur by reason of a late payment by Tenant. Acceptance of the Late Charge by Landlord shall not constitute a waiver of Tenant's default with respect to any past due amounts, nor prevent Landlord from exercising any other rights and remedies granted to Landlord under this Lease or at law or in equity. The Late Charge and the interest on past due amounts shall be considered Additional Rent.

3.3 **Intentionally Deleted.**

ARTICLE 4

Common Areas; Control of Common Areas; Operating Costs; Trash

4.1 **Common Areas**. The Common Areas shall be operated and maintained by the Landlord. The term "**Common Areas**" means all areas, space, equipment and services in or serving the Center and the Premises provided for the common or joint use and benefit of Landlord, Tenant and the occupants of the Center and their employees, agents, servants, customers and other invitees, including, without limitation, storage areas not within the Premises, public restrooms other than those within the Premises, offices not within the Premises, utility rooms other than those within the Premises, the parking areas serving the Center (the use of which is subject to the fees, rules and regulations established therefor by the operator of the parking facility from time to time), access roads, corridors, balconies, stairs, elevators, escalators, driveways, retaining walls, exterior boundary walls and fences, water, sanitary and storm sewers (including, without limitation, any on or off-site sewer lines), on or off-site water retention and drainage facilities serving the Center and which Landlord is required to maintain (however, Landlord shall only maintain as part of the Operating Costs, sanitary sewers up to the Premises), gas, electric, telephone and other utilities lines, systems, conduits and facilities to the perimeter walls of any building (even though intended for the use of only one or a limited number of occupants) and those serving more than one premises within a building, and any of the foregoing which serve the Common Areas, plantings, landscaped areas, truck service ways, loading dock areas and facilities, courts, ramps, sidewalks, any drinking fountains, and the facilities appurtenant to the foregoing.

4.2 **Control of Common Areas**. Subject to the Landlord's subsequent documents relating to use of the Common Areas, it is agreed that: **(A)** all Common Areas shall be subject to the exclusive control and management by Landlord, and Landlord shall have the right at any time (either before, during or after the initial arrangement of the entrances, access roads, parking areas and other Common Areas), to construct buildings and other improvements thereon and therein, and to permit the owners and occupants of land located outside the Center and Premises and their invitees to use the Common Areas; **(B)** Landlord shall have the right to demolish and make alterations and additions to the buildings in the Center (including the construction of additional buildings therein), and to add and exclude areas from the Center, and to relocate improvements; and **(C)** Landlord shall have the right to do and perform such other acts in and to the Common

Areas as Landlord shall determine to be advisable, in its sole and absolute discretion. The rights of Landlord as reserved in this Lease shall be subject to the condition that no exercise of such rights by Landlord shall alter the physical dimensions of the Premises, or change their location or relative proximity to other stores, or otherwise materially or unreasonably interfere with the conduct of Tenant's business in the Premises.

4.3 **Tenant's Obligations**. In addition to the Minimum Rent provided hereinabove, for each Expense Year during the Term, Tenant shall pay to Landlord Tenant's Share of Operating Expenses allocated to the tenants of the Center (pursuant to Section 4.4.2.7 below) which are incurred by Landlord on account of operation and maintenance of the Center during such Expense Year. For purposes hereof, "**Tenant's Share**" shall mean the percentage determined by dividing the Floor Area of the Premises set forth in Item 1 of the Summary, by the total Floor Area within the Center. Landlord reserves the right, in its sole discretion, to increase or decrease from time to time the total Floor Area of the Center based upon Landlord's standard Floor Area measurement standards used for the Center. In the event either the Floor Area of the Premises and/or the total Floor Area of the Center is changed, Tenant's Share shall be appropriately adjusted, and, as to the Expense Year in which such change occurs, Tenant's Share for such year shall be determined on the basis of the number of days during such Expense Year that each such Tenant's Share was in effect. It is estimated that Tenant's Share will be approximately 5.15%.

4.4 Definitions.

4.4.1 "**Expense Year**" shall mean each calendar year during the Term (or partial calendar year if the Term commences or ends on other than the provided first (1st) or last day of a calendar year); provided, however, that Landlord, upon notice to Tenant, may change the Expense Year from time to time to any other twelve (12) consecutive month period, and, in the event of any such change, Tenant's Share of Operating Expenses shall be equitably adjusted for any Expense Year involved in any such change.

4.4.2 "**Operating Expenses**" or "**Operating Costs**" for purposes hereof, are intended to be inclusive of all costs of operating and maintaining the Center, except franchise, estate, inheritance, net income, gift, corporate and excess profit taxes of Landlord, interest on and capital retirement of Landlord's mortgage loans, if any, and costs charged by Landlord directly to specific tenants (including any utilities separately metered and charged to specific tenants). Landlord agrees to make reasonable efforts to minimize operating costs insofar as such efforts are not inconsistent with Landlord's intent to operate and maintain the Project in the first-class manner. Operating Expenses may include, but shall not be limited to, the following:

4.4.2.1 "**Tax Expenses**," which, for purposes hereof, shall mean, collectively, any and all general and special taxes and impositions of every kind and nature whatsoever levied, assessed, or imposed upon, or with respect to the Center, any leasehold improvements, fixtures, installations, additions, and equipment, whether owned by Landlord or Tenant, or either because of or in connection with Landlord's ownership, leasing and operation of the Center, including, without limitation, real estate taxes, personal property taxes, sewer rents, water rents, general or special assessments, duties or levies charged or levied upon or assessed against the Center and related personal property, transit taxes, all costs and expenses (including legal fees and court costs) charged

for the protest or reduction of property taxes or assessments in connection with the Center, or any tax or excise on rent or any other tax (however described) on account of rental received for use and occupancy of any or all of the Center (except Landlord's net income taxes), whether any such taxes are imposed by the United States, the State of Arizona, the County of Maricopa, or any local governmental municipality, authority, or agency or any political subdivision of any thereof;

4.4.2.2 All costs and expenses to Landlord in maintaining fire and extended coverage insurance, property damage, liability and rent loss insurance and any other insurance maintained by Landlord covering the use and operation of the Center which is customary in comparable projects in the area or which is reasonably deemed prudent by Landlord;

4.4.2.3 All costs and expenses of repairing, operating and maintaining the heating, ventilating and air conditioning system for the Center, including the cost of all utilities required in the operation thereof, except those paid directly by tenants of the Center and including the cost of replacements of equipment used in connection with such repair and maintenance work and all costs and expenses incurred in making alterations or additions to the heating, ventilating and air conditioning system in order to comply with governmental rules, regulations and statutes;

4.4.2.4. The costs of capital improvements and structural repairs and replacements made in or to the Center in order to conform to changes subsequent to completion of the original construction of the Center in any applicable laws, ordinances, rules, regulations or orders of any governmental or quasi-governmental authority having jurisdiction over the Center (herein "**Required Capital Improvements**") and the costs of any capital improvements and structural repairs and replacements designed primarily to reduce Operating Expenses or to reduce the rate of increase in Operating Expenses (herein "**Cost Savings Improvements**"). The expenditures for Required Capital Improvements and Cost Savings Improvements shall be reimbursed to Landlord in equal installments over the useful life of such capital improvement or structural repair or replacement (as reasonably determined by Landlord) together with interest on the balance of the unreimbursed expenditure at a rate equal to the floating commercial loan rate announced from time to time by US Bank, a national banking association, or its successor, as its prime rate plus two percent (2%) per annum (the "**Prime Rate**") which is in effect on the date the expenditure was incurred by Landlord; provided, however, the amount to be reimbursed for any Cost Savings Improvements shall be limited in any year to the estimated reduction or estimated savings in Operating Expenses as a result thereof;

4.4.2.5. All costs and expenses incurred by Landlord in providing standard services and utilities to tenants of the Center, including office janitorial services, window washing and utilities not separately metered and not charged by Landlord directly to specific tenants; together with the cost of replacement of non-building standard electric light bulbs and fluorescent tubes and ballasts, which Landlord shall have the exclusive right to provide and install;

4.4.2.6. Professional building management fees not to exceed five percent (5%) of Operating Expenses; and

4.4.2.7. All costs and expenses incurred by Landlord in operating, managing, repairing and maintaining the Center, including all sums expended in connection with the Common Areas for general maintenance and repairs, resurfacing, painting, restriping, cleaning, sweeping and janitorial services, window washing, maintenance and repair of elevators, stairways, sidewalks, curbs and Center signs, sprinkler systems planting and landscaping, lighting and other utilities, maintenance and repair of any fire protection systems, automatic sprinkler systems, lighting systems, emergency back-up utility systems, storm drainage systems and any other utility systems, personnel to implement such services and to police the Common Areas, rental of machinery and equipment used in such maintenance and services, police and fire protection services, trash removal services, all costs and expenses pertaining to security systems, utilities, premiums and other costs for workers' compensation insurance, wages, withholding taxes, social security taxes, personal property taxes, fees for required licenses and permits, supplies, and charges for management of the Center. Costs and expenses incurred by Landlord in operating, managing, repairing and maintaining the Center which are incurred exclusively for the benefit of specific tenants of the Center will be billed accordingly and will not be included within the general Operating Expenses. The Operating Expenses which vary with occupancy and which are attributable to any part of the Term in which less than 95% of the Floor Area of the Center is occupied by tenants, will be adjusted by Landlord to the amount which Landlord reasonably believes that they would have been in 95% of the Floor Area of the Center has been so occupied.

4.4.2.8. Notwithstanding the foregoing, for purposes of this Lease, Operating Expenses shall not include the following:

(i) costs of items considered capital improvements, capital repairs, capital replacements, and/or capital equipment, all as determined in accordance with Landlord's standard real estate accounting practices, except as permitted in Sections 4.4.2.3 and 4.4.2.4 above and 4.4.2.7 above;

(ii) depreciation and amortization, except as provided herein and except on materials, tools, supplies and vendor-type equipment purchased by Landlord to enable Landlord to supply services Landlord might otherwise contract for with a third party where such depreciation and amortization would otherwise have been included in the charge for such third party's services, all as determined in accordance with standard real estate accounting practices, consistently applied, and when depreciation or amortization is permitted or required, the item shall be amortized over its reasonably anticipated useful life as determined by Landlord in the manner described in Section 4.4.2.4 above, together with interest on the unamortized costs at the Prime Rate;

(iii) interest, points, fees and principal payments on any mortgages encumbering the Center, and other debt costs, if any, except as specifically included in Sections 4.4.2.4 and 4.4.2.7 above;

(iv) costs of any items (including, but not limited to, costs incurred by Landlord for the repair of damage to the Center) to the extent Landlord receives reimbursement from insurance proceeds or from a third party (except that any deductible amount under any insurance policy shall be included within Operating Expenses);

(v) brokerage commissions, space planning costs, finders' fees and attorneys' fees incurred by Landlord in connection with leasing or attempting to lease space within the Center (including all such fees and costs incurred in connection with the negotiation and execution of this Lease);

(vi) costs, including permit, license and inspection costs, incurred with respect to the installation of tenant improvements made for any tenants in the Center or incurred in renovating or otherwise improving, preparing, decorating, painting or redecorating vacant space for tenants or other occupants of the Center;

(vii) interest, penalties or other costs arising out of Landlord's failure to make timely payment of any of its obligations under this Lease, including, without limitation, Landlord's failure to make timely payment of any item that is included in Operating Expenses or Tax Expenses;

(viii) attorneys' fees and other costs and expenses incurred in connection with negotiations or disputes with present or prospective tenants or other occupants of the Center (including costs incurred due to violations by tenants of the terms and conditions of their leases), or any other attorneys' fees incurred in connection with the Center (including, without limitation, any financing, sale or syndication of the Center), except (A) as specifically enumerated as an Operating Expense in this Lease, or (B) to the extent the expenditure of such attorneys' fees generally benefits the tenants of the Center;

(ix) costs and overhead and profit increment paid to Landlord or to subsidiaries or affiliates of Landlord for goods and/or services in or to the Center to the extent the same exceeds typical costs and overhead and profit increment of such goods and/or services rendered by qualified unaffiliated third parties on a competitive basis; and

(x) Costs of acquisition of sculptures, painting and other objects of art.

4.5 Calculation and Payment of Operating Expenses.

4.5.1 Statement of Estimated Operating Expenses. Prior to that date which is thirty (30) days prior to the first day of a new Expense Year, Landlord shall endeavor to give

Tenant a yearly expense estimate statement (the "**Estimate Statement**") which shall set forth Landlord's reasonable estimate (the "**Estimate**") of what the total amount of Operating Expenses for the new Expense Year shall be. The failure of Landlord to timely furnish the Estimate Statement for any Expense Year shall not preclude Landlord from enforcing its rights under this Article 4. Tenant shall pay Tenant's Share of the Estimated Expenses (defined below) with installments of Minimum Rent in monthly installments of one-twelfth (1/12th) thereof on the first day of each calendar month during such year, except that the monthly installment of Tenant's Share of the Estimated Expenses for the first (1st) full calendar month of the initial Term shall be paid at the time of Tenant's execution of this Lease. Tenant hereby acknowledges that prior to the execution of this Lease by Landlord and Tenant, Landlord provided to Tenant the Estimate Statement for calendar year 2011. As shown on the Estimate Statement for calendar year 2011, Tenant's Share of the Estimated Expenses (as defined below in this Section 4.5.1) for calendar year 2011 if Tenant was a Tenant for the full calendar year 2011 would be $23,754.50 ($3.50 per square foot times 6,787 square feet of Floor Area within the Premises), and the monthly Estimate installment due herein (assuming a September 1, 2011 Commencement Date) shall be $1,979.54 ($23,754.50/12). "**Estimated Expenses**" for any particular year shall mean Landlord's estimate of Operating Expenses for a calendar year. If at any time Landlord determines that Operating Expenses are projected to vary from the then Estimated Expenses, Landlord may, by notice to Tenant, revise such Estimated Expenses, and Tenants monthly installments for the remainder of such year shall be adjusted so that by the end of such calendar year Tenant has paid to Landlord Tenant's Share of the revised Estimated Expenses for such year. Until a new Estimate Statement is furnished, Tenant shall pay monthly, with the monthly Minimum Rent installments, an amount equal to one-twelfth (1/12) of Tenant's Share of the Estimated Expenses set forth in the previous Estimate Statement delivered by Landlord to Tenant.

4.5.2 Payment. Landlord shall endeavor to give to Tenant on or before the first day of February following the end of each Expense Year, a statement (the "**Statement**") which shall state the Operating Expenses incurred or accrued for such preceding Expense Year ("**Actual Expenses**"), and the amount of the Estimated Expenses paid by Tenant for such preceding Expense Year and shall indicate the amount, if any, of the difference between the Actual Expenses and the Estimated Expenses (the "**Excess**") for such Expense Year. If an Excess is present, Tenant shall pay, within thirty (30) days after receipt of said Statement, the full amount of the Excess for such Expense Year. If any Statement reflects that Tenant has overpaid Tenant's Share of Operating Expenses for such Expense Year, Landlord shall refund the amount of the overpayment to Tenant. The failure of Landlord to timely furnish the Statement for any Expense Year shall not prejudice Landlord from enforcing its rights under this Article 4. Even though the Term has expired and Tenant has vacated the Premises, when the final determination is made of Tenant's Share of the Operating Expenses for the Expense Year in which this Lease terminates, if an Excess is present, Tenant shall immediately pay to Landlord an amount as calculated pursuant to the provisions of Section 4.5.1 of this Lease. The provisions of this Section 4.3.2 shall survive the expiration or earlier termination of the Term.

4.6 **Audit Rights**. Within thirty (30) days after receipt of the Statement by Tenant ("Review Period"), if Tenant disputes the amount set forth in such statement, an independent certified public accountant (which accountant is a member of a nationally or regionally recognized accounting firm), designated by Tenant, may, after reasonable notice to Landlord and at reasonable times, inspect Landlord's records (pertaining to Landlord's calculation of Operating Expenses) at Landlord's offices, provided that Tenant and such accountant or representative shall, and each of them shall cause their respective agents and employees to, maintain all information contained in Landlord's records in strict confidence. Landlord shall cooperate in good faith with Tenant and the accountant to provide Tenant and the accountant with the information upon which the certification is to be based. However, if such certification by the accountant proves that the total amount of Operating Expenses set forth in the year end statement were overstated by more than five percent (5%), then the actual, documented and reasonable cost of the accountant and such certification shall be paid for by Landlord. Promptly following the parties receipt of such certification, the parties shall make such appropriate payments or reimbursements, as the case may be, to each other, as are determined to be owing pursuant to such certification.

4.7 **Security Services**. Landlord shall not be liable in any manner whatsoever to Tenant or any third party by reason of any act or omission of Landlord in providing or maintaining Security Services (or electing not to provide or maintain Security Services) in the Common Areas.

4.8 **Trash**. Tenant shall be solely responsible for the removal of all trash and garbage from its Premises to a common trash receptacle for removal from the property by the Landlord.

ARTICLE 5

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ARTICLE 6

Adjusted Gross Sales: Records and Reporting; Percentage Rent Sales Reports/Audit; Definition of Adjusted Gross Sales

6.1 **Adjusted Gross Sales Records and Reporting**. Whether or not Tenant is required to pay Percentage Rent, on or before the 15th day of each calendar month, Tenant shall furnish to Landlord, at the following address (or such other address as Landlord may designate in writing from time to time): City of Avondale, 11465 W. Civic Center Drive, Avondale, Arizona 85323-6809, Suite 610, Attention: Finance Director, a written statement of Adjusted Gross Sales for the preceding calendar month, such statement to be in a form reasonably acceptable to Landlord. Within 45 days after the last day of each Lease Year Tenant shall also furnish to Landlord a statement, certified by an officer of Tenant, of Adjusted Gross Sales for the preceding Lease Year and shall tender therewith the balance of Percentage Rent due, if any, for such Lease Year. If the installments of Percentage Rent paid by Tenant for any Lease Year exceed the amount thereof due for such Lease Year, Landlord shall credit the amount of the overpayment, first to the payment of Minimum Rent due and unpaid, and the rest, if any, shall be applied to Percentage Rent payments next falling due. Tenant shall keep at its home office during the Term hereof, for a period of three years after the close of each Lease Year, or longer if there is an ongoing dispute regarding such Adjusted Gross Sales, a complete record of Adjusted Gross Sales from the Premises in accordance with generally

accepted accounting principles consistently applied. The Landlord may request certification of requested documents by a Certified Public Accountant selected by the Landlord.

6.2 **Percentage Rent Sales Reports/Audit**. Upon not less than seven days prior notice, Landlord may, no more often than once each Lease Year, cause an audit of Tenant's Adjusted Gross Sales and exclusions from Adjusted Gross Sales for any of the prior three Lease Years to be made by an accountant to be selected and paid for by Landlord, or by a qualified member of Landlord's staff. If the audit reveals a difference in the Adjusted Gross Sales reported by Tenant to Landlord, Tenant shall immediately pay any Percentage Rent payable by Tenant to Landlord as a result of an understatement of Adjusted Gross Sales, with interest at the lesser of 12% per annum or the highest rate allowed by law from the date or dates the additional payments should have been made through the date of actual payment. If the audit reveals a difference of greater than 5%, Tenant shall pay to Landlord the cost of the audit, within 30 days after receipt of an invoice therefor. Any audit shall be performed at Tenant's home office and shall cause as little interference with Tenant's operations as reasonably possible. The provisions of this Section shall survive the expiration or earlier termination of the Term.

6.3 **Definition of Adjusted Gross Sales**. The term "**Adjusted Gross Sales**" means the aggregate gross amount of all sales of food, beverages and merchandise transacted or made and all charges for services performed on or from the Premises (including gift and merchandise certificates), rental of equipment and all business (including, but not limited to, all sales by telephone or mail, catalogue and internet sales when merchandise is either ordered or purchased on the Premises, vending machines, all other merchandising dispensing equipment, receipts from pay telephones, interest, finance charges, service charges) transacted in, upon or from the Premises by Tenant, its subtenants, licensees, contractors, franchisees or any other occupants of the Premises, including all sales made from cash or upon credit, or partially for cash and partially upon credit and upon any other money transfer procedure accomplished by electronic transfer or similar method, or by barter or exchange, regardless of collection of charges for which credit is given and all sales, charges or unreturned deposits for services and business transacted for which orders are taken in, upon or from the Premises regardless of whether or not the merchandise sold is delivered wholly or in part, the services are rendered or the business is transacted in, upon or from the Premises. Each sale, charge or business transacted upon installments or contracts thereof shall be treated as a Gross Sale for the full price or charge to the customer in the month in which such sale, charge or contract shall be made. Adjusted Gross Sales shall not include, or shall be deducted therefrom, as appropriate: **(A)** any sales tax levied upon such sales or charges, including, the amount of any City, county, State or federal sales, use, luxury or excise tax on such sales which is both added to the selling price (or absorbed therein) and paid to the taxing authorities by Tenant; **(B)** interstore transfers of merchandise where such transfer is made solely for the convenient operation of the business of Tenant and not for purpose of consummating a sale which has theretofore been made in or from the Premises and/or for the purpose of depriving Landlord of the benefit of a sale which otherwise would be made in or from the Premises; **(C)** cash or credit refunds; returns to suppliers or manufacturers; **(D)** any penalty charged by Tenant for a returned check; **(E)** reimbursement of amounts for postage, express or delivery services, including, but not limited to, United Parcel Service, incurred in delivering merchandise to customers, provided that such charges are at all times properly segregated from amounts includable in Adjusted Gross Sales and so identified on Tenant's records; **(F)** for sales at a discount to bona fide employees of Tenant, only the discounted purchase price shall be included in Adjusted Gross Sales, provided such sales do not exceed a total of 2% of Tenant's total Adjusted Gross Sales, in the aggregate, in any Lease Year; **(G)** any sale of fixtures or equipment not in the regular course of Tenant's business or after

use thereof; **(H)** gift certificates, or like vouchers, until such time as they have been converted into a sale by redemption at the Premises; **(I)** catalog and internet sales where the item purchased is neither ordered from nor paid for at the Premises; and **(J)** bad debt expense with respect to merchandise sold on credit or purchased by check, provided, if the amount thereof is subsequently collected, it shall be included in Adjusted Gross Sales in the year of collection.

6.4 **Adjusted Gross Sales Information**. If Tenant reports its sales from the Premises and from any other premises operated by Tenant in the City of Avondale, Arizona collectively on its City transaction privilege tax reports, then Tenant will provide the City with a separate accounting of the taxable revenues derived from the Premises. Finally, upon Landlord's request, Tenant will provide Landlord with a copy of Tenant's most recent annual (fiscal year) report of Adjusted Gross Sales derived from the Premises. Landlord will hold any such report in strict confidence and will not divulge the same to any third parties, except that Landlord may **(A)** provide copies to bona fide prospective lender or buyers of the Premises, provided the recipient agrees to maintain the confidentiality of such report and to use the same only in evaluating its potential loan or purchase; or **(B)** divulge the same to the extent required by Laws in any legal proceeding. By executing this Lease, Tenant specifically waives any claims it has or may have in the future relating to Landlord's use of the confidential information in accordance with this subsection 6.4.

ARTICLE 7

Real Estate Taxes

7.1 **Real Estate Taxes**. Pursuant to ARIZ. REV. STAT. §§ 42-6201 et seq. (the "**Excise Tax Statutes**"), because the City is the fee owner of the Center, the Center, upon completion, will not be assessed property taxes. Pursuant to the Excise Tax Statutes, the Center is instead subject to the assessment or levy of an excise tax (the "**Excise Tax**"). The Excise Tax is calculated in accordance with the provisions of ARIZ. REV. STAT. § 42-6203. This Excise Tax, as well as general real and personal property taxes and assessments, shall be treated as Operating Costs as detailed Article 4. However, assessments (both special and general) imposed in connection with any financing district, transportation development district, special assessment district, special benefit district, sanitary improvement district, local improvement district or any similar district of which the Center (or any portion thereof) is a part are not covered under Operating Costs and are instead treated as "**Real Estate Taxes**" according to the terms of this section and **Section 7.2** below. Tenant covenants and agrees to pay to Landlord as Additional Rent any costs for these Real Estate Taxes and in no event shall Tenant contest or appeal or have any right to contest or appeal these Real Estate Taxes levied or assessed against the Premises or the Center. In addition to paying its Proportionate Share of Real Estate Taxes a part of the Operating Costs, Tenant shall pay all taxes applicable to all other property in the Premises that is not taxed as real property and included in Real Estate Taxes, as set forth in **Section 20.1** (captioned "**Tenant's Property**").

7.2 **Tenant's Proportionate Share of Real Estate Taxes**. Tenant's "**Proportionate Share of Real Estate Taxes**" shall be an amount equal to the Real Estate Taxes on the "**Center Tax Parcel**" (as defined in this Section) multiplied by a fraction, the numerator of which is the Floor Area of the Premises and the denominator of which is the total Floor Area of the buildings within the Center Tax Parcel, including the Premises. The term "**Center Tax Parcel**" shall be defined as land owned by Landlord improved for use as part of the Center (which may be comprised of one or more individual tax parcels), but excluding any portions thereof which are separately assessed and taxed or are the subject of records maintained by the taxing authority from which the amount of tax

allocable to such portions may be separately determined and billed to the following: **(A)** to any entity other than Landlord or paid directly by that entity; or **(B)** to Landlord but paid by another entity. Landlord shall be entitled, at any time and from time to time during the Term, to change or modify the Center Tax Parcel in the exercise of its reasonable discretion.

ARTICLE 8

Liens

In no event shall any material or equipment that is incorporated in or affixed to the Premises be subject to any notice of lien, lien, encumbrance or security interest; PROVIDED, HOWEVER, the foregoing shall not preclude Tenant from granting a security interest in Tenant's Property. Notice is hereby given that Landlord shall not be liable for any work or materials furnished to Tenant on credit and that no notice of lien or mechanic's or other lien for any such work or materials shall attach to or affect Landlord's interest in the Premises based on any work or material supplied to Tenant or anybody claiming through Tenant. Tenant shall not permit any notice of lien or lien to be filed against the Premises or any portion of the Center for labor, services or materials claimed to have been performed for or furnished to Tenant, its contractors and subcontractors. If such a notice of lien or lien is filed, Tenant shall discharge the notice of lien or lien within ten days after the filing thereof (the "**Lien Cure Period**"). In the event Tenant fails to discharge such notice of lien or lien prior to the expiration of the Lien Cure Period, then such failure shall constitute an Event of Default to which no further cure period applies. Tenant hereby acknowledges its failure to discharge or "bond over" such a notice of lien or lien prior to the expiration of the Lien Cure Period shall cause Landlord to incur expenses not contemplated by this Lease, the exact amount of which is difficult to ascertain. Accordingly, if Tenant fails to "bond over" or discharge any such notice of lien or lien within the Lien Cure Period, then in addition to Landlord's other rights and remedies under this Lease, at law or in equity, Tenant shall pay to Landlord liquidated damages in the amount of $250.00 for each day between the expiration of the Lien Cure Period and the date such notice of lien or lien is removed or "bonded over." In addition, should Tenant fail to pay or "bond over" any liens within the Lien Cure Period, Landlord may (but shall not be obligated to) "bond over" such lien or pay the lien claimant and obtain a release of the lien without inquiring into the validity thereof and without liability to Landlord for any such payment, and offset any reasonable costs so incurred against any amount owed Tenant, and Tenant shall, upon demand and as Additional Rent, reimburse Landlord for the amount so paid together with all reasonable attorneys' fees incurred by Landlord. In addition to Landlord's rights and remedies under this Lease and at law or in equity, Tenant shall indemnify, defend, and hold Landlord harmless, utilizing legal counsel acceptable to Landlord, for, from and against any and all claims, demands, actions, causes of action, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees of Landlord, arising from or connected in any way with any notice of lien or lien. Nothing in this Lease shall be construed as a consent or request by Landlord, express or implied, to any contractor, subcontractor, laborer or materialman for the performance of any labor at or the furnishing of any materials to the Premises.

ARTICLE 9

Parking & Public Rights of Way

9.1 **Parking**. Tenant and its employees, customers and invitees may have the non-exclusive right, together with Landlord and all other tenants and occupants of the Center, and subject to payment of the fees (which fees will be consistent with market fees for comparable parking spaces in Avondale, Arizona, established by the operator from time to time, which rules and regulations will be reasonable and enforced in a non-discriminatory manner to the extent that the parking operator is Landlord, an affiliate of Landlord or operating pursuant to a contract with Landlord, to use the publicly designed parking lot serving the Sports Facility. Neither Tenant, nor its employees shall use any parking spaces marked or designated as reserved parking spaces. Tenant shall, within five days after request from Landlord, furnish to Landlord the automobile license numbers of all automobiles owned or used by Tenant or its employees. If there is a violation of the foregoing requirement by any employee of Tenant, Landlord shall give Tenant notice thereof, and if such violation continues following notice to Tenant, Landlord shall have the right, at Landlord's option, to tow any vehicle parked in violation of the terms hereof, or to charge Tenant the sum of $35.00 per day for each violation. Landlord may designate certain portions of the parking areas as reserved for use by certain tenants or customers of certain tenants. To accommodate Tenant parking during peak restaurant hours, the Landlord will impose daily parking restrictions between the hours of 5pm and 8pm along the north side of Civic Center Drive and the east side of 114th Street. These restrictions will provide a maximum of two hour parking along these streets.

9.2 **Parking Fees**. At some time in the future the Landlord may convert all or some of the surface parking to structured parking. However, Landlord agrees to make reasonable efforts to minimize the need for structured parking if initial development does not warrant the installation of a parking structure. In the event Landlord reasonably deems structured parking is appropriate for the Center, Landlord has the right to charge Tenant $1,400.00 per month for 14 structured parking spaced. The parking charge will commence when the parking structure is made operational, but in no event earlier than the third Lease Year. The parking fees will be administered and collected through an amendment to the Operating Costs as set forth in Article 4. The City will also provide temporary parking spaces to Tenant during the parking structure construction period and if the parking structure construction period occurs during the first three Lease Years.

9.3 **Public Rights-of-Way**. The public rights-of-way may from time to time at the sole discretion of the City, be temporarily closed for events. The City or Landlord is under no obligation to temporarily or permanently replace the loss of parking due to closure of public rights-of-way. The City or Landlord is responsible for maintenance and cleaning of public rights-of-way after any such event.

ARTICLE 10

Construction of the Premises

Landlord and Tenant agree that the Premises shall be constructed in a good and workmanlike manner in accordance with the terms and provisions of **ITEM 11** and **Exhibit B-2** hereto. Landlord agrees to use reasonable efforts to complete Landlord's Work and to deliver possession of the Premises to Tenant with all such work substantially completed by Landlord's designated delivery date, which may be adjusted by Landlord from time to time, or as soon thereafter as reasonably

possible. Tenant agrees that Landlord has made no representations or warranties regarding the condition of the Premises or the Center, except as expressly set forth in this Lease.

ARTICLE 11

Alterations; Roof Penetration; Signs; Indemnification

11.1 **Interior Non-Structural Alterations**. Tenant shall have the right to make interior, non-structural alterations or additions to the Premises without Landlord's consent. Tenant shall provide 30 days' prior notice to Landlord before the commencement of any interior, non-structural alterations or additions to be made to the Premises.

11.2 **Structural and Exterior Alterations**. Tenant shall not make any structural or exterior modifications, improvements, alterations, additions or installations in or to the Premises (the "**Alterations**") without Landlord's prior, written consent. Along with any request for Landlord's consent and before commencement of any Alterations or delivery of any materials to be used in any Alterations, Tenant shall furnish Landlord with a complete set of plans and specifications, names and addresses of contractors, copies of permits and licenses, and an indemnification in such form and amount as may be reasonably satisfactory to Landlord and, if required by Landlord, a performance bond executed by a commercial surety reasonably satisfactory to Landlord, and in an amount equal to the cost of the Alterations and the payment of all liens for labor and material arising therefrom. All Alterations shall be done only by licensed, bondable contractors or subcontractors reasonably approved by Landlord, and at such time and in such manner as Landlord may from time to time reasonably designate. Tenant shall pay the cost of all Alterations (including a reasonable charge for Landlord's services and for Landlord's inspection, architectural and engineering time), and also the cost of painting, restoring or repairing any portion of the Premises and the Center required because of Tenant's Alterations. Upon completion of the Alterations, Tenant shall furnish Landlord with contractor's affidavits and full final, unconditional waivers of liens and a reasonably detailed breakdown of the costs of all labor and materials employed in such Alterations. All Alterations shall comply with all insurance requirements and all laws, ordinances, rules and regulations of all governmental authorities (including, without limitation, the Americans With Disabilities Act) and shall be constructed in a good and workmanlike and lien free manner. Tenant shall permit Landlord to inspect construction operations in connection with any Alterations. Tenant shall not be allowed to make any modifications, improvements, Alterations, additions or installations if such action results or would result in a labor dispute or otherwise would materially interfere with Landlord's operation of the Center. Subject to applicable federal and state law, in the event any Alterations result in a labor dispute, Tenant shall cause work to be halted immediately, remove the workers, contractors or mechanics responsible for such dispute and replace them with workers, contractors and mechanics acceptable to Landlord and whose work shall not (in the sole and absolute discretion of Landlord) result in a labor dispute.

11.3 **Roof Penetration**. Tenant must obtain prior, written approval from Landlord before accessing the roof of the Center for any type of roof puncture/penetration or for attaching any items to the roof, and such work must be performed by Landlord's roofing contractor at a competitive market price or by a contractor approved by Landlord. Tenant shall be responsible for any damage to the Premises, the roof or the building containing the Premises or the Center caused by Tenant, its agents or contractors, including, but not limited to, any roof puncture/penetration. Tenant shall be responsible for the roof above its premise in the event it makes an alteration, with or without Landlord permission, and any damage to the Premises occurs. Notwithstanding the foregoing,

Landlord approves of Tenant installing a satellite dish on the roof of the Premises and will reasonably cooperate with Tenant in such planning and installation thereof so as not to penetrate the roof or roof membrane; provided, however, that Tenant submit to Landlord its plans for the installation of the satellite for Landlord's approval and that Tenant does not cause any roof warranties to be rendered null and void or inapplicable.

11.4 **Tenant's Signs**. Tenant shall comply at all times with the provisions of **Exhibit C** with respect to Tenant's interior signs. All of Tenant's signs shall comply with all Legal Requirements for the Center. Tenant shall be responsible for the costs of designing, manufacturing, installing, illuminating, operating and maintaining its signs. Upon the termination of this Lease, Tenant shall remove its signs and restore and repair all parts of the Premises and the Center affected by the installation or removal of its signs, to the condition existing prior to installation or to a condition reasonably acceptable to Landlord. If Tenant fails or refuses to remove its sign as herein required, Landlord may, but shall not be obligated to, remove such signs and repair and restore all damage caused by their removal, and Tenant shall pay to Landlord the costs of all such removal, repair and restoration, together with an amount equal to 25% of such costs, within ten days after receipt of an invoice therefor. Landlord reserves the right to place signage on the exterior of the Premises, including, without limitation, building identification signage, directional signage and signage for other tenants and occupants of the Center.

11.5 **Indemnification**. Tenant agrees to indemnify, defend and hold Landlord harmless, utilizing legal counsel acceptable to Landlord, for, from and against any and all claims, demands, actions, causes of action, losses, damages, costs, and expenses, including court costs and reasonable attorneys' fees of Landlord arising from or connected in any way with Tenant's interior non-structural alterations, Alterations, roof puncture/penetrations, Tenant's signs, or any other work performed by or on behalf of Tenant on the Premises regardless of whether or not such claim, demand, action, cause of action, loss, damage, cost or expense is caused in part by a party indemnified hereunder, unless caused by Landlord's gross negligence or willful misconduct in which event Landlord shall be solely liable. The provisions of this Section shall survive the expiration or termination of this Lease.

ARTICLE 12

Repair and Maintenance

12.1 **Landlord Repairs**. Landlord agrees to make or cause to be made the following repairs (which shall include replacements, if necessary) (collectively, "**Landlord Repairs**") within a reasonable period of time after receipt of notice from Tenant of the need therefor:

A. **Structural Repairs**. Structural portions of the Premises ("**structural portions**" consisting only of the foundation, roof, floor slab and members supporting the roof), the cost of which shall be included in Operating Costs; PROVIDED, HOWEVER, notwithstanding the foregoing, in no event shall Landlord be responsible for the repair or replacement of the floor covering in the Premises. In the event Landlord fails to perform its maintenance obligations herein, Tenant shall have the right to perform such maintenance and Landlord shall reimburse Tenant for the cost thereof within thirty (30) days after receipt of an invoice therefor.

B. **Utility Repairs**. All repairs to and replacements of utility systems and sewer lines up to the point of the meters located in the mechanical room or, if there is no mechanical

room, to the point at which they are stubbed to the Premises, the cost of which shall be included in Center Operating Costs. PROVIDED, HOWEVER, in the event any damage is caused by one or more acts or omissions of Tenant, its agents, employees, customers or invitees (or any other person other than Landlord), or if a damaged utility line exclusively serves the Premises, Tenant shall pay the cost of such repairs within 30 days after receipt of an invoice therefor. Additionally, Landlord shall include in Operating Costs the costs of repair(s) to plumbing and utility lines from the entrance points of the utility lines into the Center to the mechanical room(s) or, if there is no mechanical room, to the point at which they are stubbed to the Premises.

12.2 **Tenant Repairs**. Except as is Landlord's obligation under this Article, Tenant agrees, at its own cost and expense, to take good care of the Premises and Tenant's trash area and to keep them in good and first-class order, condition and state of repair (which shall include replacements, if necessary) including, without limitation, the following:

A. **Interior Repairs**. Any and all interior repairs, including but not limited to all repairs to its trade fixtures and electrical equipment and fixtures, plumbing fixtures, lines and equipment and other utility lines (including sewer and utility lines within and exclusively serving the Premises), from the point of the meters in the mechanical room or, if there is no mechanical room, to the point at which they are stubbed to the Premises), elevators, if any, and wiring (including that within walls or ceilings, or under flooring or floor covering, or in or under the slab).

B. **Storefront Repairs**. All storefront repairs, including glass and doors, door frames, locks, lifts, openers and hardware.

C. **Window Repairs**. All repairs to windows (including sashes, frames, locks and hardware) and all Tenant's signs (including replacement of signs).

D. **Maintenance Repair**. All the maintenance, repair and replacement of the HVAC System located in and exclusively serving the Premises, including maintenance of all fixtures, equipment, ducts, machinery, machinery controls, appliance and utility lines as are used for, in connection with or which are part of the electrical, plumbing, heating, air conditioning, ventilation or other mechanical systems in and exclusive to the Premises. Tenant shall, within 30 days after the Delivery Date, enter into and provide Landlord a copy of, and thereafter maintain, a preventative maintenance contract on the HVAC System in the Premises, which contract shall provide for periodic maintenance in accordance with the manufacturer's specifications. In the event Tenant fails to maintain such preventative maintenance contract, Landlord, at its option, may arrange for such a preventative maintenance contract for the HVAC System on terms reasonably acceptable to Tenant; PROVIDED, HOWEVER, Landlord has notified Tenant of this failure of Tenant to comply with the maintenance requirements set forth herein and Tenant has failed to cure such noncompliance within 30 days after receipt by Tenant of Landlord's notice, in which event the cost of such preventative HVAC System maintenance shall be billed directly to Tenant and shall be paid within thirty days after receipt of an invoice therefor.

ARTICLE 13

Inspections; Self Help; Construction in the Center

13.1 **Inspections**. Landlord shall have the right, upon reasonable prior notice, except in the event of an emergency (in which case only such notice as is practicable shall be required), to enter

upon the Premises for any purpose, including to determine Tenant's compliance with this Lease or to maintain and repair any pipes, conduits or ducts, whether used in the supply of services to Tenant or to other occupants of the Center. Landlord shall further have the right, on at least 48 hours prior notice, to enter the Premises in connection with the following: **(A)** construction on the Premises; or **(B)** completing any work, repairs, alterations, or improvements in and about the Premises.

13.2 **Landlord's Right to Self Help**. If Tenant neglects or refuses to make repairs to or to maintain the Premises as required under this Lease, or to fulfill any other obligation (or any part thereof) as required under this Lease, then in addition to all other rights and remedies of Landlord as a result of such failure, Landlord and/or its agents shall have the right, upon giving Tenant reasonable notice of its election to do so, except in the event of an emergency (in which case only such notice as is practical shall be required), to make the repairs or perform the maintenance or other obligations on behalf of and for the account of Tenant. The cost of the work so done or obligations performed by Landlord or its agents, together with an amount equal to 25% of such costs, shall be paid for by Tenant within thirty days after Tenant's receipt of a bill therefor. If Tenant fails to pay such amount within such 30-day period, the amount shall accrue interest at the Interest Rate upon the expiration of such 30-day period until paid. Nothing herein shall imply any duty on the part of Landlord to do any work which Landlord is not specifically and expressly required to perform under this Lease or which, under any provisions of this Lease, Tenant is required to perform, and the performance of such work by Landlord shall not constitute a waiver of Tenant's default. Landlord shall have no liability to Tenant for any loss or damage which may result to its stock or business by reason of such repairs, replacements or action.

13.3 **Construction in the Center**. In connection with any construction, excavation or other building operations related to changes to the Center, Landlord, its agents, employees and contractors shall have the right of access to enter the Premises on reasonable prior notice to Tenant and to strengthen, add to or shore the foundations, walls, columns or supporting members thereof, and to erect scaffolding and/or protective barricades around and about the Premises (but not so as to preclude entry thereto) and to do any act or thing necessary for the safety or preservation of the Premises, in Landlord's sole discretion, and Landlord shall use reasonable efforts to complete all construction in the Premises as promptly as possible (considering the nature and extent of the construction and subject to prudent construction practices). Tenant's obligations under this Lease shall not be affected by any such changes, construction, excavation or other building operations, and so long as Landlord acts reasonably, Landlord shall not be liable for any inconvenience, disturbance, loss of business or any other annoyance arising therefrom.

ARTICLE 14

Utilities/Meters; Interruption of Service

14.1 **Utilities/Meters**. Landlord shall provide utility lines to the Premises, including **(A)** one sewer stub directly into the Premises, **(B)** 1000 amp service panel, **(C)** HVAC System controls and all required wiring from panel to HVAC System units for Tenant, and **(D)** one water line of a size sufficient for the Premises. Tenant agrees to obtain directly from the provider thereof and pay all charges for electricity, air conditioning, heating, gas, water, sanitary sewer and other utility bills relating to the Premises from and after the Delivery Date. If any utility services are not separately metered to the Premises, Landlord may require Tenant (as part of Tenant's Work or at any time during the Term of this Lease), at Tenant's sole cost and expense, to install check or sub-meters to

measure Tenant's consumption of such utilities, and shall pay Landlord as Additional Rent, a share of the cost of such utilities (based on Tenant's consumption thereof as evidenced by such check or sub-meter and the rate for such utilities paid by Landlord). Additionally, if any utility service (whether separately or jointly metered to the Premises) is required to be maintained in Landlord's name, Tenant shall either pay all charges for such utility if separately metered to the Premises, or a proportionate share thereof (as set forth in this paragraph above) if jointly metered with other premises. Tenant shall pay any tap, connection and hook-up fees, and any security and other deposits, payable in connection with the utilities serving the Premises except for such development impact fees or hook-up fees charged by the City. All utilities (if separately metered) shall be transferred into Tenant's name on or before the Delivery Date (or such earlier date as Tenant may enter the Premises to perform Tenant's Work) and if Tenant fails to do so Landlord shall have the right to have the utility service to the Premises terminated. If Tenant installs any electrical equipment that overloads the lines in the Premises, Tenant shall, at its own expense, make whatever changes are necessary to comply with the requirements of codes and ordinances of the City or any governing body having jurisdiction.

14.2 **Interruption of Service**. No unreasonable interruption in, or temporary stoppage of (not to exceed one business day), any of the services or utilities furnished to the Premises is to be deemed an eviction or disturbance of Tenant's use and possession of the Premises, nor does any such interruption or stoppage relieve Tenant from any obligation under this Lease, render Landlord liable for damages or entitle Tenant to any Rent abatement.

ARTICLE 15

Tenant's Insurance; Landlord's Insurance; Mutual Release and Waiver of Subrogation

15.1 **Tenant's Insurance**. Tenant, at its sole cost and expense, shall obtain and keep in force commencing as of the Delivery Date, the following insurance with an insurance company authorized to do business in Arizona and which has a general policy rating of A or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a similar rating from a similar or successor service):

A. **"Special Form Causes of Loss" Property Insurance**. Property insurance using ISO forms CP0010 and CP1030 (or their equivalent) and including equipment breakdown covering all of Tenant's Property, plate glass and all "**Leasehold Improvements**" (as defined in **Article 21**) in the Premises made and paid for by Tenant (including, without limitation, Leasehold Improvements paid for with the Construction Allowance, if any), in an amount equal to the full replacement cost thereof.

B. **Business Interruption Insurance**. Business interruption insurance using ISO form CP0030 (or its equivalent) and including equipment breakdown, with a deductible or waiting period of no greater than 72 hours, in an amount that shall reimburse Tenant for direct or indirect loss of earnings attributable to all perils insured against in the previous Subsection or attributable to the prevention of access to the Premises by civil authority; and sufficient to reimburse Tenant for Rent in the event of a casualty to, or temporary taking of, the Center or the Premises.

C. **Commercial General Liability Insurance**. Commercial general liability insurance to protect against claims for bodily injury and property damage arising out of premises operations, products, and completed operations, and advertising and personal injury liability,

including Dram Shop or host liquor liability (if alcoholic beverages are sold or served in, from or about the Premises), written on an occurrence basis using ISO form CG0001 (or its equivalent) with no amendments to the definition of an insured contract, and including specific coverage for Tenant's security guards, with policy limits of not less than $2,000,000.00 per occurrence, exclusive of defense costs, unless Landlord agrees to a lesser amount. The foregoing policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

D. **Environmental Insurance**. Without limiting the provisions of **Article 32**, in the event Tenant's use of the Premises does or might result in the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants (including, without limitation, any Hazardous Materials) into or upon land, the atmosphere or any watercourse or body of water, then Tenant shall obtain environmental insurance insuring against any loss for bodily injury, property damage, cleanup costs and defense expenses resulting from any of the above-described causes with limits of not less than $2,000,000.00 inclusive per occurrence and $2,000,000.00 annual aggregate, per location, or such higher limits as Landlord may require from time to time during the Term. The policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager and all mortgagees of Landlord.

E. **Employer's Liability Insurance and Workers Compensation**. Employer's Liability insurance, with minimum limits of not less than $500,000.00, bodily injury each accident, $500,000.00 bodily injury by disease policy limit, and $500,000.00 bodily injury by disease each employee, and Worker's Compensation in form and amount as required by applicable law. The policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

F. **Umbrella Liability Insurance**. Umbrella liability insurance over such primary general liability, employer's liability insurance policies and/or commercial automobile liability insurance (as applicable) in limits of not less than $2,000,000.00, inclusive, per occurrence, and $2,000,000.00 annual aggregate, per location, or such higher limits as Landlord may require from time to time during the Term. The policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

G. **Builder's Risk Insurance**. In the event Tenant performs any repairs or alterations in, on or about the Premises, Builder's Risk insurance on a "Special Form" basis (including collapse) using a completed value (non reporting) form for full replacement cost covering all work which Tenant contracts for or performs in the Center and all materials and equipment used or installed by Tenant in or about the Premises, off site and in transit. This insurance shall include: **(1)** interests of Tenant, Landlord, Landlord's property manager, all mortgagees of Landlord, Tenant's contractor, subcontractors and sub-subcontractors; and **(2)** a mutual release and waiver of subrogation for all parties.

H. **Commercial Automobile Liability Insurance**. Commercial automobile liability insurance to include contractual liability insurance for the indemnities set forth in this contract covering all owned, non-owned and hired automobiles, in limits of not less than $1,000,000.00 combined single limit (each accident), or such higher limits as Landlord may require from time to time during the Term. The policy(ies) shall include a waiver of any right of subrogation

of the insurers thereunder against Landlord and its members, shareholders, employees and property manager.

l. **Insurance Changes**. Landlord may, from time to time, require changes or endorsements to Tenant's insurance required herein.

15.2 **Policies of Insurance**. Tenant shall have the right to satisfy the insurance required by this Article by means of blanket insurance policy(ies), provided that no other loss which may also be insured by the blanket insurance shall affect the insurance coverages required hereby and further provided that Tenant delivers to Landlord a certificate specifically stating that such coverages apply to Landlord, Landlord's property manager, all mortgagees of Landlord, the Premises and the Center. All policies of insurance or certificates thereof, except with respect to workers compensation or professional liability, shall name Landlord, Landlord's property manager, and all mortgagees of Landlord, as additional insureds, as their respective interests may appear. All self-insured retentions and deductible amounts shall be subject to Landlord's prior written approval. Any and all deductibles or co-insurance in the above-described policies or inadequacy of limits for coverage shall be assumed by, for the account of, and at Tenant's sole risk. Prior to commencing any work under this Agreement, Tenant will provide Landlord with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Tenant's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Landlord shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. Tenant agrees to further provide Landlord evidence of renewals of policies not later than 30 days prior to the end of the expiring term. All policies of insurance carried by Tenant shall be primary and non-contributing in the event of any loss or damage with any insurance required to be maintained by Tenant under this Lease. All policies and certificates shall require the insurer to notify Landlord, Landlord's property manager, and all mortgagees of Landlord, in writing, not less than 30 days before any lapse, non-renewal or cancellation, including cancellation for nonpayment of premium, or other termination thereof, and shall include a clause or endorsement denying the insurer any rights of subrogation against Landlord, Landlord's property manager, and all mortgagees of Landlord. Landlord reserves the right to request or receive for review certified copies of any and all insurance policies to which this Lease is applicable. The required coverage and/or limits referred to herein shall in no way affect or limit Tenant's liability with respect to its duties and obligations under this Lease.

15.3 **Uses Which Affect Insurance**. Tenant shall not knowingly conduct or permit to be conducted in the Premises any activity, or place any equipment in or about the Premises or the Center, which shall invalidate the insurance coverage in effect or increase the rate of insurance on the Premises or the Center, and Tenant shall comply with all requirements and regulations of Landlord's property and liability insurers. If any invalidation of coverage or increase in the rate of insurance occurs or is threatened by any insurance company due to any act or omission by Tenant, or its agents, employees, representatives, or contractors, such statement or threat shall be conclusive evidence that the increase in such rate is due to the act of Tenant, and Tenant shall be liable for the increase and such amount shall be considered Additional Rent payable with the next monthly installment of Minimum Rent due under this Lease.

15.4 **Landlord's Insurance**. Landlord shall, at all times during the Term, carry a policy or policies of commercial general liability insurance covering the Common Areas in the Center and special form causes of loss insurance covering Landlord's improvements in the Center, all in such forms and amounts and with such deductibles and self-insured retentions as Landlord reasonably deems appropriate. Landlord shall not be required to carry insurance of any kind on Tenant's Property, and Tenant hereby acknowledges and agrees that Tenant shall have no right to receive any proceeds from any insurance policies carried by Landlord. If insurance coverages generally maintained by landlords of similar space in similar buildings in the area in which the Center is located increase or otherwise change, Landlord may similarly change the insurance coverages Landlord maintains under this Lease.

ARTICLE 16

Non-Liability of Landlord; Tenant Indemnification; Landlord Indemnification; Third Party Claims; Tenant's Risk

16.1 **Non-Liability of Landlord**. Except as provided in **Section 16.3** (captioned "**Landlord Indemnification**"), neither Landlord, nor its affiliates, owners, members, managers, partners, directors, officers, agents and employees shall be liable to Tenant and Tenant hereby waives all claims for any loss, injury, or damage, to Tenant or to any other person, or to its or their property, irrespective of the cause of such injury, damage or loss. Further, except as provided in **Section 16.3**, neither Landlord, nor its affiliates, owners, members, managers, partners, directors, officers, agents and employees shall be liable to Tenant and Tenant hereby waives all claims: **(A)** against Landlord for damage to any property or injury to, or death of, any person in, upon, or about the Center, including the Premises, arising at any time and from any cause, except to the extent caused by the negligence or willful misconduct of Landlord, its agents, employees, or contractors; **(B)** for any damage caused by other tenants or persons in the Center or by occupants of property adjacent thereto, or by the public, or caused by construction (except to the extent solely caused by the negligence or willful misconduct of Landlord, its agents, employees, or contractors), or by any private, public or quasi-public work; **(C)** for any injury or damage to persons or property resulting from the condition or design of, or any defect in, the Center or its mechanical systems or equipment which may exist or occur, or matters arising out of the provision or lack of provision of security, or the action or inaction of any third party security contractor; **(D)** with respect to matters for which Landlord is or may be liable for consequential, punitive or indirect damages purportedly arising out of any loss of use of the Premises or the Common Areas or any loss of use of equipment or facilities therein by Tenant or any person claiming through or under Tenant; **(E)** related to any defect in the Premises or the Center; and/or **(F)** related to any injury or damage to person or property caused by fire, explosion, falling plaster, steam, gas, electricity, water, rain, flood, snow, or leaks from any part of the Premises or from the pipes, appliances, plumbing works, roof, or subsurface of any floor or ceiling, or from the street or any other place, or by dampness or by any other similar cause.

16.2 **Tenant Indemnification**. Tenant hereby agrees to indemnify, defend, and hold Landlord and its affiliates, owners, members, managers, partners, directors, officers, agents and employees (collectively, the "**Landlord Indemnified Parties**") harmless for, from and against any and all "**Losses**" (as defined in this Section), which arise from or are connected in any way with any or all of the following (collectively, "**Tenant's Indemnified Matters**"): **(A)** the conduct or management by Tenant or Tenant's officers, directors, members, partners, subtenants, invitees, agents, employees, contractors or representatives ("**Tenant Parties**") of the Premises or any

business therein, or any work or Alterations done, or any condition created by Tenant or any Tenant Parties in or about the Premises during the Term or during the period of time, if any, prior to the Commencement Date that Tenant is given access to the Premises; **(B)** any act, omission or negligence of any or all of Tenant and Tenant Parties; **(C)** any accident, injury or damage whatsoever occurring in, at or upon either or both of the Center and the Premises and caused wholly or in part by Tenant and/or Tenant Parties; **(D)** any breach by Tenant of any of its warranties and representations under this Lease; **(E)** any actions necessary to protect Landlord's interest under this Lease in a bankruptcy proceeding or other proceeding under the Bankruptcy Code; **(F)** any violation or alleged violation by any or all of Tenant and/or any Tenant Parties of any law, code, ordinance or other governmental regulation; **(G)** any breach or default on the part of Tenant in the performance of any covenant or obligation contained in this Lease; **(H)** claims for work or labor performed for or materials supplied or furnished to Tenant and/or any Tenant Parties; and **(I)** the violation of any "**Environmental Law**" (as defined in **Article 32**) or any permit, application or consent required in connection with any Environmental Law by any or all of Tenant and Tenant Parties with respect to the Premises during the Term; excluding, however, any violation of any Environmental Law resulting directly from the acts or omissions of Landlord and Landlord's employees, agents and contractors. In case any action or proceeding is brought against any or all of Landlord and Landlord Indemnified Parties by reason of any of Tenant's Indemnified Matters, Tenant, upon notice from Landlord shall defend such action or proceeding by counsel reasonably satisfactory to, or selected by, Landlord. For purposes of this Article, the term "**Losses**" shall mean all claims, demands, expenses, actions, judgments, damages, penalties, fines, liabilities, losses of every kind and nature, suits, administrative proceedings, costs and fees, including, without limitation, attorneys' and consultants' reasonable fees and expenses, and the costs of cleanup, remediation, removal and restoration, that are in any way related to any matter covered by the foregoing obligations. The provisions of this Section shall survive the expiration or termination of this Lease.

16.3 **Landlord Indemnification**. To the extent permitted by law, Landlord hereby agrees to indemnify and save harmless Tenant, its officers, agents and servants, for, from and against any and all claims, actions, suits, judgments, decrees, orders, liability and expense in connection with loss of life, bodily injury and/or damage to property **(A)** arising from or out of any occurrence in or upon any of the Common Areas, except to the extent the same is caused by the willful misconduct or negligent act or omission of Tenant and/or Tenant Parties; and **(B)** occasioned wholly or in part by any willful misconduct or negligent act of Landlord, its agents, employees or servants. The provisions of this Section shall survive the expiration or earlier termination of this Lease with respect to any damage, injury or death occurring before such expiration or earlier termination.

16.4 **Third Party Claims**. Landlord shall have no liability to Tenant, Tenant Parties, or other third parties in the event of damage to or loss of personal property (including Tenant's Property) within the Premises or any other injury or damage arising from any act or omission of co-tenants or other occupants of the Center, or of their employees, or of other third parties, not including Landlord, its agents, contractors or employees.

16.5 **Tenant's Risk**. All personal property in the Premises shall be at Tenant's sole risk, and Landlord shall not be liable for any damage done to, or loss of, such personal property, or for damage or loss suffered by the business income or occupation of Tenant arising from any act of neglect of third parties, or from bursting, overflowing, or leaking of water, sewer or steam pipes, rain, wind, tornadoes, floor or other surface or subsurface water, from overflow of drainage facilities or backup or stoppage of any drain, sewer or other water runoff facility or device or from the heating or plumbing fixtures, noise, dust, or from electric wires, or from gas, odors, natural disaster, riot or

act of violence, leaking roofs or caused in any other manner. Tenant shall give Landlord prompt notice of any accident to, defect in or problem in the Premises or Building of which Tenant has knowledge or notice. Tenant, for itself and its agents, employees, representatives, contractors, successors, assigns, invitees and licensees, expressly assumes all risks of injury or damage to person or property, whether proximate or remote, resulting from the condition of the Center or any part thereof.

ARTICLE 17

Assignment and Subletting

17.1 **Consent of Landlord**. Tenant shall not assign this Lease or sublet the Premises or any part thereof or mortgage, pledge or hypothecate its leasehold interest or grant any concession or license within the Premises or sublease any operating department therein, whether by sale, assignment, death, incompetency, mortgage, deed of trust, trust, operation of law or otherwise, and whether voluntary or involuntary, without the prior written consent of Landlord (which Landlord may grant or withhold in the exercise of its sole and absolute discretion) which consent shall be evidenced by the signature of the City Manager thereon. Any attempt to do any of the foregoing, without the prior written consent of Landlord, shall be void and of no force or effect. This prohibition shall be construed to include a prohibition against an assignment or subletting by operation of law.

17.2 **Corporate, Partnership or Limited Liability Company Transfer**. Any transfer of Tenant's interest in this Lease by merger, consolidation or dissolution or any change in ownership or power to vote a majority of the "**voting stock**" (as defined in this Section) or majority in interest in Tenant, if Tenant is a corporation or limited liability company, or any transfer of this Lease by transfer of any other ownership interest of Tenant, or any Guarantor, during the Term shall constitute an assignment for the purpose of this Lease, and shall not be permitted unless Tenant obtains the express consent of Landlord. For purposes of this Section, the term "**voting stock**" means shares of stock or interest of any kind, regularly entitled to vote for the election of directors, managing partners, or managers or their equivalent of the corporation, limited liability company, partnership or other entity involved.

17.3 **Assignment; Pledging**. If this Lease is assigned or if the Premises are subleased (whether in whole or in part) or in the event of the mortgage, pledge or hypothecation of the leasehold interest or grant of any concession or license within the Premises or if the Premises are occupied in whole or in part by anyone other than Tenant in violation of the terms of this Article, Landlord shall have the right to do the following: **(A)** collect rent from the assignee, sublessee, mortgagee, pledgee, party to whom the leasehold interest was hypothecated, concessionee or licensee or other occupant and apply the net amount collected to the Rent payable hereunder without being deemed to have approved or consented to such action by Tenant; and/or **(B)** re enter the Premises, assume and take possession of the whole or any part thereof, and remove all persons or personal property therefrom, by direct or summary action, or in a different type of suit or proceeding, by force, or otherwise, without being deemed guilty of trespass or other actionable wrong by reason thereof, and without being liable for damages therefor or in connection therewith, and after demand made therefor, Tenant or anyone in possession claiming under Tenant shall be deemed guilty of unlawful detainer and subject to such summary or other action as may be provided by law.

17.4 **Event of Assignment or Subletting**. If Tenant wishes to assign this Lease or sublet all or any part of the Premises, it shall first give written notice of such intention to Landlord,

furnishing Landlord with a copy of the final proposed assignment or sublease document and with full information as to the identity and financial status of the proposed assignee or subtenant. Any proposed assignment document shall provide, without limitation, the following: **(A)** that the assignee thereunder shall be liable for all of the obligations of Tenant under this Lease (including, without limitation, the payment of any and all amounts paid or to be paid by Tenant under this Lease on an estimated basis and reconciled on an annual basis, regardless of whether such reconciliation occurs subsequent to such assignment); and **(B)** that any security deposit paid to Landlord under this Lease is transferred to such assignee. Within 60 days after receipt of such notice and documentation from Tenant, Landlord shall have the right, by notice to Tenant, to either: **(1)** terminate this Lease, in which case Tenant shall be relieved of further liability hereunder and under the proposed assignment or sublease; **(2)** approve or reject such assignment or subletting; or **(3)** convert the assignment or sublease into a direct lease between Landlord and such proposed assignee or sublessee and receive all of the rents. If no such response is given, Landlord shall be deemed to have elected to disapprove the assignment or subletting. Notwithstanding the foregoing, Tenant may not attempt to assign or sublease this Lease until 12 months after the commencement of this Lease.

17.5 **Permitted Transfer**. Notwithstanding anything contained in this Lease to the contrary, Tenant, without Landlord's prior consent but with 20 days prior written notice, may assign this Lease or sublet the whole of the Premises (a "**Permitted Transfer**") to a legal entity (a "**Permitted Transferee**") which is either: **(A)** the successor, by merger or otherwise, to all or substantially all of Tenant's assets and liabilities; or **(B)** controls or is controlled by or is under common control with Tenant. For purposes of this Section, the term "**control**" (including the terms "controls," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. Any such assignment or subletting shall be otherwise subject to and upon all of the terms, provisions and covenants of this Lease. However, any assignment, including a Permitted Transfer, shall not in any way relieve Tenant of liability as to any term or condition of this Lease without the express approval of Landlord.

17.6 **Miscellaneous Provisions**. Landlord agrees to give an estoppel letter to any assignee or sublessee to which Landlord consents or in the event of a Permitted Transfer, upon request from such assignee or sublessee. Any sale, assignment, mortgage, transfer or subletting of this Lease which is not in compliance with the provisions of this Article shall be void and of no further force or effect. All rentals paid to Tenant by an assignee or sublessee shall be received by Tenant in trust for Landlord and forwarded immediately to Landlord without offset or reduction, or, at Landlord's election, such rentals shall be paid directly to Landlord (to be applied as a credit and offset to Tenant's Rent obligations). All consideration paid to Tenant for an assignment, sublease or other right to use the Premises which is in excess of the amount required to be paid over to Landlord for the use of the Premises (or pro rata portion of the amount required to be paid to Landlord in the case of a sublease of a portion of the Premises) shall be paid to Landlord by Tenant upon receipt. Tenant shall pay all costs incurred by Landlord in connection with any proposed assignment or sublease, including reasonable attorneys' fees, and shall pay any brokerage commission incurred by reason of any such proposed assignment or sublease.

17.7 **No Release or Waiver**. Notwithstanding anything contained in this Lease to the contrary, no consent or action by Landlord, and no assignment or subletting permitted by Landlord, shall be deemed a waiver or a release of Tenant from the performance by Tenant of its covenants, duties and obligations hereunder. All obligations and duties shall continue notwithstanding any such consent, assignment or subletting.

ARTICLE 18

Landlord Transfer

18.1 **Landlord Transfer**. Landlord reserves the right to sell or otherwise assign its interest in this Lease or the Premises and the acquisition of title or of Landlord's interest in this Lease by a subsequent owner shall not affect or impair this Lease. However, Landlord may not sell, assign, or otherwise transfer this Lease with Tenant without also selling, assigning, or otherwise transferring any and all of Landlord's liabilities and/or responsibilities under this Lease. If Landlord conveys or transfers its entire interest in the Premises, upon such conveyance or transfer, Landlord (and in the case of any subsequent conveyances or transfers, the then grantor or transferor) shall be released from all liability with respect to the performance of any obligations on the part of Landlord to be performed hereunder from and after the date of such conveyance or transfer. Upon notice of such transfer, Tenant shall attorn to the new owner as landlord.

18.2 **Development Matters**. Tenant hereby acknowledges and agrees that Landlord shall have the right to improve or cause to be improved or to convey or lease to third parties for improvement (without the necessity of obtaining Tenant's consent) the outlots, if any, contiguous or adjacent to the Center to which legal or equitable title is acquired by Landlord at any time during the term hereof (individually, an "**Outlot**", collectively, the "**Outlots**"), as separate and independent developments from the remainder of the Center, and the same may (at Landlord's sole election) be excluded from the Center for purposes of this Lease. In the event of a sale, transfer or other conveyance of any of the Outlots, Landlord may enter into an agreement with the transferee granting appropriate easement and other rights, and containing such other matters as Landlord and such transferee may agree, to the extent not inconsistent with this Lease.

ARTICLE 19

Permitted Use; Prohibited Uses; Future Restriction; Rules and Regulations; Legal Requirements; Radius Restriction

19.1 **Permitted Use**. It is understood and agreed between the parties hereto that during the Term of this Lease, the Premises shall be used and occupied only for the Permitted Use as defined in **ITEM 3** of the Cover Sheet and for no other purpose or purposes without the prior written consent of Landlord (which may be withheld in Landlord's sole and absolute discretion). In the event Landlord elects (in the exercise of its sole and absolute discretion) to permit Tenant to use all or any portion of the Premises for a use other than the Permitted Use described in **ITEM 3** of the Cover Sheet, then such approved use shall constitute a "**Permitted Use**" for purposes of this Lease.

19.2 **Prohibited Uses; Future Restrictions**. In addition to Tenant's agreement to operate only for the Permitted Use as provided above, Tenant expressly covenants and agrees that it shall not operate or permit any operation in the Premises so as to violate or permit the violation of, or cause Landlord to violate any future provision for exclusive use or other restriction negotiated by Landlord and applicable to the Premises or the Center after the Effective Date ("**Future Restriction**"); PROVIDED, HOWEVER, Landlord agrees that any Future Restriction which would in any way limit or restrict Tenant's right to use the Premises for the Permitted Use (or such other use

as Landlord may have expressly approved in writing prior to the date of such Future Restriction) shall have no application whatsoever to Tenant's conduct of said Permitted Use or approved use in the Premises, so long as this Lease is in full force and effect. Additionally, Tenant shall promptly comply with all encumbrances of record affecting the Premises from time to time, all laws, ordinances and lawful orders, the rules adopted by the Declarant, or, if applicable, any rules and regulations of the Center, as may be amended or promulgated in the future, affecting the Premises and the cleanliness, safety, occupation and use of the same. In addition to other restrictions on the use of the Premises, Tenant shall not use or permit the Premises to be used for, and the Premises are subject to, and Tenant shall abide by, the "**Center Rules and Regulations**" (as defined in this Article). In the event that Tenant's use violates or causes Landlord to violate the provisions of any of the Exclusives or any Prohibited Use or Future Restriction, then and in any of such events, Landlord shall give Tenant written notice of such violation and Tenant shall immediately cease such violation within two days thereafter. In the event Tenant fails to remedy such violation, then in addition to Landlord's rights and remedies under this Lease and at law or in equity, Tenant shall indemnify, defend, and hold harmless Landlord for, from and against any and all claims, demands, actions, causes of action, losses (including, but not limited to, loss or abatements of rents resulting from the exercise of abatement or termination rights by another tenant pursuant to its lease), damages, costs, and expenses, including court costs and reasonable attorneys' fees, and including any cost or legal expenses of Landlord in enforcing the restriction as and against Tenant and otherwise arising from or related to wholly or in part, the use of the Premises in violation of any Exclusive, Prohibited Use or Future Restriction. In the event Tenant violates any of the provisions of this Section, Landlord shall have all rights and remedies provided in this Lease, in addition to all rights and remedies available to Landlord at law or in equity, including, but not limited to, injunctive relief.

19.3 **Center Rules and Regulations**. In addition to the restrictions contained in this Lease, Landlord may from time to time promulgate reasonable and non-discriminatory rules and regulations which further govern the operation of Tenant's business in the Premises and in and about the Center ("**Center Rules and Regulations**"). Tenant agrees to abide by and comply with all such reasonable and non-discriminatory rules and regulations. A copy of the Center Rules and Regulations currently in effect for the Center is attached hereto as **Exhibit C** and incorporated herein by this reference.

19.4 **Legal Requirements**. Tenant shall be obligated (and shall be responsible) to comply with any Legal Requirements, which pertain to Tenant's use and occupancy of the Premises, whether such Legal Requirements are structural or nonstructural in nature. The term "**Legal Requirements**" means all applicable current or future statutes, ordinances, orders, rules, regulations, judgments and requirements of public authorities with jurisdiction over the Center and/or the Premises, and all other matters of record affecting the Premises from time to time. Tenant shall not do or permit anything to be done in or about the Premises, nor bring or keep anything therein which is not within the Permitted Use of the Premises which shall in any way increase the existing rate of or affect any fire or other insurance upon the Premises or the Center or any of its contents, or cause a cancellation of any insurance policy covering said Premises or the Center or any part thereof or any of its contents. Further, Tenant shall furnish and maintain an adequate number of fire extinguishers in good operating condition as may be reasonably required by Landlord or any governmental authority, and in any event, not less than one such extinguisher for each floor or level of the Premises.

19.5 **Radius Restriction**. Except for a second restaurant in the Center operated by Tenant or any Tenant Affiliate, Tenant agrees that if during the Term of this Lease (and irrespective of

whether Tenant is open and operating for business in the Center), either Tenant or any person, corporation, partnership, joint stock association, trust or other firm or entity which controls Tenant or is controlled by Tenant or is under common control with Tenant (and also, in the event Tenant is a corporation, if any officer or director thereof or shareholder directly or indirectly owning more than 10% of the outstanding stock thereof, or parent, subsidiary or related or affiliated corporation) (a "**Tenant Affiliate**") either directly or indirectly, **(A)** commences the operation of or operates any store for the Permitted Use and/or under the Trade Name (whether or not Tenant is open and operating for business in the Premises at such time), or **(B)** commences the operation of or operates any store for any use being conducted in the Premises from time to time, or **(C)** commences the operation of or operates any store selling or otherwise sells any merchandise or services of the type sold by Tenant in the Premises as permitted under this Lease or similar or related items, or **(D)** in any other manner competes with the business being conducted by Tenant at the Premises, within a radius of six (6) air miles of the Premises, which Tenant acknowledges is a reasonable area for the purpose of this provision, then in any of such events, during the period of such other store's operation, the monthly Minimum Rent payable by Tenant hereunder shall be adjusted to the greater of the following: **(1)** 150% of the amount stipulated in this Lease for each calendar month during the Term hereof during which such operations are conducted; and **(2)** the aggregate of Minimum Rent when added to Percentage Rent, calculated as if 100% of all amounts sold at such other store are added to Adjusted Gross Sales from the Premises. Such adjustment reflects the agreement of the parties as to the damages, which Landlord would likely incur by reason of the diversion of business and customer traffic from the Premises and the Center to such other store within such radius, as a proximate result of the operation of such other store. Tenant shall provide statements of Adjusted Gross Sales with respect to sales from such other store in the manner and at the times set forth in this Lease, and Landlord shall have the same rights with respect to such statements as Landlord has under this Lease. Tenant acknowledges and agrees that the provisions of this Section shall apply irrespective of whether Tenant is open and operating for business in the Premises. Landlord and Tenant further agree that Landlord shall not execute a lease with a restaurant of substantially like character in the same Building as Tenant.

19.6 **Tenant Exclusive**. Provided Tenant has not been in default at any time during the Term and so long as Tenant is operating a Mexican food full service sit down restaurant at the Premises, Landlord shall not sell or lease any portion of the Center, other than the Premises, to any company or person whose primary business is a full service sit down or takeout restaurant primarily serving Mexican food (the "**Restricted Use**"). The parties agree that for purposes hereof, primary business shall mean that at least fifteen percent (15%) of the respective tenant's gross sales are from the sale of Mexican food items.

ARTICLE 20

Bankruptcy and Other Actions

Any Event of Default of the type described in **Subsection 23(D)** (captioned "**Bankruptcy**") under the Default provisions of this Lease (a "**Bankruptcy Event**") shall be deemed in material breach of Tenant's obligations hereunder and this Lease shall thereupon automatically terminate. Landlord does, in addition, reserve any and all other remedies provided in this Lease or in the law in connection with any Bankruptcy Event.

A. No default of this Lease by Tenant, either prior to or subsequent to the happening of any Bankruptcy Event, shall be deemed to have been waived unless expressly done so in writing by Landlord.

B. It is understood and agreed that this is a lease of real property in a shopping center as such a lease is described in Section 365(b)(3) of the Bankruptcy Code, that Landlord is entitled to all rights and benefits of a landlord thereunder, and that nothing contained herein shall be deemed a waiver of any such right or benefit.

C. Subject to applicable federal and state law, included within and in addition to any other conditions or obligations imposed upon Tenant or its successor in the event of assumption and/or assignment of this Lease in connection with any Bankruptcy Event are the following: **(1)** the cure of any monetary defaults and the reimbursement of pecuniary loss within not more than 30 days of assumption and/or assignment; **(2)** the deposit of an additional sum equal to three months of Minimum Rent and Additional Rent to be held as security; **(3)** the use of the Premises as set forth in this Lease with the quality and quantity of any goods or services required to be offered for sale unchanged with a covenant of continuous operation by Tenant or its successor; **(4)** the reorganized debtor or assignee of such debtor in possession or Tenant's trustee demonstrates in writing that it has retailing experience in shopping centers of comparable size and financial ability to operate a retail establishment out of the Premises in the manner contemplated in this Lease and meets all other reasonable criteria of Landlord as did Tenant upon execution of this Lease; **(5)** the prior written consent of any mortgagee to which this Lease has been assigned as collateral security; and **(6)** the Premises, at all times, remains a single store and no physical changes of any kind may be made to the Premises unless in compliance with the applicable provisions of this Lease.

ARTICLE 21

Tenant's Property; Personal Property Taxes; Leasehold Improvements

21.1 **Tenant's Property**. Upon the expiration or earlier termination of this Lease, Tenant shall remove from the Premises all of Tenant's furniture, trade fixtures, signage (including both interior and exterior signage, but excluding signage required by law [e.g., "EXIT" signage]), merchandise, inventory, displays and other personal property paid for by Tenant (i.e., excluding any property or improvements paid for by Landlord either directly or with the Construction Allowance) located in the Premises (collectively, "**Tenant's Property**"). Tenant shall use reasonable efforts to avoid or minimize any damage to the Premises or Center resulting from such removal and shall repair any damage to the Premises or Center caused by the removal of Tenant's Property, and all utility lines shall be professionally capped or plugged and Tenant shall leave the Premises in broom clean condition. Tenant hereby agrees that, in addition to any other work required to comply with the provisions of this Section, the foregoing shall require Tenant to repair all damage to the exterior of the Premises resulting from the removal of Tenant's signage and other improvements therefrom, and to repaint all areas beneath such signage and improvements to the extent required for such areas to match the color and materials of the remainder of the exterior of the Premises. If Tenant shall fail to remove any of Tenant's Property, such Property shall become the property of Landlord and Landlord shall have the right to dispose of such Property as it deems appropriate, and Tenant shall reimburse Landlord for any costs thereby incurred on demand. This requirement shall survive the Term of this Lease to the extent necessary to give effect hereto. Notwithstanding anything contained in this Lease to the contrary, in addition to Tenant's obligation to pay its Proportionate

Share of Real Estate Taxes as set forth in **Article 7** above, during the Term of this Lease Tenant acknowledges and agrees that it shall pay all taxes, impositions, assessments and similar charges levied or imposed by any governmental or taxing authority against Tenant's Property or any other property or fixtures located in the Premises and used in connection with the operation of Tenant's business therein that are not taxed as real property, whether owned by Landlord or Tenant (collectively, "**Personal Property Taxes**"). Tenant shall pay all Personal Property Taxes directly to the applicable governmental authority (or, if Landlord receives the bill with respect to any Personal Property Taxes, Tenant shall pay to Landlord within 20 days after receipt of an invoice therefor from time to time, in which event Landlord shall remit such Personal Property Taxes to the applicable governmental authority).

21.2 **Leasehold Improvements Remain**. Notwithstanding anything to the contrary set forth in this Lease, all alterations, decorations, installations, additions or improvements upon or to the Premises attached or affixed to the real estate by either party, including, but not limited to, all paneling, millwork, decorations, partitions, air conditioning units, heating equipment, hot water heaters, light fixtures, railings, mezzanine floor, galleries, elevators, stairways, vault doors, kitchen equipment and the like (collectively, the "**Leasehold Improvements**"), shall immediately become the property of Landlord upon installation and shall remain upon, and be surrendered with the Premises, as a part thereof, at the termination of this Lease. The value or cost of the Leasehold Improvements constructed by Tenant shall in no way constitute a substitute for or a credit against any obligation of Tenant under this Lease to pay Rent. Notwithstanding the foregoing, Landlord may, at its option, require, by giving notice to Tenant within a reasonable time after the expiration of the Term, earlier termination or cancellation of the Lease, default or otherwise, that any or all of the Leasehold Improvements made by Tenant upon or to the Premises be removed by Tenant, in which case such Leasehold Improvements shall be removed, and the Premises and Building shall be restored, to the condition in which it was delivered by Landlord. Tenant shall use reasonable efforts to avoid or minimize any damage to the Premises or Center resulting from such removal, and shall repair any damage to the Premises or Center caused by the removal of such Leasehold Improvements. If Tenant shall fail to either **(A)** properly remove any of Tenant's Property as required under this Lease; or **(B)** repair any damage caused by the removal of any alterations or property (including, without limitation, Tenant's Property) which Tenant is required or entitled to remove from the Premises pursuant to this Lease, and such failure shall continue for more than five days after Tenant's receipt of written notice of such failure, then and in either of such events, Landlord may (but shall not be obligated to) remove any such alterations or property and dispose of the same and/or repair such damage and restore the Premises to the condition required under this Lease, and Tenant shall reimburse Landlord for all costs and expenses incurred in connection with such disposal and/or repairs, together with an additional amount equal to 25% of such costs and expenses, within ten days after receipt of an invoice therefor from Landlord. In the event Tenant fails to pay Landlord all or any portion of the amount requested in such invoice within such ten-day period, the amount shall accrue interest at the Interest Rate from the expiration of such ten-day period.

ARTICLE 22

Eminent Domain

22.1 **Definition/General**. In the event of a taking of all or any part or of any interest in the Premises, the Building, the Center buildings, the Common Areas or any other part of the Property by reason of any exercise of the power of eminent domain, or if there is a transfer thereof or of any

interest therein, made in avoidance of an exercise of the power of eminent domain (all of the foregoing being hereinafter collectively referred to as a "**Taking**"), the following provisions shall apply. Landlord shall notify Tenant of any pending or threatened Taking and of all related proceedings including the settling of any award.

A. **Total Taking**. In the event of a Taking of all of the Premises, the Center, this Lease shall terminate as of the date of such Taking and all of Tenant's obligations hereunder, including its obligation to pay Rent accruing from and after the date of the Taking shall terminate as of the date of such Taking.

B. **Partial Taking**. In the event of a Taking of the following: **(1)** more than 20% of the Premises; **(2)** more than 40% of the Building or the Center buildings; **(3)** more than 35% of the Common Areas (including the parking areas); or **(4)** more than two of the accessways serving the Center without replacement thereof, then Tenant or Landlord may terminate this Lease by notice to the other within 60 days after possession is taken by the condemning authority; PROVIDED, HOWEVER, in the event Tenant elects to terminate this Lease pursuant to Clause (C) above, Landlord shall have the right to nullify such election by giving Tenant notice of its election to promptly restore the Common Areas so taken or furnish substitute facilities which are functionally equivalent to or better than the Common Areas so taken and within a reasonable distance from those portions taken.

22.2 **Restoration**. In the event this Lease is not canceled as herein provided, then Landlord shall: **(A)** restore, if the condemnation award proceeds are available and sufficient to do so, the affected portion and, if applicable, so much of the remainder of the Premises to a complete architectural unit to the extent that they existed on the date physical delivery thereof was initially delivered to Tenant prior to the Commencement Date (in any event subject to then existing code); and **(B)** turn over to Tenant (for restoration purposes by Tenant) that portion of Landlord's award applicable to Tenant's Work initially installed by Tenant and additional Tenant Improvements that was awarded to Landlord (rather than to Tenant) and not otherwise received by Tenant from the condemning authority or pursuant to **Section 22.3** (captioned "**Award**") for such element of damage; PROVIDED, HOWEVER, Landlord may terminate this Lease, if no condemnation award proceeds are available or the condemnation award proceeds are insufficient to restore such affected portion or remainder of the Premises as provided above, by written notice to Tenant within 60 days after the date the condemning authority notifies Landlord of the amount of the condemnation award proceeds (if any). Following the physical delivery of the Premises to Tenant, Tenant shall commence and complete restoration of the Premises to at least the extent of Tenant's Work initially installed by Tenant and additional Tenant Improvements. During the period of restoration in the Premises only, the Rent shall be equitably abated in accordance with the nature and extent that Tenant's use and enjoyment of the Premises has been affected. Notwithstanding anything contained in this Lease to the contrary, in the event Landlord restores the Premises, Tenant shall agree to waive any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right.

22.3 **Award**. All damages awarded for any Taking shall belong to and be the property of Landlord, Tenant hereby assigning to Landlord its interest, if any, in said award. Notwithstanding the foregoing, Tenant shall have the right to prove in any condemnation proceedings and to receive any separate award which may be made for damages to or condemnation of Tenant's movable trade fixtures and equipment and for moving expenses; PROVIDED, HOWEVER, Tenant shall in no event have any right to receive any award for its interest in this Lease or for loss of leasehold, and any such award shall not reduce amounts that would otherwise be available to Landlord.

Notwithstanding the foregoing provisions of this Article, Landlord may terminate this Lease with no further liability to Tenant in the event that following any Taking of any part of the Center, or any conveyance in lieu thereof, any party holding a mortgage, trust deed or similar lien on Landlord's interest in the Center elects to require the application of an award or payment for the taking or conveyance in lieu thereof to reduce the indebtedness secured by such mortgage, trust deed or similar lien.

ARTICLE 23

Default

23.1 **Default Definition**. The occurrence of all or any of the following shall constitute an "**Event of Default**" by Tenant:

A. **Non-payment of Rent or other sums**. Any installment of Minimum Rent, Percentage Rent, Additional Rent or any other sum(s) required to be paid by Tenant hereunder, or any part thereof, shall at any time be in arrears and unpaid following five (5) days after the due date thereof as herein provided.

B. **Vacation or Abandonment of Premises**. Tenant has "**vacated or abandoned**" (as defined in this Subsection) the Premises, and such conditions continues for a period of more than five days after Tenant's receipt of written notice thereof. For purposes of this subsection, the term "**vacated or abandoned**" shall mean that Tenant has: **(1)** ceased operating for business in the Premises, and **(2)** has either: **(a)** verbally or in writing expressed to Landlord or its agent its intention to cease performing all or any of its obligations under this Lease; or **(b)** removed such items of Tenant's Property from the Premises so as to render the Premises unsuitable for the operation of Tenant's business therein; or **(c)** tendered the keys to the Premises to Landlord or its agent; PROVIDED, HOWEVER, Tenant hereby agrees that no acceptance of notice or of the keys to the Premises by Landlord or any agent of Landlord shall constitute an acceptance of surrender of the Premises or terminate this Lease or Tenant's liability hereunder.

C. **Non-performance**. There is any default or breach on the part of Tenant in the observance or performance of any of the other covenants, agreements, or conditions of this Lease on the part of Tenant to be kept and performed, and said default or breach shall continue for a period of 30 days after notice thereof from Landlord to Tenant (or, if such default cannot reasonably be cured within 30 days, if Tenant shall fail to commence to cure the default within such 30-day period or thereafter fails to diligently pursue such cure to completion, but in no event shall cure period exceed 90 days).

D. **Bankruptcy**. If: **(1)** Tenant or any Guarantor of Tenant's obligations under this Lease shall become insolvent, or shall make a transfer in fraud of creditors, or shall make an assignment for the benefit of creditors; **(2)** Tenant or any Guarantor of Tenant's obligations under this Lease shall file a petition under any section or chapter of the United States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any State thereof, or an order for relief relating to Tenant or any Guarantor of Tenant's obligations under this Lease is granted in proceedings filed against Tenant or any guarantor of Tenant's obligations under this Lease; or **(3)** a receiver or trustee shall be appointed for the Premises or for all or substantially all of the assets of Tenant or any guarantor of Tenant's obligations under this Lease.

E. **Attachment**. This Lease or the Premises or any part of the Premises are taken upon execution or by other process of law directed against Tenant, or are taken upon or subject to any attachment at the instance of any creditor or claimant against Tenant, and the attachment is not discharged or disposed of within 15 days after its levy.

F. **Failure to Take Possession**. Tenant fails to take possession of the Premises on the Commencement Date as required hereunder.

23.2 **Remedies**. Upon an Event of Default of Tenant hereunder Landlord, at its option, may exercise any or all of the following remedies, which shall be in addition to the exercise of all rights and remedies of Landlord under this Lease, at law or in equity, with respect to such Event of Default:

A. **Terminate**. Cancel and terminate this Lease and all rights of Tenant hereunder and enter the Premises and take possession thereof.

B. **Take Possession**. Without terminating the Lease, re-enter and take possession of the Premises and remove all persons and property therefrom. Tenant hereby grants to Landlord a lien and security interest as security for payment of all Rent, Additional Rent, or any other charges now or hereafter payable by Tenant hereunder, upon all equipment, fixtures, and inventory (and the proceeds thereof within the Premises, including all improvements, equipment, fixtures, inventory, merchandise, and other personal property now or hereafter placed on or in the Premises, to the full extent of Tenant's and any assignee's, or subtenant's interest herein, and such lien shall include the right to prevent removal of the property from the Premises and may be enforced, upon nonpayment of rent or other charges as property from the Premises and may be enforced, upon nonpayment of rent to other charges as aforesaid, or any other default by Tenant hereunder, without any type of notice to Tenant, unless notice is required by some other provision of this Lease by the re-entry, taking and sale, lease or other disposition of such property. Landlord shall also have all other rights and remedies upon default provided by law, including those set forth in the Uniform Commercial Code. The sale, lease, or other disposition of the property shall be either public or private after at least ten days notice to Tenant at his last known address, and Landlord shall have the right and privilege to be a purchaser at any such sale. Landlord and Tenant agree that ten days notice of such sale, lease, or other disposition of the property is reasonable under the circumstances. Landlord shall not be deemed guilty of trespass or liable for any loss or damage occasioned thereby. Should Landlord elect to re-enter, as herein provided, or should Landlord take possession pursuant to legal proceedings or pursuant to any notice provided for by law or by this Lease, Landlord may either cancel this Lease pursuant to the rights reserved elsewhere in this Lease, or Landlord may, from time to time, without canceling this Lease, make such alterations and repairs as may be necessary in order to relet the Premises; and relet said Premises or any part thereof for such term or terms (which may be for a term extending beyond the Term of this Lease) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable; upon each such reletting all rentals received by Landlord from such reletting shall be applied first, to the payment of any indebtedness other than Rent due hereunder from Tenant to Landlord, second, to the payment of any costs and expenses of such reletting, including brokerage fees and reasonable attorneys' fees, third, to the payment of costs of any alterations and repairs necessary to relet the Premises, fourth, to the payment of Rent due and unpaid hereunder, and the residue, if any, shall be held by Landlord and applied in payment of future Rent or damage as such amounts may become due and payable hereunder during the entire term of the Lease. If such rentals received from such reletting during any month be less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such

deficiency to Landlord. No such re-entry or taking possession of said Premises by Landlord shall be construed as an election on its part to cancel this Lease unless a notice of such intention is given to Tenant or unless the cancellation thereof is decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to cancel this Lease for such previous Event of Default.

C. **Locks/Security Devices**. Alter locks and other security devices at the Premises in accordance with applicable law.

D. **Tenant Improvement Allowance**. Withhold payment of any unpaid portion of the Tenant Improvement Allowance, if any, regardless of whether Tenant has already paid for all or any portion of the cost of the work, materials or labor to be paid for with the Tenant Improvement Allowance.

E. **Injunctive Relief**. Without limitation, exercise any other right at law or in equity, including specifically, but not by way of limitation, the pursuit of temporary or permanent injunctive relief.

23.3 **Additional Provisions**. If Tenant shall after default voluntarily give up or tender possession of the Premises to Landlord, by delivering the keys to the Premises to Landlord or its agent or property manager, or both, such actions shall be deemed to be in compliance with Landlord's rights and the acceptance thereof by Landlord shall not be deemed to constitute a surrender of the Premises or otherwise affect Landlord's rights in connection with such default; it being understood and agreed that such surrender may be effected only by the written agreement of Landlord and Tenant. Tenant hereby waives (to the extent legally permissible) any and all notices otherwise required under common law, as same presently exist or may be hereafter amended (or any subsequent similar statute relating to notice prior to instituting such action or proceeding). In the event of termination of this Lease or of Tenant's right to possession of the Premises or repossession of the Premises for an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Premises, or any portion thereof, or to collect rental after reletting (if any); but Landlord shall have the option to relet or attempt to relet and in the event of reletting Landlord may relet the whole or any portion of the Premises for any period, to any tenant, and for any use and purpose. In the event that Landlord shall have taken possession of the Premises, Landlord shall have the right to use all the furniture, fixtures and equipment at the Premises, including that which is owned by or leased to Tenant, prior to any foreclosure thereon by Landlord or repossession thereof by a Landlord thereof or third party having a lien thereon. Landlord shall also have the right to remove from the Premises (without legal process) all or any portion of such furniture, fixtures, equipment and other property located thereon and place same in storage at any premises elected by Landlord, and in such event, Tenant shall be liable to Landlord for costs incurred by Landlord in connection with such removal and storage, together with interest thereon at the Interest Rate. Landlord shall also have the right to relinquish possession of all or any portion of such furniture, fixtures, equipment and other property to any person ("**Claimant**") claiming to be entitled to possession thereof, without the necessity of making any investigation or inquiry as to the basis upon which Claimant purports to act, and Tenant agrees to indemnify, defend and hold Landlord harmless from all cost, expense, loss, damage and liability incident to Landlord's relinquishment of possession of all or any portion of such furniture, fixtures, equipment or other property. Tenant stipulates and agrees that the rights set forth in this Section are commercially reasonable.

ARTICLE 24

Subordination; Estoppels

24.1 **Subordination**. Tenant covenants and agrees that **(A)** this Lease is and shall automatically and without further act or deed by Tenant be and remain subject and subordinate to any mortgages, deeds of trust, security deeds or other security instruments, and any ground leases or underlying leases presently existing or hereafter placed upon all or any portion of the Center (each a "**Mortgage**") and to any and all advances to be made thereunder, and to any interest accrued thereon, and to all renewals, replacements, modifications, consolidations and extensions thereof or participation thereof, **(B)** any mortgagee, grantee, master lessor, beneficiary or trustee (each a "**Mortgagee**") may elect to have this Lease made a prior lien to its Mortgage, and in the event of such election and upon notification by Landlord or such Mortgagee to Tenant to that effect, this Lease shall without further act or deed by Tenant be deemed prior in lien to said Mortgage, whether this Lease is dated prior to or subsequent to the date of any such Mortgage, and **(C)** Tenant shall execute and deliver whatever instruments may reasonably be required by Landlord or any present or prospective Mortgagee to acknowledge such subordination or priority (as applicable) in recordable form. Tenant's failure to execute such instrument within 20 days after Tenant's receipt of same shall constitute a separate Event of Default for which no cure period applies. If any proceeding is brought for default under any Mortgage to which this Lease is subject, or in the event of foreclosure, deed in lieu of foreclosure or the exercise of the power of sale under any Mortgage covering the Premises (each a "**Foreclosure**") and if requested by Landlord's successor, Tenant shall attorn to such successor and shall recognize that successor as Landlord under this Lease. Tenant agrees that such successor shall not be **(1)** liable for any act or omission of Landlord under this Lease occurring prior to such Foreclosure, **(2)** subject to any offset accruing to Tenant against Landlord prior to such Foreclosure, or **(3)** bound by any previous prepayment of Rent or Security Deposit which have not been expressly delivered by Landlord to such successor. If so requested, Tenant shall enter into a new lease with such successor on the same terms and conditions as are contained in this Lease (for the unexpired Term of this Lease then remaining).

24.2 **Estoppel**. The parties agree that they shall rely solely upon the terms of this Lease to govern their relationship. They further agree that reliance upon any representation, act, or omission outside the terms of this Lease shall be deemed unreasonable, and shall not establish any rights or obligations on the part of either party. Within 20 days after the request of the other party at any time and from time to time, each of Landlord and Tenant agree to execute, acknowledge and deliver to the other party a written instrument in form reasonably acceptable to Landlord and Tenant, duly executed, acknowledged: **(A)** certifying that this Lease has not been modified except as set forth in such certificate and is in full force and effect as modified; **(B)** specifying the dates to which the Minimum Rent, Percentage Rent, Additional Rent and other charges hereunder have been paid; **(C)** stating whether or not, to the knowledge of the party executing such instrument, the other party is in default and, if so, stating the nature of such default; **(D)** stating the Commencement Date; **(E)** stating whether the option to extend the Term has been exercised; and **(F)** affirming such other factually accurate matters pertaining to the provisions or subject matter of this Lease as may be required by the other party.

ARTICLE 25

Notices

Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if **(A)** delivered to the party at the address set forth below, **(B)** deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below, **(C)** given to a recognized and reputable overnight delivery service, to the address set forth below or **(D)** delivered by facsimile transmission to the number set forth below:

If to Tenant:	Carlos O'Brien's Scottsdale, L.L.C. 735 N. 114th Avenue Avondale, Arizona, 85323 Attn: Sean O'Brien Facsimile: (480) 367-8407
With copy to:	GALLAGHER & KENNEDY, P.A. 2575 East Camelback Road Phoenix, Arizona 85016 Attn: Dana Stagg Belknap Facsimile: (602) 530-8500
If to the City:	City of Avondale 11465 West Civic Center Drive Avondale, Arizona 85323 Attn: Charles P. McClendon, City Manager Facsimile: (623) 333-0100
With copy to:	GUST ROSENFELD, P.L.C. One East Washington Street, Suite 1600 Phoenix, Arizona 85004-2553 Attn: Andrew J. McGuire, Esq. Facsimile: (602) 340-1538

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this subsection. Notices shall be deemed received **(1)** when delivered to the party, **(2)** three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, **(3)** the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day or **(4)** when received by facsimile transmission during the normal business hours of the recipient. If a copy of a notice is also given to a party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

ARTICLE 26

Surrender of Premises

Tenant shall surrender the Premises in broom clean condition and in good order, condition and repair, reasonable wear and tear and insured casualty damage excepted, and shall surrender all keys for the Premises to Landlord at the place then fixed for the payment of Rent and shall inform Landlord of all combinations on locks, safes and vaults, if any, in the Premises. Tenant's obligation to observe or perform this covenant shall survive the expiration or earlier termination of this Lease.

ARTICLE 27

Holding Over

If Tenant remains in possession of the Premises after the expiration of the Term or earlier termination of this Lease, without the execution of a new Lease, then, at Landlord's option, Tenant shall be deemed to be occupying the Premises as a month-to-month holdover Tenant, subject to all the provisions of this Lease insofar as they are applicable to a month-to-month tenancy, but at a daily rental of two times the per day Minimum Rent and Additional Rent provided under this Lease, computed on the basis of a 30 day month, plus a like daily amount of Percentage Rent.

ARTICLE 28

Casualty

28.1 **Removal of Debris**. In the event of a casualty, Tenant shall be responsible for the prompt removal of all debris resulting from Tenant Improvements installed in the Premises by Tenant, including Tenant's furniture and fixtures.

28.2 **Termination**. If at any time during the Term, the Premises or any material portion of the Center should be destroyed or damaged by fire or other casualty, Landlord shall have the election to repair and reconstruct the damaged portion of the Premises and/or the Center to substantially the condition which existed at the time of Landlord's tender of possession of the Premises to Tenant or alternatively, to terminate this Lease. Landlord shall notify Tenant of its election within 90 days after receipt of notice from Tenant of such damage or destruction. In the event Landlord elects to terminate this Lease pursuant to this Section, Rent shall be apportioned on a per diem basis and be paid to the date of termination, such termination to be effective 30 days following the date of Landlord's notice and upon expiration of such 30-day period neither party shall have any further rights or obligations hereunder.

28.3 **Repair**. If Landlord elects to repair and restore the Premises: **(A)** this Lease shall continue in full force and effect; **(B)** such repairs shall be made by Landlord within a reasonable period of time; **(C)** Minimum Rent shall abate proportionately only during the period and to the extent that the Premises are unfit for use, and are not otherwise used, by Tenant for any purpose; and **(D)** for purposes of computing the Percentage Rent, if any, due hereunder during any such period, the computation shall be based upon the proportionately abated Minimum Rent provided for in the preceding sentence. Notwithstanding the foregoing, if the damage is due to the fault or neglect of Tenant or its employees, there shall be no abatement of Rent. If Landlord elects to repair

and restore the Premises, Tenant hereby covenants and agrees to restore the interior of the Premises, pursuant to Landlord's standard construction procedures, and reopen fully stocked and staffed in the Premises promptly thereafter. Notwithstanding anything contained in this Lease to the contrary, in the event Landlord elects to repair and restore the Premises, Tenant shall agree to waive any existing Opening or On-Going Co-Tenancy Failure(s) and Tenant's Economic Termination Right.

28.4 **Notice**. Tenant shall give notice to Landlord within two days after Tenant learns of any accident, damage or destruction at the Premises.

ARTICLE 29

Waiver

One or more waivers of any covenant or condition of this Lease by Landlord shall not be construed as a waiver of a further breach of the same covenant or condition, and the consent or approval by Landlord to or of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to any subsequent similar act by Tenant. No receipt of money by Landlord after a Tenant default has been declared shall, without the consent of Landlord, in any way reinstate, continue or extend the Term of this Lease. Receipt by Landlord of Tenant's keys to the Premises shall not constitute an acceptance of surrender of the Premises without Landlord's acknowledgment thereof.

ARTICLE 30

Quiet Possession

Landlord agrees that, so long as Tenant fully complies with all of the terms, covenants and conditions herein contained on Tenant's part to be kept and performed, Tenant shall peaceably and quietly have, hold and enjoy the Premises free from molestation by Landlord or any party claiming by, through or under Landlord.

ARTICLE 31

Broker's Commission

Each party hereto warrants to the other that there are no claims for brokerage commissions or finder's fees in connection with the execution of this Lease. Each party agrees to indemnify the other against, and hold it harmless from, all liabilities arising from any such claim including, without limitation, the cost of counsel fees in connection therewith.

ARTICLE 32

Asbestos and Other Hazardous Materials

32.1 **Definitions**. For purposes of this Lease:

A. "**Environmental Laws**" means any federal, state or local statute, regulation or ordinance or any judicial or administrative decree or decision, whether now existing or hereinafter enacted, promulgated or issued, with respect to any Hazardous Materials, drinking water, groundwater, wetlands, landfills, open dumps, storage tanks, underground storage tanks, solid waste, waste water, storm water runoff, waste emissions or wells, including, without limiting the generality of the foregoing, the following statutes, and regulations, orders, decrees, permits, licenses and deed restrictions now or hereafter promulgated thereunder, and amendments and successors to such statutes and regulations as may be enacted and promulgated from time to time: Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601 et seq., as amended by the Superfund Amendments and Reauthorization Act; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; the Hazardous Material Transportation Act, 42 U.S.C. §1801 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.; the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.; the Emergency Planning and Community Right to Know Act, 42 U.S.C. §11001 et seq.; the Clean Air Act, 42 U.S.C. §7401 et seq.; the Uranium Mill Tailings Radiation Control Act (42 U.S.C. Section 7901 et seq.); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 et seq.); the Noise Control Act (42 U.S.C. § 4901 et seq.); the Safe Drinking Water Act (21 U.S.C. § 349, 42 U.S.C. § 201 and § 300f et seq.); and the National Environmental Policy Act (42 U.S.C. § 4321 et seq.).

B. "**Hazardous Materials**" means each and every element, compound, chemical mixture, contaminant, pollutant, material, waste or other substance which is defined, determined or identified as hazardous or toxic under any Environmental Law.

C. "**Release**" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, storing, escaping, leaking, dumping, discarding, burying, abandoning, using, generating, permitting, producing, introducing, maintaining, disposing or releasing into the Premises, the Center or the environment.

D. "**Environmental Authorities**" means the United States, the State and any political subdivision thereof, the United States Environmental Protection Agency and any and all governmental authorities and the agencies, departments, commissions, boards, bureaus, bodies, councils, offices, authorities, or instrumentality of any of them, of any nature whatsoever for any governmental unit (federal, state, county, district, municipal, city or otherwise) whether now or hereafter in existence having jurisdiction under any Environmental Law.

E. "**Notice**" means any communication, written or oral, actual or threatened, from any governmental authority or any other public or private entity or individual, concerning any violation of any Environmental Law, or any act or omission resulting or which may result in the Release of Hazardous Material, and shall include the imposition of any liens on the Center or revenues or assets of Landlord.

32.2 **Tenant Requirements**. Neither Tenant, nor its agents, employees, contractors, servants, subtenants, concessionaires or invitees, shall Release any Hazardous Materials in or

about any portion of the Premises or the Center, or transport any Hazardous Materials to or from the Premises or the Center, except construction materials (other than asbestos or polychlorinated biphenyls), office equipment, cleaning solutions, other maintenance materials and oil and other petroleum products that are or contain Hazardous Materials may be used, handled or stored on the Premises, provided such materials, equipment, solutions and products are used is in de minimis amounts and are used only incidental to and as reasonably necessary for the operation and maintenance of the Premises for the Permitted Use hereunder and in compliance with all applicable Environmental Laws. In addition, neither Tenant, nor its agents, employees, contractors, servants or subtenants, shall install, use or permit the installation or use of storage tanks or other subterranean structures, on, under or adjacent to the Premises. Tenant shall, at Tenant's sole cost and expense, comply with all Environmental Laws applicable to Tenant's operations in the Premises and the Center, and make all submissions to, provide all information required by, and comply with all requirements of all Environmental Authorities. If there is any Release or transportation by Tenant of Hazardous Materials at or from the Premises or the Center, or which arises at any time from Tenant's use or occupancy of the Premises or the Center, and Landlord, any Environmental Authority or any third party demands that a remediation be undertaken, then Tenant, at Tenant's sole cost and expense, shall prepare and submit remediation plans for the demanding party's approval, and Tenant shall carry out all such remediation in accordance with such approved plans. In addition, Tenant shall promptly provide all information regarding the Release or transportation of Hazardous Materials that is requested by Landlord. If remediation is required by Tenant pursuant to the provisions of this Article, then Tenant shall continue to pay any and all Rent that comes due during such remediation and no abatement of Rent shall apply. If Tenant fails to fulfill or begin to fulfill any obligation imposed under this Section within 30 days after receipt of written notice from Landlord, Landlord may, in its sole discretion, undertake the remediation of such Hazardous Materials from the Premises and/or the Center, in which event Tenant shall cooperate with Landlord in order to prepare all documents Landlord deems necessary or appropriate to determine the applicability of the Environmental Laws to the Premises and the Center, and Tenant's use thereof and for compliance therewith. In addition, Tenant shall execute all documents promptly upon Landlord's request, and reimburse Landlord for all reasonable expenses incurred by Landlord in fulfilling Tenant's obligations set forth in this Section, together with an additional amount equal to 25% of such expenses, within ten days after receipt of an invoice therefor. Notwithstanding the foregoing, Tenant shall have no obligation to undertake any remediation or incur any costs or expenses (as required in this Section) as a result of Hazardous Materials **(A)** existing in the Premises on or before the Delivery Date and not Released by Tenant, or its agents, employees, contractors, servants, subtenants, concessionaires or invitees; or **(B)** Released in the Premises or the Center by Landlord, its agents, contractors or employees.

32.3 **Tenant Indemnification**. Tenant shall indemnify, protect and save Landlord, its officers, members, managers, agents and servants, and any Encumbrance Holder and management company (collectively, "**Landlord's Indemnitees**"), harmless for, from and against any and all damages, losses, liabilities, obligations, penalties, claims, litigation, proceedings or expenses of any kind or of any nature whatsoever (including reasonable attorneys' and experts' fees and disbursements), which may at any time be imposed upon, incurred by or asserted or awarded against Landlord or any of the Landlord Indemnitees, arising out of, or in anyway connected with, any breach or violation of the requirements set forth in this Article by Tenant or any of its agents, employees, contractors, servants, subtenants, concessionaires or invitees. In connection with Tenant's indemnification hereunder: **(A)** upon receipt of written notice from Landlord, Tenant agrees to defend any claim or demand brought, or any action, petition, or order filed, against Landlord or the Landlord Indemnitees by counsel reasonably satisfactory to Landlord,

whether any such claim or action is rightfully or wrongfully brought or filed; and Tenant shall pay all reasonable expenses incurred in connection with defending against such action or proceeding; and **(B)** Tenant shall pay, satisfy and discharge any judgments, liens, orders or decrees which may be recovered or filed against Landlord, or any of the Landlord Indemnitees, arising out of any such claim, demand, action, petition or order.

32.4 **Survival**. The provisions of this Article shall extend to and be enforceable by Landlord's liability, health, disability and worker's compensation insurers, and shall survive the expiration or sooner termination of the Term.

ARTICLE 33

Security Deposit; Conflicts; Access; Relationship; Headings & Miscellaneous

33.1 **Security Deposit**. On or before the Effective Date, Tenant shall deposit with Landlord the sum specified in **ITEM 13** of the Cover Sheet (the "**Security Deposit**"). The Security Deposit shall be held by Landlord without liability for interest as security for the faithful performance by Tenant of all of its obligations under this Lease. The Security Deposit shall not be mortgaged, assigned, transferred or encumbered by Tenant without the prior written consent of Landlord and any such act on the part of Tenant shall be without force and effect and shall not be binding upon Landlord. If any of the Rent or any other sum payable by Tenant to Landlord hereunder shall be overdue and unpaid or paid by Landlord on behalf of Tenant, or if Tenant shall fail to perform any of its obligations under this Lease, then Landlord may, at its option and without prejudice to any other remedy which Landlord may have on account thereof, appropriate and apply said entire Security Deposit, or so much thereof as may be necessary to compensate Landlord for Minimum Rent, Percentage Rent, Additional Rent, loss or damage sustained by Landlord as a result thereof, and Tenant shall forthwith upon demand restore the Security Deposit to the original sum deposited. Should Tenant comply with all of said obligations and promptly pay all the rentals when due and all other sums payable by Tenant to Landlord, said Security Deposit shall be refunded in full to Tenant at the expiration or earlier termination of this Lease. In the event of bankruptcy or other debtor-creditor proceedings against Tenant, as specified in **Article 20**, the Security Deposit shall be deemed to be applied first to the payment of rental and other charges due Landlord for the earliest periods prior to the filing of such proceedings. Landlord may deliver the Security Deposit to the purchaser or assignee of Landlord's interest in the Premises in the event that such interest is transferred and thereupon Landlord shall be discharged from any further liability with respect to the Security Deposit. This Section shall also apply to any subsequent transfer of Landlord's interest in the Premises.

33.2 **Governing Item**. Notwithstanding anything contained in the Lease to the contrary, in the event of a conflict between Tenant's approved Construction Documents, as set forth in **Exhibit B-2**, and the terms and conditions of this Lease, including, but not limited to, **Exhibit B-2**, Tenant's approved Construction Documents, as approved by Landlord in accordance with **Exhibit B-2**, shall govern.

33.3 **Landlord Access to Rent**. Landlord may, at any time during the last 12 months of the Term, upon reasonable notice to Tenant, enter the Premises at all reasonable hours for the purpose of offering them for rent and may place and keep on the windows and doors of the Premises signs advertising the Premises for rent.

33.4 **Relationship**. Nothing contained herein shall be deemed or construed by the parties hereto, nor by any third party, as creating a relationship between the parties hereto other than the relationship of landlord and tenant.

33.5 **Submission**. The submission of this Lease for examination does not constitute a reservation or any option for the Premises and this Lease becomes effective only upon its execution and delivery by both parties hereto.

33.6 **Headings**. The Article headings used throughout this Lease are for convenience and reference only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Lease.

33.7 **Construction**. Whenever herein the singular number is used, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders. The captions, section numbers, article numbers, and index appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such sections or articles of this Lease nor in any way affect this Lease.

33.8 **Independent Covenants**. The doctrine of independent covenants shall apply in all matters relating to this Lease including, without limitation, all obligations of Landlord and Tenant to perform their respective obligations under this Lease. All obligations of Tenant which by their nature involve performance after the end of the Term, or which cannot be ascertained to have been performed until after the end of the Term of this Lease, shall survive the expiration or earlier termination of this Lease.

33.9 **Holiday Lights**. Tenant agrees to allow Landlord's representative to install and maintain holiday lights on the Premises during the holiday season, as long as such lights shall not interfere with Tenant's signs or obstruct Tenant's entrance. During the holiday season, holiday lights may be placed upon the outline of the roofline of the buildings located at the Center.

33.10 **Financial Statement**. Upon Landlord's request, Tenant agrees to provide Landlord with a true and correct "**Financial Statement**" (as defined in this Section) of Tenant and any Guarantors of the Lease within 15 days after Landlord's request of such a Financial Statement. If Landlord, in its reasonable discretion, determines that the creditworthiness or financial status of Tenant falls below a level then acceptable to Landlord at any time during that period following the Effective Date but prior to the Delivery Date; or in the event that a bankruptcy proceeding is filed by or against Tenant; or if Tenant breaches the Lease; or, if Tenant dies (if an individual); then Landlord may, at any time and upon 30 days notice, terminate this Lease. For purposes of this Section, Tenant's "**Financial Statement**" shall include the following documents: **(A)** a balance sheet; **(B)** an income statement; **(C)** a statement of cash flows; and **(D)** a statement of owner's equity.

33.11 **Time of Essence & Binding Nature**. Time is of the essence of all of the terms and provisions of this Lease, and the terms and conditions hereof shall extend to and be binding upon the heirs, executors, successors and assigns of the parties hereto and mention of the singular shall include the plural and the plural shall include the singular.

33.12 **Memorandum of Lease**. Neither party shall record any memorandum of this Lease, except in accordance with the foregoing provisions. Tenant shall not record this Lease without the consent of the Landlord, which may be withheld for any reason whatsoever, in Landlord's absolute

discretion. At the request of either party, the parties shall execute and deliver a recordable memorandum of lease in a form reasonably acceptable to Landlord and Tenant. The requesting party shall be responsible for all recording costs.

33.13 **Trial Waiver**.

THE PARTIES HERETO IRREVOCABLY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER PARTY AGAINST THE OTHER ON ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, OR TENANT'S USE AND OCCUPANCY OF THE PREMISES.

33.14 **Governing Law**. This Lease shall be subject to the laws of the State of Arizona.

33.15 **Attorneys' Fees**. In the event either party to this Lease brings any legal action to enforce the provisions hereof, the prevailing party in any such action shall be entitled to recover from the non-prevailing party all attorneys' fees and other fees and costs incurred by such prevailing party in connection with any such action.

33.16 **Force Majeure**. In the event either party hereto shall be delayed or hindered in or prevented from the performance of any act required under this Lease by reason of strikes, lockouts, labor troubles, acts of God, inclement weather, including periods of rain, inability to procure materials, failure of power, restrictive governmental law or regulations, riots, insurrections, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease ("**Force Majeure**"), then performance of such act shall be excused for the number of calendar days of such delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. No delay under this Section shall be effective unless Landlord or Tenant shall have notified the other of the delay within 20 days after cessation of the event giving rise to such delay setting forth the nature of such Force Majeure and the duration of such delay. The provisions of this Section shall not: **(A)** operate to excuse Tenant from prompt payment of Minimum Rent, Percentage Rent, Additional Rent or any other payment required by the terms of this Lease; nor **(B)** be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds.

33.17 **Intentionally Deleted**.

33.18 **Guaranty**. Subject to the limitations set forth in **Exhibit E**, this Lease is guaranteed by the parties set forth in **ITEM 12** of the Cover Sheet, and such Guarantor(s) shall execute a Guaranty in the form attached hereto as **Exhibit E** ("**Form of Lease Guaranty**"). If Landlord, in its sole discretion, determines that the creditworthiness or financial status of Guarantor falls below a level then acceptable to Landlord, or a bankruptcy proceeding is filed by or against a Guarantor, or if the Guarantor defaults under the Guaranty or if the Guarantor dies (if an individual), Landlord may at any time upon demand, require Tenant to deliver additional or different security for this Lease, and if Tenant fails to provide such additional or different security, Landlord may terminate this Lease with 30 days notice.

33.19 **Tenant Liability; Authority**. If this Lease is executed by more than one person or entity as "**Tenant**", each such person or entity shall be jointly and severally liable hereunder. It is expressly understood that any one of the parties who have executed this Lease as "**Tenant**" (herein

individually referred to as "**Signatory**") shall be empowered to execute any modification, amendment, exhibit, floor plan, or other document ("**Future Instrument**") and bind each such Signatory who has executed this Lease regardless of whether each Signatory, in fact, executes such Future Instrument. If Tenant is a corporation, limited liability company or partnership, each individual executing this Lease on behalf of such entity represents and warrants that he/she is duly authorized to execute and deliver this Lease on behalf of said entity, in accordance with the organizational documents of said entity, and that this Lease is binding upon said entity.

33.20 **Homeland Security**. Tenant represents, certifies and warrants to Landlord as follows: **(A)** Tenant is not named by, and is not acting, directly or indirectly, for or on behalf of any person, group, entity or nation named by, any Executive Order, including without limitation Executive Order 13224, or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person," or other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enacted, enforced or administered by the Office of Foreign Assets Control; **(B)** Tenant is not engaged in this transaction, directly or indirectly, for or on behalf of, or instigating or facilitating this transaction, directly or indirectly on behalf of, any such person, group, entity or nation; and **(C)** none of the proceeds used to pay Minimum Rent and Additional Rent have been or will be derived from a "specified unlawful activity" as defined in, and Tenant is not otherwise in violation of, the Money Laundering Control Act of 1986, as amended, or any other applicable laws regarding money laundering activities. Furthermore, Tenant agrees to immediately notify Landlord if Tenant was, is, or in the future becomes a "senior foreign political figure," or an immediate family member or close associate of a "senior foreign political figure," within the meaning of Section 312 of the USA PATRIOT Act of 2001. Notwithstanding anything in this Lease to the contrary, Tenant acknowledges and agrees that this Lease is a continuing transaction and that the foregoing representations, certifications and warranties are ongoing and shall be and remain true and in full force and effect on the date hereof and throughout the Term and that any breach thereof shall constitute an automatic Event of Default giving rise to Landlord's remedies and Tenant agrees to indemnify, defend and hold harmless Landlord and Landlord's management agent from and against all losses, damages, costs and expenses resulting from or relating to any breach of the foregoing representations, certification and warranties.

33.21 **Limitation of Landlord's Liability**. Notwithstanding any other provision of this Lease, Tenant agrees that neither Landlord nor any of Landlord's officers, directors, partners, shareholders, members or employees shall have any personal liability hereunder. Additionally, notwithstanding anything in this Lease to the contrary, in no event shall Landlord ever be liable to Tenant for consequential damages or special damages.

33.22 **Legal Representation of the Parties**. This Lease was negotiated by the Parties hereto with the benefit of legal representation and any rules of construction or interpretation otherwise requiring this Lease to be construed or interpreted against any party shall not apply to any construction or interpretation hereof or thereof.

33.23 **Agreement; Amendment**. This Lease (including all Riders, Exhibits, Addenda and Guaranty, if any) is the complete agreement between Landlord and Tenant concerning the Premises and the Center. There are no oral agreements, understandings, promises or representations between Landlord and Tenant affecting this Lease. All prior negotiations and understandings, if any, between the parties hereto with respect to the Premises and the Center, shall be of no force or effect and shall not be used to interpret this Lease. This Lease shall not be amended, changed or extended except by written instrument signed by both parties hereto. This Lease shall be considered to have been executed by a person if there exists a photocopy, facsimile

copy, or a photocopy of a facsimile copy of an original hereof or of a counterpart hereof which has been signed by such person. Any photocopy, facsimile copy, or photocopy of facsimile copy of this Lease or a counterpart hereof shall be admissible into evidence in any proceeding as though it were an original.

33.24 **Subsequent Commencement**. This Lease shall be effective as of the day and year first above written notwithstanding that the Term shall commence at a date subsequent thereto and Landlord and Tenant intend that each shall have vested rights immediately upon the full execution signing of this Lease and that this Lease shall be fully binding and in full force and effect from and after execution hereof by the last to sign of Landlord and Tenant.

33.25 **Severability**. If any provision of this Lease or the application of it to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease shall not be affected thereby and each provision of the Lease shall be valid and enforceable to the fullest extent permitted by law, and the remaining provisions of this Lease shall be interpreted so as to nearly as possible conform to the intent of the parties as indicated in this Lease.

33.26 **Conflict of Interest**. The Landlord may cancel this Lease pursuant to ARIZ. REV. STAT. § 38-511 without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting, or creating the Lease on behalf of the Landlord is, at any time while the Lease or any extension of the Lease is in effect, an employee of the Tenant in any capacity or a consultant to the Tenant with respect to the subject matter of the Lease. The cancellation shall be effective when written notice from the Landlord is received by the Tenant, unless the notice specifies a later time.

33.27 **Tenant Termination Right**. Tenant shall have the right to terminate this Lease during the initial Term if (i) the property commonly referred to as "**Block OA**", which is described and depicted on **Exhibit G** attached hereto and incorporated herein, is developed as a mixed-use development, (ii) the Tenant agrees to open its business as part of such mixed-use development on Block OA and (iii) the Tenant obtains the written consent of the City to terminate the Lease.

33.28 **Incorporation of Exhibits**. All Exhibits identified in this Lease, including, but not limited to the following listed Exhibits, shall be and are hereby incorporated into this Lease by this reference:

EXHIBIT A	SITE PLAN
EXHIBIT B-1	DELIVERY DATE CERTIFICATE
EXHIBIT B-2	CONSTRUCTION GUIDELINES
EXHIBIT C	CENTER RULES AND REGULATIONS
EXHIBIT D	FORM OF COMMENCEMENT DATE MEMORANDUM
EXHIBIT E	FORM OF LEASE GUARANTY
EXHIBIT F	FORM OF SUBSTITUTE GUARANTY

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the undersigned parties have executed this Lease the day and year first above written.

LANDLORD:

CITY OF AVONDALE,
an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Date Executed: _____

ATTEST:

_____
Carmen Martinez, City Clerk

TENANT:

CARLOS O'BRIEN'S SCOTTSDALE, L.L.C., an Arizona limited liability company

By: _____

Name: SEAN O'BRIEN

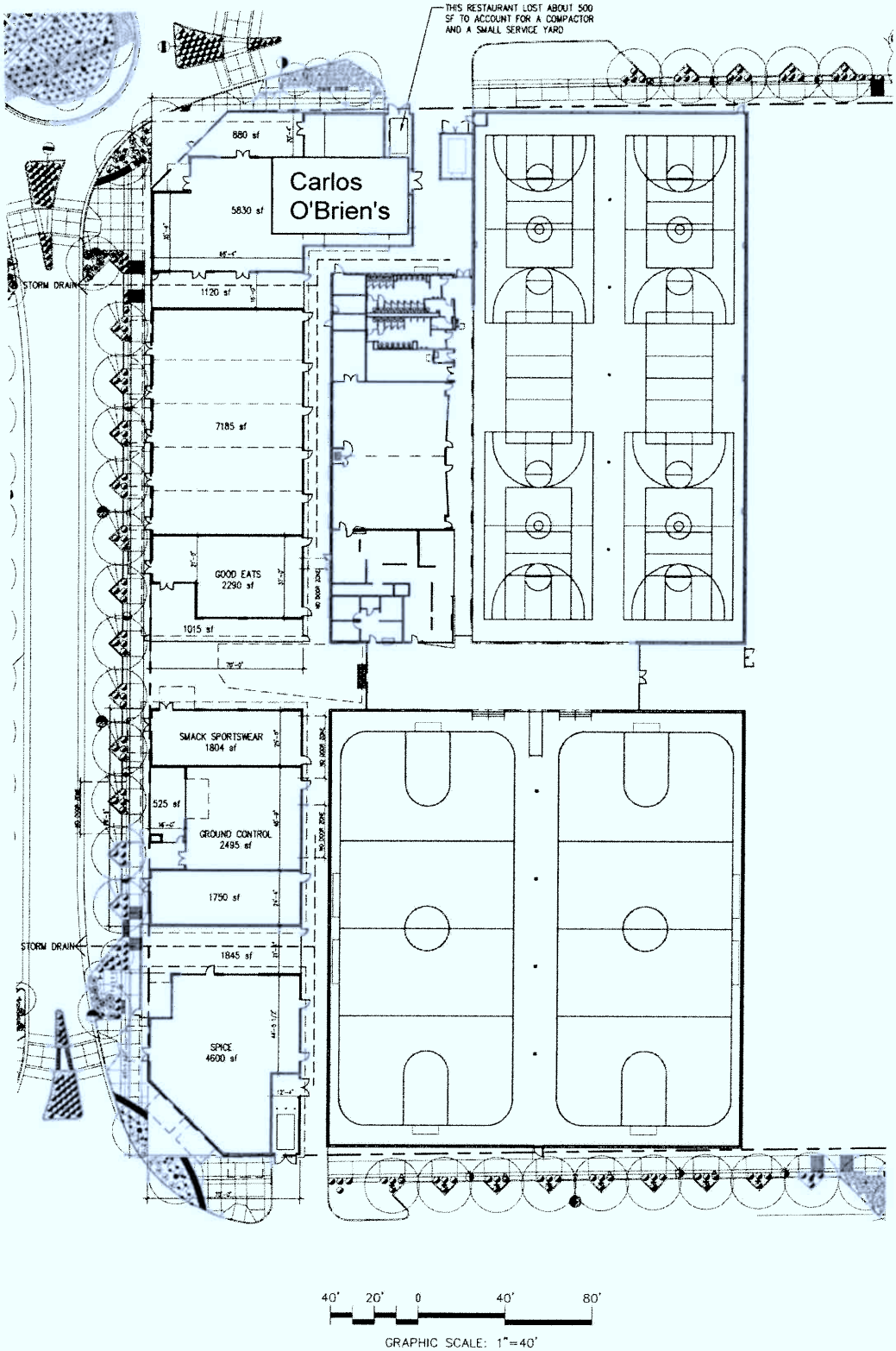
Title: MANAGING MEMBER

Date Executed: 12-27-10

EXHIBIT A

SITE PLAN

Tenant hereby acknowledges that the attached Site Plan is intended to show the approximate layout of the Center and location of the Premises, and Landlord has the right at any time to expand, reduce, remove, demolish, renovate or construct any existing or new improvements in the Center, including, without limitation, the right to change the shape, size, configuration, number, design or extent of such improvements, provided the approximate location, size and configuration of the Premises shall not be materially changed.



AVONDALE SPORTS CENTER RETAIL

135371 16.FEBRUARY.2010

262361

SMITHGROUP

EXHIBIT B-1

DELIVERY DATE CERTIFICATE

[To Be Attached]

EXHIBIT B-2

CONSTRUCTION GUIDELINES

THIS **EXHIBIT B-2** (the "**Construction Guidelines**") supplements the Lease to which it is attached and is incorporated therein as if set out in full. In the event of a conflict between the terms of this **Exhibit B-2** and the Lease, this **Exhibit B-2** shall control. Capitalized terms not defined in this **Exhibit B-2** shall have the meanings given to such terms in the Lease.

1. **Landlord's Work.** Landlord shall, at its own cost and expense, perform only the work described as "**Landlord's Work**" in **ITEM 11** of the Lease. Landlord has made no representations or warranties regarding the condition of the Premises or the Center, except as expressly set forth in this Lease.

2. **Tenant's Work.** Tenant shall, at its own cost and expense, perform all work described as "Tenant's Work" in **ITEM 11** of the Lease in addition to all work not described as "**Landlord's Work**" in the Lease necessary to complete the Premises and to prepare them for the operation of Tenant's business therein (collectively, "**Tenant's Work**"). The parties acknowledge that Tenant will be required to comply with the public procurement laws for each contract to be entered into by Tenant in connection with the construction of Tenant Improvements, consistent with the obligations of ARIZ. REV. STAT. §§ 34-201 et seq. Tenant agrees that all Leasehold Improvements to the Premises shall, upon installation, become the property of Landlord and shall remain upon the Premises upon the expiration or earlier termination of this Lease. Tenant shall not do anything upon or in connection with the Premises or the construction of any part thereof which interferes in any way with, or results in a work stoppage in connection with, construction of any part of the Center or any other tenant's space.

3. **Plans and Specifications.**

3.1 **Tenant's Drawings.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of store finish drawings ("**Tenant's Drawings**") by January 15, 2011.

3.2 **Approval of Tenant's Drawings**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Drawings, specifying in detail any reasons for disapproval. If Tenant's Drawings are disapproved, Tenant shall incorporate Landlord's comments and resubmit Tenant's Drawings to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Drawings to approve or disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Drawings. Landlord will not unreasonably withhold its approval.

3.3 **Construction Documents.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of construction plans and specifications ("**Construction Documents**") by May 31, 2010. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.4 **Approval of Construction Documents**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Construction Documents, specifying in detail any reasons for disapproval. If Tenant's Construction Documents are disapproved, Tenant shall incorporate

Landlord's comments and resubmit Tenant's Construction Documents to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Construction Documents to approve or disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Construction Documents. Landlord will not unreasonably withhold its approval. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.5 **Tenant's Architect/Engineer.** Tenant shall cause all architects and engineers engaged by Tenant (each a "**Professional**") to obtain and keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), a policy of professional liability insurance covering all liability arising out of any negligent acts or errors and omissions committed by such Professional with limits of not less than $1,000,000.00 per claim and annual aggregate, with a retroactive date prior to the contract date. Each Professional shall maintain such policy for a minimum of two years after completion of work or shall obtain a two-year extended reporting period if the policy is canceled or non-renewed.

4. **Tenant's Contractor.** All contractors engaged by Tenant shall be bondable, licensed contractors, having good labor relations, and capable of performing quality workmanship and working in harmony with Landlord's contractors and other contractors on the job. The term "contractors" as used in this Section shall be deemed to include subcontractors. The City shall have the absolute right to review contractor plans, bids, and estimated costs and, in its reasonable discretion, the City may approve or disapprove Tenant's Contractor, specifying in detail any reasons for disapproval. If the Tenant's Contractor is not approved, the City has authority to solicit a different contractor to perform any and all work according to the specifications of this lease.

4.1 **Insurance.** On or before entry into the Premises, Tenant shall cause its contractor to obtain and to keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), until Tenant's Work is completed, all of the following insurance:

A. **Commercial General Liability Insurance.** Commercial general liability insurance to protect against claims for bodily injury and property damage arising out of premises operations, products, and completed operations, and advertising and personal injury liability, written on an occurrence basis using ISO Form CG0001 (or its equivalent) with no amendments to the definition of an insured contract, in limits of not less than $1,000,000.00 inclusive, per occurrence, and $1,000,000.00 annual aggregate per project, or such higher limits as Landlord may require from time to time during the Term. Completed Operations to remain in force for at least two years following project completion. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

B. **Commercial Automobile Liability Insurance.** Commercial automobile liability insurance to include contractual liability insurance for the indemnities set forth in this contract covering all owned, non-owned and hired automobiles, in limits of not less than $1,000,000.00 combined single limit (each accident), or such higher limits as

Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

C. **Employer's Liability Insurance and Workers Compensation.** Employer's Liability insurance, with minimum limits of not less than $500,000 bodily injury each accident, $500,000.00 bodily injury by disease policy limit and $500,000.00 bodily injury by disease each employee, and Worker's Compensation, in form and amount as required by applicable state law. To the extent permitted by applicable law, such policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

D. **Umbrella Liability Insurance.** Umbrella liability insurance over the primary general liability, automobile liability and employer's liability insurance policies in limits of not less than $2,000,000.00 inclusive per occurrence, and $2,000,000.00 annual aggregate, per project, or such higher limits as Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

E. **Builder's Risk Insurance.** Builder's Risk insurance on a "Special Form" basis (including collapse) using a completed value (non-reporting) form for full replacement cost covering all work which Tenant contracts for or performs in the Center and all materials and equipment used or installed by Tenant in or about the Premises, off site and in transit. This insurance shall include: (1) interests of Tenant, Landlord, Landlord's property manager, all mortgagees of Landlord, Tenant's contractor, subcontractors and sub-subcontractors; and (2) a mutual release and waiver of subrogation for all parties.

F. **Insurance Changes.** Landlord may require, from time to time, changes or endorsements to Tenant's contractor insurance required herein.

4.2 **Policies of Insurance.** Tenant's contractor shall have right to satisfy the insurance required by this Section by means of blanket insurance policy(ies), provided that no other loss which may also be insured by the blanket insurance shall affect the insurance coverages required hereunder and further provided that Tenant's contractor delivers to Landlord a certificate specifically stating that such coverages apply to Landlord, Landlord's property manager, all mortgagees of Landlord, the Premises and the Center. All policies of insurance or certificates thereof, except with respect to workers compensation or professional liability, shall name Tenant, Landlord, Landlord's property manager, and all mortgagees of Landlord, as additional insureds, as their respective interests may appear, including products and completed operations. All self insured retentions and deductible amounts shall be subject to Landlord's prior written approval. Any and all deductibles or coinsurance in the above-described policies or inadequacy of limits for coverage shall be assumed by, for the account of, and at Tenant's contractor sole risk. Prior to commencing any work under this Agreement, Tenant will provide Landlord with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Tenant's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full

force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Landlord shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. Tenant agrees to further provide Landlord evidence of renewals of policies not later than 30 days prior to the end of the expiring term. All policies of insurance carried by Tenant's contractor shall be primary and non-contributing in the event of any loss or damage with any insurance required to be maintained by Tenant's contractor under the terms of this Lease. All policies and certificates shall notify Tenant, Landlord and any mortgagee of Landlord, in writing, not less than 30 days before any lapse, non-renewal or cancellation, including cancellation for nonpayment of premium, or other termination thereof and shall include a clause or endorsement denying the insurer any rights or subrogation against Tenant and Landlord, Landlord's property manager, and all mortgagees of Landlord. Landlord reserves the right to request and receive for review certified copies of any and all insurance policies to which the Lease is applicable. The required coverage and or limits referred to and set forth herein shall in no way affect or limit Tenant's contractor's liability with respect to its performance.

4.3 **Conditions to Commencement of Tenant's Work.** On or before entry into the Premises, Tenant shall cause its contractor to: **(A)** review the plans and specifications (including all exhibits, addendums or riders thereto); **(B)** review other related data including "**technical data**"; **(C)** inspect the Premises; and **(D)** obtain all governmental permits and approvals and pay any associated tax (including, but not limited to, excise tax) to complete Tenant's Work and forward copies to Landlord.

4.4 **Construction of Tenant's Work.** Tenant shall cause its contractor: **(A)** to construct Tenant's Work strictly in accordance with Landlord approved plans and specifications and changes thereto which are stamped approved by Landlord's architect; **(B)** to advise Landlord immediately of any requested change from the plans and specifications; **(C)** to keep a Landlord approved original set of plans and specifications at the job site at all times; and **(D)** not to leave the job site until Landlord's and Tenant's punchlist items are complete, all damage is repaired and the site is free of debris and all unused materials are removed. Daily site clean up is required.

4.5 **Contractor Deposit.** Prior to commencement of construction, Tenant or Tenant's contractor shall deposit with Landlord the amount of $5,000.00 for the Premises as a damage/repair/clean-up deposit (the "**Contractor Deposit**"). Landlord may utilize the Contractor Deposit if Tenant's contractor does not repair damage to the property, damages the property, does not complete punchlist items or does not clean-up their construction site as required or otherwise fulfill the obligations of this Section. Should Landlord be required to complete any work to be completed by Tenant's contractor, including, but not limited to, cleanup, painting, punchlist items, etc., Tenant shall pay Landlord the cost of such work, together with an amount equal to 25%, within 20 days after receipt of an invoice therefor. Any items borrowed from Landlord shall be documented.

4.6 **Damage to Equipment.** Tenant agrees that Landlord shall not be liable and Tenant shall indemnify Landlord against any damage to Tenant's contractor or contractor's employee's property, or any equipment entrusted to Tenant's contractor by others, and for the loss of or damage to any of Tenant's contractor's property or equipment by theft or otherwise, unless caused by Landlord's gross negligence or willful misconduct.

4.7 **Violations by Tenant's Contractors**. In addition to application of the Contractor Deposit, and any and all remedies at law or equity, in the event Tenant's contractor violates the requirements of this Exhibit, Landlord, upon five days notice, may order Tenant's contractors to remove themselves, their equipment and their employees from Landlord's property. Notwithstanding the foregoing, in the event Tenant's contractor violates the requirements of this Exhibit on two occasions, as to the third such occasion, Landlord shall not be required to give notice to Tenant and may order Tenant's contractors to remove themselves, their equipment and their employees from the Center.

5. **Allowance**. In consideration of the performance by Tenant of Tenant's Work in the Premises and the timely fulfillment of all of the terms of this Lease, Landlord agrees to pay to Tenant the Construction Allowance, as described in the Lease, applicable to the "**hard costs**" (as defined below) for Tenant's permanent leasehold improvements for the Premises. For this purpose, "**hard costs**" shall mean and refer only to the cost of labor and materials incorporated into the Premises as permanent leasehold improvements, and shall not include, without limitation, any so called "**soft costs**," design/architectural/engineering fees or the cost of Tenant's trade fixtures, inventory, personal property or any other property constituting "**Tenant's Property**" (as defined in the Lease). The Construction Allowance shall be applicable only to Tenant's Work actually performed and completed to the Premises and shall be paid according to the provisions of **ITEM 11(G)** of the Cover Sheet of this lease. Landlord further agrees to pay Tenant any and all remaining retainage within 21 days of the Certificate of Occupancy, provided **all** of the flowing have occurred:

5.1 **Opened.** Tenant has opened for business in the Premises as required by this Lease and has paid to Landlord the first and any subsequently owed Rent payment(s) or other amounts due under this Lease.

5.2 **Commencement Date Memorandum.** Tenant has executed and delivered to Landlord a Commencement Date Memorandum in the form attached to the Lease as **Exhibit D**;

5.3 **No Default.** Tenant is not in default after notice and the lapse of any applicable cure period.

5.4 **Work Completed**. Tenant's Work is completed in accordance with approved Construction Documents.

5.5 **Debris.** The Premises and the Common Areas surrounding the Premises are free of Tenant's debris, all contractor equipment and materials have been removed from the Premises, and any damage to the Center or the Common Areas caused by Tenant, its agents or contractors, has been repaired.

5.6 **Liens, Judgments, Levies, or Tax Liens**. The Premises, including all installations therein, are free and clear of all liens and there are no judgments, levies, attachments, liens or tax liens pending or in effect with respect to Tenant's Work in the Premises.

5.7 **Required Documentation.** Tenant has submitted the following completed documentation to Landlord:

A. **Lien Waivers.** Full, final and unconditional lien waivers and releases in favor of Landlord, Landlord's lender, any proposed purchaser, or any other person/entity

reasonably requested by Landlord, from Tenant's general contractor and from all Tenant's subcontractors having contracts in excess of $5,000.00.

B. **Certificates.** A copy of the permanent Certificate of Occupancy and any temporary Certificates of Occupancy.

C. **Contractor's Final Billing.** A copy of the final billing from Tenant's general contractor (broken down in reasonable detail and showing the cost of work performed at the Premises adequate to componentized for tax purposes under either generally accepted accounting principles or Internal Revenue guidelines).

D. **Architect Certificate.** Tenant's architect's certificate certifying that Tenant's Work is completed in accordance with the approved Construction Documents, including all items on Landlord's representative's punch list.

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EXHIBIT C

CENTER RULES AND REGULATIONS

Landlord agrees to use its reasonable efforts to cause compliance by tenants of the Center with these Rules and Regulations, as they may be revised or amended by Landlord from time to time in its commercially reasonable discretion (as amended, the "**Rules and Regulations**"), but in no event shall Landlord be responsible for the violation or nonperformance of any of these Rules and Regulations by any other tenant. Unless otherwise provided, all terms used in these Rules and Regulations shall have the same meaning as set forth in this Lease. To the extent that the provisions of these Rules and Regulations are inconsistent with the provisions of this Lease, the provisions of the Lease shall control. In the event Tenant violates any of the Rules and Regulations and such violation continues for more than 24 hours after Tenant's receipt of notice thereof from Landlord, then Tenant shall pay Landlord, as liquidated damages, an amount equal to $50.00 per day so long as such violation continues. Tenant recognizes that its violation of the Rules and Regulations will result in damages to Landlord and that the nature and amount of such damages is difficult or impossible to quantify, and that the foregoing amount represents a reasonable approximation of the actual damages Landlord would suffer in the event Tenant violates the Rules and Regulations.

1. **Business Hours.** Unless otherwise specified in this Lease, Tenant agrees to remain open for the standard Center business hours as reasonably determined by Landlord from time to time.

2. **Common Areas.** Tenant shall not use the Common Areas, including areas adjacent to the Premises (except any outdoor seating area approved by Landlord pursuant to Section 9 below), for any purpose other than ingress and egress, and in accordance with all other applicable provisions of this Lease, including these Rules and Regulations. Without limiting the generality of the foregoing, Tenant shall not use the Common Areas to canvass, solicit business or information from, or distribute any article or material to, other tenants, occupants or invitees of the Center, without the express written consent of Landlord. Tenant shall not allow anything to remain in or to obstruct any passageway, sidewalk, court, corridor, stairway, entrance, exit, elevator, shipping area, or other area outside the Premises (except as set forth in Section 9 below). Janitorial closets, utility closets, telephone closets, broom closets, electrical closets, storage closets, and other such closets, rooms and areas shall be used only for the purposes and in the manner designated by Landlord, and may not be used by Tenant, or its contractors, agents, employees, or other parties without Landlord's prior written consent.

3. **No Outside Sales; Loading Areas.** Tenant agrees not to use any portion of the Common Areas for sale or display of any merchandise or any other business, occupation, undertaking or solicitation of customers and further agrees to receive or ship articles of any kind only through loading areas as designated by Landlord.

4. **Deliveries.** Deliveries of furniture, inventory and all other items shall be brought into the Center in compliance with all Legal Requirements and at Tenant's sole risk. All such deliveries shall be made prior to 10:00 am and only through the service entrances of Tenant's Premises and service entrances of the Center, when available. Landlord may inspect items brought into the Center or Premises with respect to weight or dangerous nature or compliance with this Lease or applicable laws. Tenant shall move all inventories, supplies, furniture, equipment and other items directly into the Premises immediately upon receipt.

5. **Trash; Recycling Program.** All garbage, refuse, trash and other waste shall be kept in the kind of container, placed in the areas, and prepared for collection in the manner and at the times and places specified by Landlord, subject to the Section in the Lease concerning Hazardous Substances. Tenant shall not burn any trash or garbage of any kind in or about the Premises or Center. Landlord reserves the right to require that Tenant participate in any recycling program designated by Landlord. If Tenant is permitted under this Lease to handle foodstuffs, garbage and refuse shall be stored and daily removed from the Premises in leak proof, airtight containers. If any leakage occurs, Tenant shall promptly clean and remove any evidence of such leakage at its expense. Tenant shall immediately clean up and remove spills and debris in connection with its disposal of waste at or from the Premises.

6. **Pest Control.** Tenant shall, at its sole cost, arrange for pest control at such intervals as may reasonably be required by Landlord. Tenant shall provide Landlord with evidence of Tenant's compliance with this provision within five days after Landlord's written request. If, however, Landlord shall provide or arrange for such pest control, Tenant shall pay to Landlord Tenant's Proportionate Share of the cost thereof (or such other share as Landlord may fairly and reasonably determine) on or before the first day of each calendar month in advance, or Landlord may include such charges in Operating Costs.

7. **Sign and Display Windows.** Tenant shall not place any sign or any other item outside the Premises (including, without limitation, on the exterior walls and roof), or on the interior or exterior surfaces of doors or glass panes or windows, without the express written consent of Landlord. Tenant shall not install within the Premises any sign that is visible from outside the Premises or that is illuminated, without Landlord's prior written approval. If Landlord approves or requires illuminated signs, Tenant shall keep them illuminated each day during the hours designated by Landlord from time to time. All Tenant's signs shall be professionally designed, prepared and installed and in good taste so as not to detract from the general appearance of the Premises or the Center and shall comply with the sign criteria developed by Landlord as set forth in the Lease. The term "**sign**" for purposes of this Section shall mean any sign, placard, picture, name, direction, lettering, insignia, trademark, advertising material, advertising display, awning or other similar item, including Tenant's storefront sign. Blinds, shades, drapes and other such items shall not be placed in or about the windows in the Premises except to the extent, if any, that the character, shape, designs, color, material and make thereof is first approved by Landlord in writing. During such periods as Tenant is required to operate its store hereunder, Tenant shall keep the display window(s) and signs, if any, in the Premises well lit during business hours and daily until at least 11:00 p.m., at Landlord's discretion.

8. **Display of Merchandise.** Tenant shall not place or maintain any permanent or temporary fixture or other item or display any merchandise: **(A)** outside of the Premises; or **(B)** anywhere inside the Premises within six feet of any entrance to the Premises (except that, with respect to any recessed entry of the Premises, Tenant shall not place or maintain any such fixtures or other item within three feet of any entrance). All displays of merchandise shall be tasteful and professional.

9. **Outdoor Seating.** Tenant is not permitted to maintain outdoor seating without the express written consent of Landlord. Any outdoor seating area (the "**Outdoor Seating Area**"), including the placement and quantity of furniture, fixtures and equipment in, and the design and materials of, the Outdoor Seating Area, must be approved by Landlord. The Outdoor Seating Area

shall be installed and maintained at Tenant's sole cost and expense, in accordance with all applicable laws and at all times clean and free of debris. When not in use, Tenant shall store the Outdoor Seating Area furniture, fixtures and equipment in an appropriate location, which, if on the Premises, shall be approved by Landlord in the exercise of its sole and absolute discretion.

10. **Plumbing Equipment.** The toilet rooms, urinals, wash bowls, drains and sewers and other plumbing fixtures, equipment and lines shall not be misused or used for any purpose other than that for which they were constructed, and no foreign substance of any kind shall be deposited therein. The expense incurred due to any breakage, stoppage or damage resulting from a violation of this provision shall be borne by Tenant, who shall, or whose employees, invitees or agents shall, have caused such breakage, stoppage or damage.

11. **Exhaust System; Grease Traps; Odor Control.** If Tenant operates a business on the Premises in which smoke and/or odor cannot be avoided by an exhaust termination location design, Tenant shall, at Tenant's sole cost and expense, provide an exhaust air pollution control system approved by Landlord. If Tenant operates a restaurant, prior to opening for business, Tenant shall install and thereafter maintain, at Tenant's sole cost and expense, a grease containment system, approved by Landlord, and in compliance with Legal Requirements, on all roof exhaust fans serving the Premises. In addition, Tenant shall properly maintain, clean, repair and replace adequate grease traps. Landlord will install a 2000 gallon grease trap interceptor. Tenant shall clean all grease interceptors no less than four times per year. Notwithstanding anything to the contrary contained in these Rules and Regulations and the Lease, Tenant shall use reasonable and diligent efforts to promptly resolve any odor problems arising from its use of the Premises during the Term.

12. **Roof; Awnings and Projections.** Tenant shall not install any aerial, antennae, satellite dish or any other device on the roof, exterior walls or Common Areas of the Center without obtaining Landlord's prior written consent, provided that Tenant shall be permitted to install, at Tenant's sole cost and expense, cable television service to the Premises. Tenant may install and have access to the HVAC System only to the extent approved in writing or required by Landlord from time to time in connection with Tenant's obligations under this Lease. No awning or other projection shall be attached by or for Tenant to the exterior walls of the Premises or the Building. Any item set forth in this Section installed without the prior written consent of Landlord shall be subject to removal by Landlord without notice to Tenant all at Tenant's sole cost and expense.

13. **Overloading Floors.** Tenant shall not overload any floor or part thereof in the Premises, Building or Center, including any public corridors or elevators therein, and Landlord may designate the location of safes, vaults and all other heavy articles and require supplementary supports of such material and dimensions as Landlord may deem necessary to properly distribute the weight at Tenant's expense (including expenses for structural review and engineering).

14. **Locks and Keys.** Upon termination of this Lease or Tenant's right to possession, Tenant shall: **(A)** return to Landlord all keys, parking stickers or key cards, and in the event of loss of any such items, shall pay Landlord therefor; and **(B)** advise Landlord as to the combination of any vaults or locks that Landlord permits to remain in the Premises.

15. **Unattended Premises.** Before leaving the Premises unattended, Tenant shall close and securely lock all doors or other means of entry to the Premises and shut off all lights (except signs required to be illuminated hereunder), water faucets and other utilities in the Premises (except heat to the extent necessary to prevent the freezing or bursting of pipes). This provision shall not

imply that Tenant may leave the Premises unattended in violation of the operating requirements set forth elsewhere in this Lease.

16. **Heating Facilities.** If the Premises are equipped with heating facilities separate from those in the remainder of the Center, Tenant shall keep the Premises at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.

17. **Food and Beverages; Game and Vending Machines.** Except to the extent expressly permitted under this Lease, Tenant shall not: **(A)** use the Premises for the manufacture, preparation, display, sale, barter, trade, gift or service of food or beverages, including, without limitation, intoxicating liquors; or **(B)** install, operate or use any video, electronic or pinball game or machine, or any coin or token operated vending machine or device to provide products, merchandise, food, beverages, candy, cigarettes or other commodities or services, including, but not limited to, pay lockers, pay toilets, scales and amusement devices; PROVIDED, HOWEVER, that Tenant may install vending machines for the sale of non-alcoholic beverages, food and candy in an area not visible from the sale area or exterior of the Premises for the exclusive use of Tenant's employees.

18. **Labor Relations.** Tenant shall conduct its labor relations and relations with employees so as to avoid strikes, picketing and boycotts of, on or about the Premises or Center. If any of Tenant's employees strike, or if picket lines or boycotts or other visible activities objectionable to Landlord are established, conducted or carried out against Tenant, its employees, agents, contractors or subcontractors in or about the Premises or Center, Tenant shall remove or cause to be removed all such employees, agents, contractors and subcontractors until the dispute has been settled.

19. **Landlord's Trade Name and Trademarks.** No symbol, design, name (other than the name of the Center in Tenant's advertising as permitted or required by this Lease), mark or insignia adopted by Landlord for the Center or picture or likeness of the Center shall be used by Tenant without the prior written consent of Landlord.

20. **Prohibited Activities.** Tenant shall not: **(A)** use strobe, flashing lights or rotating spotlights in or on the Premises (or other areas of the Center) or in any signs for the Premises; **(B)** use, sell or distribute leaflets, handbills, bumper stickers, other stickers or decals, balloons or other such articles in the Premises (or other areas of the Center); **(C)** operate any loudspeaker, telephone set, phonograph, radio, CD player or other musical or sound producing instrument or devise that can be heard outside the Premises; **(D)** operate any electrical or other device which interferes with or impairs radio, television, microwave, or other broadcasting or reception from or in the Center or elsewhere; **(E)** make or permit objectionable noise, vibration, smoke, fumes, vapors or odors to emanate from the Premises unless, in the case of smoke, fumes, vapors, or odors, Tenant installs and maintains a grease containment system or, if applicable, skin and hair salon odor control system, approved by Landlord in writing; **(F)** do or permit anything in or about the Premises or any other areas of the Center that is unlawful, immoral, obscene, pornographic, or which tends to create or maintain a nuisance or do any act tending to injure the reputation of the Center; **(G)** use or permit upon the Premises or other areas of the Center anything that violates the certificates of occupancy issued for the Premises or the Center, or causes a cancellation of Landlord's insurance policies or increases Landlord's insurance premiums (and Tenant shall comply with all requirements of Landlord's insurance carriers, the American Insurance Association, and any board of fire underwriters); **(H)** use the Premises for any purpose, or permit upon the Premises or any areas of the Center anything that may be dangerous to parties or property (including, but not limited to, flammable oils, fluids, paints,

chemicals, firearms or any explosive articles or material(s); **(I)** cause, conduct, permit or advertise any auction or closing-out or wholesale business in the Premises; or any distress sale, fire sale, bankruptcy sale, liquidation, relocation sale, closing sale, going-out-of-business sale, sheriff's sale, receiver's sale, or any other sale that, in Landlord's opinion, adversely affects the reputation of the Center or suggests that the business operations are to be discontinued in the Premises; nor **(J)** do or permit anything to be done upon the Premises or any other areas of the Center in any way tending to disturb, bother or annoy any other tenant at the Center or the occupants of neighboring property.

21. **Responsibility for Compliance.** Tenant shall be responsible for ensuring compliance with these Rules and Regulations, as they may be amended from time to time, by Tenant's employees and, as applicable, by Tenant's agents, invitees, contractors, subcontractors and suppliers.

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EXHIBIT D

FORM OF COMMENCEMENT DATE MEMORANDUM

THIS COMMENCEMENT DATE MEMORANDUM ("**Memorandum**") dated as of _____, 20__, by and between, **CITY OF AVONDALE, an Arizona municipal corporation** ("**Landlord**"), and, **CARLOS O'BRIEN'S SCOTTSDALE, L.L.C., an Arizona limited liability company** ("**Tenant**").

RECITALS:

A. By that certain Center Lease dated as of _____ between Landlord and Tenant (the "**Lease**"), Landlord leased to Tenant and Tenant leased from Landlord the Premises, subject to the conditions and limitations therein contained.

B. **ITEM 7** of the Cover Sheet of the Lease provides that, upon determination of the Commencement Date, Landlord and Tenant shall execute a memorandum which shall set forth, among other things, the Commencement Date, the exact Floor Area of the Premises, the date when Tenant may exercise its Option Term pursuant to **ITEM 8** of the Cover Sheet of the Lease, and the date on which the initial term of the Lease shall expire (subject to Tenant's right, if any, to extend the Term of the Lease as provided therein), and shall evidence Tenant's acceptance of the Premises and agreement that Landlord has fully complied with Landlord's covenants and obligations.

C. The Commencement Date and such other dates have been determined and, accordingly, the parties desire to enter into this Memorandum.

D. Unless otherwise provided herein, all capitalized words and terms in this Memorandum shall have the same meanings ascribed to such words and terms in the Lease.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Delivery Date was _____.

2. The Commencement Date is _____. Tenant's obligation to pay Minimum Rent and other charges payable by Tenant under the Lease shall commence as of the Commencement Date set forth above.

3. The Floor Area of the Premises is _____ square feet.

4. Tenant shall exercise its right to the Option Term, if at all, before _____, subject to the conditions and limitations set forth in _____ of the Lease.

5. The date on which the initial Term of the Lease shall expire, unless such Term is extended by Tenant as provided in the Lease, is _____.

6. Tenant hereby acknowledges Tenant's acceptance of possession of the Premises and agrees that Landlord has fully complied with Landlord's covenants and obligations under the Lease.

7. Tenant acknowledges that all Rent is payable to Landlord at the following address, unless further notified:

City of Avondale
11465 W. Civic Center Drive, Suite 250
Avondale, Arizona 85323
Attn: Accounts Receivable

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

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum as of the day and year first above written.

LANDLORD:

CITY OF AVONDALE,
an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Date Executed: _____

ATTEST:

_____
Carmen Martinez, City Clerk

TENANT:

CARLOS O'BRIEN'S SCOTTSDALE, L.L.C., an Arizona limited liability company

By: _____

Name: _____

Title: _____

Date Executed: _____

EXHIBIT E

FORM OF LEASE GUARANTY

In order to induce City of Avondale, an Arizona municipal corporation, its successors and assigns ("**Landlord**"), to enter into that certain Lease Agreement dated _____, (the "**Lease**") between Landlord and Carlos O'Brien's Scottsdale, L.L.C., ("**Tenant**"), and in consideration of the benefits inuring to the undersigned (the "**Guarantor**") under said Lease, the receipt and sufficiency of which are represented by the Guarantor to Landlord to be sufficient and adequate, the Guarantor hereby unconditionally guarantees the performance of all of Tenant's obligations under the Lease, including, without limitation, the payment of rental as provided therein, but subject to a maximum guaranteed amount of $714,000 during Year One and $612,000 during Year Two. This Guaranty shall remain in full force and effect for the first seven lease years, unless Guarantor does not provide a Substitute Guaranty in which event this Guaranty will remain in force and effect for the initial seven year term of the Lease. Subject to the earlier termination provisions set forth herein, this Guaranty shall terminate and be of no force and effect upon the expiration of the initial seven year term of the Lease, and Guarantor shall automatically be released of any and all obligations under this Guaranty after the expiration of such initial seven year term.

After the end of the second Lease Year, Guarantor will have the option to provide a bond, letter of credit, or other substitute guaranty (the "**Substitute Guaranty**"). The Substitute Guaranty shall be executed in the form attached hereto as **Exhibit F**, Form of Substitute Guaranty, duly executed by Sean O'Brien as Principal and having a Surety thereon which is approved by the City and holds a Certificate of Authority issued by the Arizona Department of Insurance to transact surety business in the State of Arizona. Individual sureties are unacceptable. All Insurers and Sureties shall have at the time of submission of the Substitute Guaranty an A.M. Best's Key Rating Guide of "A-" or better as currently listed in the most recent Best Key Guide, published by the A.M. Best Company. Once the Substitute Guaranty is executed, it shall be substituted for and take the place of this Guaranty during all such times when the Substitute Guaranty is available to and fully enforceable by the City.

The Substitute Guaranty, or to the extent a Substitute Guaranty is not provided and this Guaranty remains in full force and effect during the initial term of the Lease, shall secure the following amounts for Years Three through Seven:

Year Three:	$510,000.00
Year Four:	$408,000.00
Year Five:	$306,000.00
Year Six:	$204,000.00
Year Seven:	$102,000.00

Guarantor agrees that the Substitute Guaranty issued pursuant to the schedule above must be taken out for the full amount listed and shall be in full force and effect for the remaining portion of this lease until or unless Landlord receives and accepts a replacement Substitute Guaranty according to the schedule above. If any Substitute Guaranty is terminated at any time during the Term of the Lease, the original Guaranty, as provided for in the first two lease years, shall be automatically reinstated and enforceable without further act from either party. After the end of the seventh Lease Year, Guarantor is released from all obligations related to such guaranty or substitute.

Guarantor hereby waives notice of acceptance of this Guaranty agreement and all other notices in connection herewith or in connection with the liabilities, obligations and duties guaranteed hereby, including notices to it of default by Tenant under the Lease, and hereby waives diligence, presentment, protest and suit on the part of Landlord in the enforcement of any liability, obligation or duty guaranteed hereby. Guarantor(s) hereby waive the provisions of Section 12-1641 et. seq. of the Arizona Revised Statutes.

Guarantor further agrees that Landlord shall not be first or concurrently required to enforce against Tenant or any other person, any liability, obligation or duty guaranteed hereby before seeking enforcement thereof against Guarantor. The liability of Guarantor shall not be affected by any indulgence, compromise, settlement, or variation of terms which may be extended to Tenant by Landlord, or agreed upon by Landlord or Tenant, and shall not be affected by any assignment or sublease by Tenant of its interest in the Lease, nor shall the liability of the Guarantor be affected by the insolvency, bankruptcy (voluntary or involuntary), or reorganization of Tenant, nor by the voluntary or involuntary liquidation, sale or other disposition of all or substantially all of the assets of Tenant or by action of Landlord, including but not limited to any assignment, pledge, conveyance or transfer of the Lease. Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments, or other covenants respecting the Lease as they may deem appropriate and Guarantor shall not be released thereby, but shall continue to be fully liable for the performance of all obligations and duties of Tenant under the Lease as so modified, extended or amended.

Guarantor further agrees: **(A)** to indemnify, defend and hold Landlord harmless from and against any claims, damages, expenses or losses, including to the extent permitted by law, the reasonable fees of an attorney, resulting from or arising out of any breach of the Lease or any term of the Lease by Tenant or by reason of Tenant's failure to perform any of its obligations thereunder; and **(B)** to the extent permitted by law, to pay any costs or expenses, including the reasonable fees of an attorney, incurred by Landlord in enforcing this Guaranty or the Lease. The Guarantor acknowledges that Landlord shall or may assign its rights under the Lease to anyone as security for a loan to be made by such institutional investor to Landlord OR FOR ANY OTHER REASON, and as long as any indebtedness of Landlord shall be outstanding AND/OR such assignment of the Lease shall exist, such lender or any assignee shall be entitled to bring any suit, action or proceeding against the undersigned for the enforcement of any provision of this Guaranty and it shall not be necessary in any such suit, action or proceeding to make Landlord a party thereto. This Guaranty may not be modified or amended without the prior written consent of such assignee of Landlord's interest in the Lease and any attempted modification or amendment without such consent shall be void. This Guaranty shall be binding upon Guarantor, his heirs, legal representatives, successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns. This Guaranty shall be governed by and construed and enforced in accordance with the laws of the State of Arizona. If there is more than one Guarantor, the liability of each Guarantor shall be joint and several.

IN WITNESS WHEREOF, **Guarantor** has caused this instrument to be executed this _____ day of _____, 20__.

"**GUARANTOR**"

_____
Sean O'Brien

Address: 7111 East Bell Road
Scottsdale, Arizona 85254
SSN: _____

Date Executed: _____

1353713.7 12/27/2010
2623619v2/21850-0001

EXHIBIT F

FORM OF SUBSTITUTE GUARANTY

KNOW ALL PERSONS BY THESE PRESENTS:

THAT, _____ an Arizona corporation (hereinafter called Principal), as Principal, and _____, a corporation authorized to do business in the State of Arizona by the Department of Insurance pursuant to Title 20, Chapter 2, Article 1, Arizona Revised Statutes, organized and existing under the laws of the State of _____, with its principal office in the City of _____, (hereinafter called the Surety), as Surety, are held and firmly bound unto the City of Avondale (the "**Obligee**") in the amount of _____ (Dollars) ($_____), for the payment whereof, the said Principal and Surety bind themselves, and their heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written Lease Agreement with the Obligee, dated _____, 20__, for construction of Tenant Improvements and operation of a business related to Tenant's Premises containing approximately 4,600 square feet of Floor Area and approximately 1,800 square feet of patio space, located at Corporate Drive and 114th Avenue, in the retail component of the mixed-use development associated with the Sports Facility in Avondale, Arizona (the "**Agreement**"), which is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, the condition of this obligation is that if the principal faithfully performs and fulfills all of the undertakings, covenants, terms, conditions of the Agreement during the original term of the Agreement and any extension of the Agreement, with or without notice to the surety, and during the life of any guaranty required under the Agreement, and also performs and fulfills all of the undertakings, covenants, terms, and conditions of all duly authorized modifications of the Agreement that may hereafter be made, notice of which modifications to the surety being hereby waived, the above obligation is void. Otherwise it remains in full force and effect. The prevailing party in a suit on this bond shall recover as part of the judgment reasonable attorney fees that may be fixed by the court.

Witness our hands this _____ day of _____, 20__.

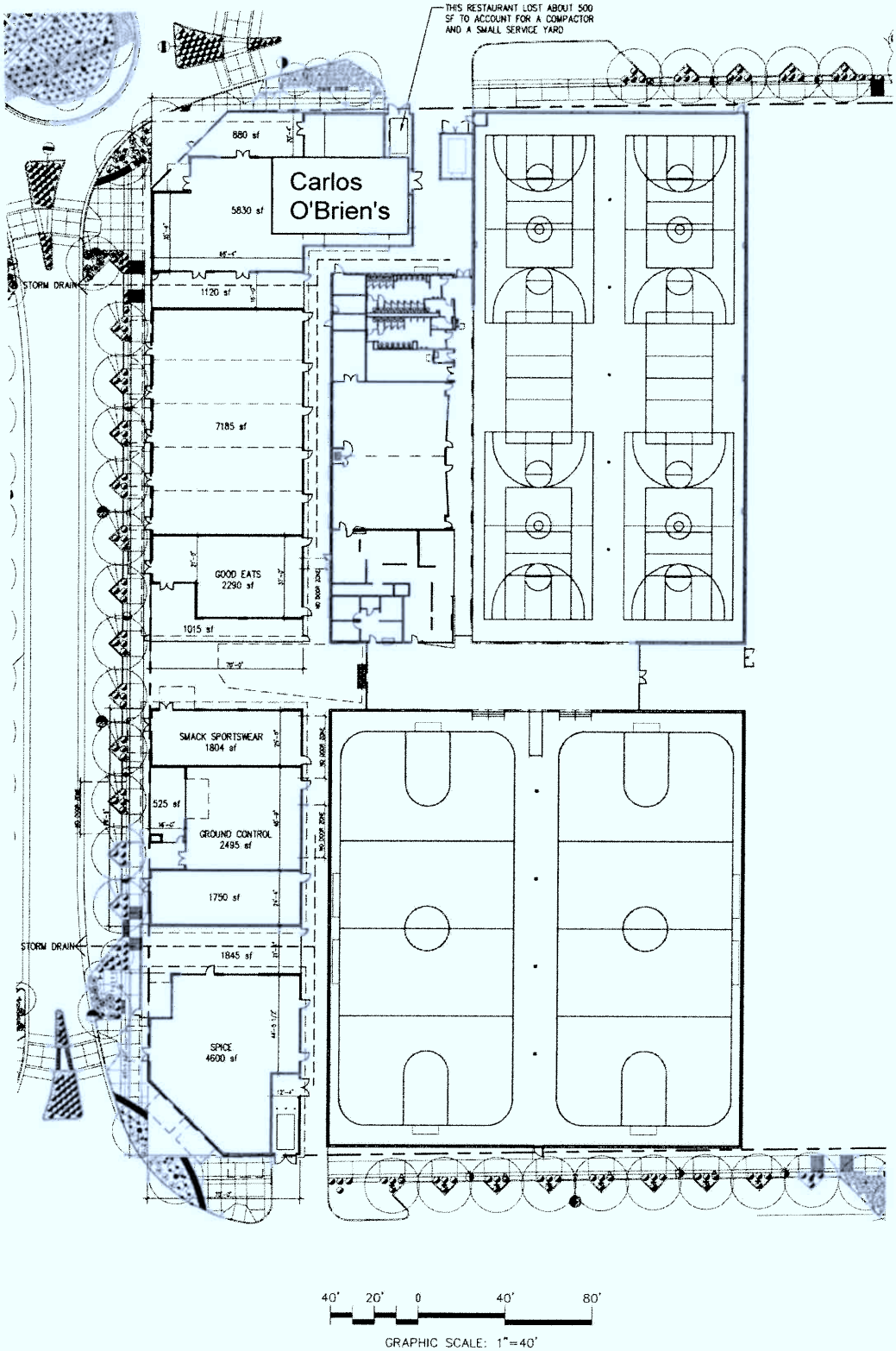
_____
Principal
Seal

By:_____

_____
Surety Seal

By:_____

_____
Agency of Record



AVONDALE SPORTS CENTER RETAIL

135371 16.FEBRUARY.2010

262361

SMITHGROUP

EXHIBIT B-1

DELIVERY DATE CERTIFICATE

[To Be Attached]

EXHIBIT B-2

CONSTRUCTION GUIDELINES

THIS **EXHIBIT B-2** (the "**Construction Guidelines**") supplements the Lease to which it is attached and is incorporated therein as if set out in full. In the event of a conflict between the terms of this **Exhibit B-2** and the Lease, this **Exhibit B-2** shall control. Capitalized terms not defined in this **Exhibit B-2** shall have the meanings given to such terms in the Lease.

1. **Landlord's Work.** Landlord shall, at its own cost and expense, perform only the work described as "**Landlord's Work**" in **ITEM 11** of the Lease. Landlord has made no representations or warranties regarding the condition of the Premises or the Center, except as expressly set forth in this Lease.

2. **Tenant's Work.** Tenant shall, at its own cost and expense, perform all work described as "Tenant's Work" in **ITEM 11** of the Lease in addition to all work not described as "**Landlord's Work**" in the Lease necessary to complete the Premises and to prepare them for the operation of Tenant's business therein (collectively, "**Tenant's Work**"). The parties acknowledge that Tenant will be required to comply with the public procurement laws for each contract to be entered into by Tenant in connection with the construction of Tenant Improvements, consistent with the obligations of ARIZ. REV. STAT. §§ 34-201 et seq. Tenant agrees that all Leasehold Improvements to the Premises shall, upon installation, become the property of Landlord and shall remain upon the Premises upon the expiration or earlier termination of this Lease. Tenant shall not do anything upon or in connection with the Premises or the construction of any part thereof which interferes in any way with, or results in a work stoppage in connection with, construction of any part of the Center or any other tenant's space.

3. **Plans and Specifications.**

3.1 **Tenant's Drawings.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of store finish drawings ("**Tenant's Drawings**") by January 15, 2011.

3.2 **Approval of Tenant's Drawings**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Drawings, specifying in detail any reasons for disapproval. If Tenant's Drawings are disapproved, Tenant shall incorporate Landlord's comments and resubmit Tenant's Drawings to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Drawings to approve or disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Drawings. Landlord will not unreasonably withhold its approval.

3.3 **Construction Documents.** Tenant shall prepare and furnish to Landlord, at Tenant's sole cost and expense, and in compliance with applicable laws, statutes, ordinances and codes, a complete set of construction plans and specifications ("**Construction Documents**") by May 31, 2010. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.4 **Approval of Construction Documents**. Landlord shall have 30 days after receipt to approve or disapprove Tenant's Construction Documents, specifying in detail any reasons for disapproval. If Tenant's Construction Documents are disapproved, Tenant shall incorporate

Landlord's comments and resubmit Tenant's Construction Documents to Landlord within 15 days. Landlord shall have 15 days after receipt of the resubmitted Construction Documents to approve or disapprove them, and, in the event of disapproval, the procedures set forth herein shall be repeated until Landlord has approved Tenant's Construction Documents. Landlord will not unreasonably withhold its approval. A complete set of Construction Documents shall be kept on the Premises at all times until Tenant opens for business therein.

3.5 **Tenant's Architect/Engineer.** Tenant shall cause all architects and engineers engaged by Tenant (each a "**Professional**") to obtain and keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), a policy of professional liability insurance covering all liability arising out of any negligent acts or errors and omissions committed by such Professional with limits of not less than $1,000,000.00 per claim and annual aggregate, with a retroactive date prior to the contract date. Each Professional shall maintain such policy for a minimum of two years after completion of work or shall obtain a two-year extended reporting period if the policy is canceled or non-renewed.

4. **Tenant's Contractor.** All contractors engaged by Tenant shall be bondable, licensed contractors, having good labor relations, and capable of performing quality workmanship and working in harmony with Landlord's contractors and other contractors on the job. The term "contractors" as used in this Section shall be deemed to include subcontractors. The City shall have the absolute right to review contractor plans, bids, and estimated costs and, in its reasonable discretion, the City may approve or disapprove Tenant's Contractor, specifying in detail any reasons for disapproval. If the Tenant's Contractor is not approved, the City has authority to solicit a different contractor to perform any and all work according to the specifications of this lease.

4.1 **Insurance.** On or before entry into the Premises, Tenant shall cause its contractor to obtain and to keep in force, with an insurance company authorized to do business in Arizona which has a general policy rating of A- or better and a financial class of VII or better by A.M. Best Company, Inc. (or if a rating of A.M. Best Company is no longer available, a comparable rating from a similar or successor service), until Tenant's Work is completed, all of the following insurance:

A. **Commercial General Liability Insurance.** Commercial general liability insurance to protect against claims for bodily injury and property damage arising out of premises operations, products, and completed operations, and advertising and personal injury liability, written on an occurrence basis using ISO Form CG0001 (or its equivalent) with no amendments to the definition of an insured contract, in limits of not less than $1,000,000.00 inclusive, per occurrence, and $1,000,000.00 annual aggregate per project, or such higher limits as Landlord may require from time to time during the Term. Completed Operations to remain in force for at least two years following project completion. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

B. **Commercial Automobile Liability Insurance.** Commercial automobile liability insurance to include contractual liability insurance for the indemnities set forth in this contract covering all owned, non-owned and hired automobiles, in limits of not less than $1,000,000.00 combined single limit (each accident), or such higher limits as

Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

C. **Employer's Liability Insurance and Workers Compensation.** Employer's Liability insurance, with minimum limits of not less than $500,000 bodily injury each accident, $500,000.00 bodily injury by disease policy limit and $500,000.00 bodily injury by disease each employee, and Worker's Compensation, in form and amount as required by applicable state law. To the extent permitted by applicable law, such policy shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

D. **Umbrella Liability Insurance.** Umbrella liability insurance over the primary general liability, automobile liability and employer's liability insurance policies in limits of not less than $2,000,000.00 inclusive per occurrence, and $2,000,000.00 annual aggregate, per project, or such higher limits as Landlord may require from time to time during the Term. To the extent permitted by applicable law, such policy(ies) shall include a waiver of any right of subrogation of the insurers thereunder against Landlord, Landlord's property manager, and all mortgagees of Landlord.

E. **Builder's Risk Insurance.** Builder's Risk insurance on a "Special Form" basis (including collapse) using a completed value (non-reporting) form for full replacement cost covering all work which Tenant contracts for or performs in the Center and all materials and equipment used or installed by Tenant in or about the Premises, off site and in transit. This insurance shall include: (1) interests of Tenant, Landlord, Landlord's property manager, all mortgagees of Landlord, Tenant's contractor, subcontractors and sub-subcontractors; and (2) a mutual release and waiver of subrogation for all parties.

F. **Insurance Changes.** Landlord may require, from time to time, changes or endorsements to Tenant's contractor insurance required herein.

4.2 **Policies of Insurance.** Tenant's contractor shall have right to satisfy the insurance required by this Section by means of blanket insurance policy(ies), provided that no other loss which may also be insured by the blanket insurance shall affect the insurance coverages required hereunder and further provided that Tenant's contractor delivers to Landlord a certificate specifically stating that such coverages apply to Landlord, Landlord's property manager, all mortgagees of Landlord, the Premises and the Center. All policies of insurance or certificates thereof, except with respect to workers compensation or professional liability, shall name Tenant, Landlord, Landlord's property manager, and all mortgagees of Landlord, as additional insureds, as their respective interests may appear, including products and completed operations. All self insured retentions and deductible amounts shall be subject to Landlord's prior written approval. Any and all deductibles or coinsurance in the above-described policies or inadequacy of limits for coverage shall be assumed by, for the account of, and at Tenant's contractor sole risk. Prior to commencing any work under this Agreement, Tenant will provide Landlord with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Tenant's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full

force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Landlord shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. Tenant agrees to further provide Landlord evidence of renewals of policies not later than 30 days prior to the end of the expiring term. All policies of insurance carried by Tenant's contractor shall be primary and non-contributing in the event of any loss or damage with any insurance required to be maintained by Tenant's contractor under the terms of this Lease. All policies and certificates shall notify Tenant, Landlord and any mortgagee of Landlord, in writing, not less than 30 days before any lapse, non-renewal or cancellation, including cancellation for nonpayment of premium, or other termination thereof and shall include a clause or endorsement denying the insurer any rights or subrogation against Tenant and Landlord, Landlord's property manager, and all mortgagees of Landlord. Landlord reserves the right to request and receive for review certified copies of any and all insurance policies to which the Lease is applicable. The required coverage and or limits referred to and set forth herein shall in no way affect or limit Tenant's contractor's liability with respect to its performance.

4.3 **Conditions to Commencement of Tenant's Work.** On or before entry into the Premises, Tenant shall cause its contractor to: **(A)** review the plans and specifications (including all exhibits, addendums or riders thereto); **(B)** review other related data including "**technical data**"; **(C)** inspect the Premises; and **(D)** obtain all governmental permits and approvals and pay any associated tax (including, but not limited to, excise tax) to complete Tenant's Work and forward copies to Landlord.

4.4 **Construction of Tenant's Work.** Tenant shall cause its contractor: **(A)** to construct Tenant's Work strictly in accordance with Landlord approved plans and specifications and changes thereto which are stamped approved by Landlord's architect; **(B)** to advise Landlord immediately of any requested change from the plans and specifications; **(C)** to keep a Landlord approved original set of plans and specifications at the job site at all times; and **(D)** not to leave the job site until Landlord's and Tenant's punchlist items are complete, all damage is repaired and the site is free of debris and all unused materials are removed. Daily site clean up is required.

4.5 **Contractor Deposit.** Prior to commencement of construction, Tenant or Tenant's contractor shall deposit with Landlord the amount of $5,000.00 for the Premises as a damage/repair/clean-up deposit (the "**Contractor Deposit**"). Landlord may utilize the Contractor Deposit if Tenant's contractor does not repair damage to the property, damages the property, does not complete punchlist items or does not clean-up their construction site as required or otherwise fulfill the obligations of this Section. Should Landlord be required to complete any work to be completed by Tenant's contractor, including, but not limited to, cleanup, painting, punchlist items, etc., Tenant shall pay Landlord the cost of such work, together with an amount equal to 25%, within 20 days after receipt of an invoice therefor. Any items borrowed from Landlord shall be documented.

4.6 **Damage to Equipment.** Tenant agrees that Landlord shall not be liable and Tenant shall indemnify Landlord against any damage to Tenant's contractor or contractor's employee's property, or any equipment entrusted to Tenant's contractor by others, and for the loss of or damage to any of Tenant's contractor's property or equipment by theft or otherwise, unless caused by Landlord's gross negligence or willful misconduct.

4.7 **Violations by Tenant's Contractors**. In addition to application of the Contractor Deposit, and any and all remedies at law or equity, in the event Tenant's contractor violates the requirements of this Exhibit, Landlord, upon five days notice, may order Tenant's contractors to remove themselves, their equipment and their employees from Landlord's property. Notwithstanding the foregoing, in the event Tenant's contractor violates the requirements of this Exhibit on two occasions, as to the third such occasion, Landlord shall not be required to give notice to Tenant and may order Tenant's contractors to remove themselves, their equipment and their employees from the Center.

5. **Allowance**. In consideration of the performance by Tenant of Tenant's Work in the Premises and the timely fulfillment of all of the terms of this Lease, Landlord agrees to pay to Tenant the Construction Allowance, as described in the Lease, applicable to the "**hard costs**" (as defined below) for Tenant's permanent leasehold improvements for the Premises. For this purpose, "**hard costs**" shall mean and refer only to the cost of labor and materials incorporated into the Premises as permanent leasehold improvements, and shall not include, without limitation, any so called "**soft costs**," design/architectural/engineering fees or the cost of Tenant's trade fixtures, inventory, personal property or any other property constituting "**Tenant's Property**" (as defined in the Lease). The Construction Allowance shall be applicable only to Tenant's Work actually performed and completed to the Premises and shall be paid according to the provisions of **ITEM 11(G)** of the Cover Sheet of this lease. Landlord further agrees to pay Tenant any and all remaining retainage within 21 days of the Certificate of Occupancy, provided **all** of the flowing have occurred:

5.1 **Opened.** Tenant has opened for business in the Premises as required by this Lease and has paid to Landlord the first and any subsequently owed Rent payment(s) or other amounts due under this Lease.

5.2 **Commencement Date Memorandum.** Tenant has executed and delivered to Landlord a Commencement Date Memorandum in the form attached to the Lease as **Exhibit D**;

5.3 **No Default.** Tenant is not in default after notice and the lapse of any applicable cure period.

5.4 **Work Completed**. Tenant's Work is completed in accordance with approved Construction Documents.

5.5 **Debris.** The Premises and the Common Areas surrounding the Premises are free of Tenant's debris, all contractor equipment and materials have been removed from the Premises, and any damage to the Center or the Common Areas caused by Tenant, its agents or contractors, has been repaired.

5.6 **Liens, Judgments, Levies, or Tax Liens**. The Premises, including all installations therein, are free and clear of all liens and there are no judgments, levies, attachments, liens or tax liens pending or in effect with respect to Tenant's Work in the Premises.

5.7 **Required Documentation.** Tenant has submitted the following completed documentation to Landlord:

A. **Lien Waivers.** Full, final and unconditional lien waivers and releases in favor of Landlord, Landlord's lender, any proposed purchaser, or any other person/entity

reasonably requested by Landlord, from Tenant's general contractor and from all Tenant's subcontractors having contracts in excess of $5,000.00.

B. **Certificates.** A copy of the permanent Certificate of Occupancy and any temporary Certificates of Occupancy.

C. **Contractor's Final Billing.** A copy of the final billing from Tenant's general contractor (broken down in reasonable detail and showing the cost of work performed at the Premises adequate to componentized for tax purposes under either generally accepted accounting principles or Internal Revenue guidelines).

D. **Architect Certificate.** Tenant's architect's certificate certifying that Tenant's Work is completed in accordance with the approved Construction Documents, including all items on Landlord's representative's punch list.

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EXHIBIT C

CENTER RULES AND REGULATIONS

Landlord agrees to use its reasonable efforts to cause compliance by tenants of the Center with these Rules and Regulations, as they may be revised or amended by Landlord from time to time in its commercially reasonable discretion (as amended, the "**Rules and Regulations**"), but in no event shall Landlord be responsible for the violation or nonperformance of any of these Rules and Regulations by any other tenant. Unless otherwise provided, all terms used in these Rules and Regulations shall have the same meaning as set forth in this Lease. To the extent that the provisions of these Rules and Regulations are inconsistent with the provisions of this Lease, the provisions of the Lease shall control. In the event Tenant violates any of the Rules and Regulations and such violation continues for more than 24 hours after Tenant's receipt of notice thereof from Landlord, then Tenant shall pay Landlord, as liquidated damages, an amount equal to $50.00 per day so long as such violation continues. Tenant recognizes that its violation of the Rules and Regulations will result in damages to Landlord and that the nature and amount of such damages is difficult or impossible to quantify, and that the foregoing amount represents a reasonable approximation of the actual damages Landlord would suffer in the event Tenant violates the Rules and Regulations.

1. **Business Hours.** Unless otherwise specified in this Lease, Tenant agrees to remain open for the standard Center business hours as reasonably determined by Landlord from time to time.

2. **Common Areas.** Tenant shall not use the Common Areas, including areas adjacent to the Premises (except any outdoor seating area approved by Landlord pursuant to Section 9 below), for any purpose other than ingress and egress, and in accordance with all other applicable provisions of this Lease, including these Rules and Regulations. Without limiting the generality of the foregoing, Tenant shall not use the Common Areas to canvass, solicit business or information from, or distribute any article or material to, other tenants, occupants or invitees of the Center, without the express written consent of Landlord. Tenant shall not allow anything to remain in or to obstruct any passageway, sidewalk, court, corridor, stairway, entrance, exit, elevator, shipping area, or other area outside the Premises (except as set forth in Section 9 below). Janitorial closets, utility closets, telephone closets, broom closets, electrical closets, storage closets, and other such closets, rooms and areas shall be used only for the purposes and in the manner designated by Landlord, and may not be used by Tenant, or its contractors, agents, employees, or other parties without Landlord's prior written consent.

3. **No Outside Sales; Loading Areas.** Tenant agrees not to use any portion of the Common Areas for sale or display of any merchandise or any other business, occupation, undertaking or solicitation of customers and further agrees to receive or ship articles of any kind only through loading areas as designated by Landlord.

4. **Deliveries.** Deliveries of furniture, inventory and all other items shall be brought into the Center in compliance with all Legal Requirements and at Tenant's sole risk. All such deliveries shall be made prior to 10:00 am and only through the service entrances of Tenant's Premises and service entrances of the Center, when available. Landlord may inspect items brought into the Center or Premises with respect to weight or dangerous nature or compliance with this Lease or applicable laws. Tenant shall move all inventories, supplies, furniture, equipment and other items directly into the Premises immediately upon receipt.

5. **Trash; Recycling Program.** All garbage, refuse, trash and other waste shall be kept in the kind of container, placed in the areas, and prepared for collection in the manner and at the times and places specified by Landlord, subject to the Section in the Lease concerning Hazardous Substances. Tenant shall not burn any trash or garbage of any kind in or about the Premises or Center. Landlord reserves the right to require that Tenant participate in any recycling program designated by Landlord. If Tenant is permitted under this Lease to handle foodstuffs, garbage and refuse shall be stored and daily removed from the Premises in leak proof, airtight containers. If any leakage occurs, Tenant shall promptly clean and remove any evidence of such leakage at its expense. Tenant shall immediately clean up and remove spills and debris in connection with its disposal of waste at or from the Premises.

6. **Pest Control.** Tenant shall, at its sole cost, arrange for pest control at such intervals as may reasonably be required by Landlord. Tenant shall provide Landlord with evidence of Tenant's compliance with this provision within five days after Landlord's written request. If, however, Landlord shall provide or arrange for such pest control, Tenant shall pay to Landlord Tenant's Proportionate Share of the cost thereof (or such other share as Landlord may fairly and reasonably determine) on or before the first day of each calendar month in advance, or Landlord may include such charges in Operating Costs.

7. **Sign and Display Windows.** Tenant shall not place any sign or any other item outside the Premises (including, without limitation, on the exterior walls and roof), or on the interior or exterior surfaces of doors or glass panes or windows, without the express written consent of Landlord. Tenant shall not install within the Premises any sign that is visible from outside the Premises or that is illuminated, without Landlord's prior written approval. If Landlord approves or requires illuminated signs, Tenant shall keep them illuminated each day during the hours designated by Landlord from time to time. All Tenant's signs shall be professionally designed, prepared and installed and in good taste so as not to detract from the general appearance of the Premises or the Center and shall comply with the sign criteria developed by Landlord as set forth in the Lease. The term "**sign**" for purposes of this Section shall mean any sign, placard, picture, name, direction, lettering, insignia, trademark, advertising material, advertising display, awning or other similar item, including Tenant's storefront sign. Blinds, shades, drapes and other such items shall not be placed in or about the windows in the Premises except to the extent, if any, that the character, shape, designs, color, material and make thereof is first approved by Landlord in writing. During such periods as Tenant is required to operate its store hereunder, Tenant shall keep the display window(s) and signs, if any, in the Premises well lit during business hours and daily until at least 11:00 p.m., at Landlord's discretion.

8. **Display of Merchandise.** Tenant shall not place or maintain any permanent or temporary fixture or other item or display any merchandise: **(A)** outside of the Premises; or **(B)** anywhere inside the Premises within six feet of any entrance to the Premises (except that, with respect to any recessed entry of the Premises, Tenant shall not place or maintain any such fixtures or other item within three feet of any entrance). All displays of merchandise shall be tasteful and professional.

9. **Outdoor Seating.** Tenant is not permitted to maintain outdoor seating without the express written consent of Landlord. Any outdoor seating area (the "**Outdoor Seating Area**"), including the placement and quantity of furniture, fixtures and equipment in, and the design and materials of, the Outdoor Seating Area, must be approved by Landlord. The Outdoor Seating Area

shall be installed and maintained at Tenant's sole cost and expense, in accordance with all applicable laws and at all times clean and free of debris. When not in use, Tenant shall store the Outdoor Seating Area furniture, fixtures and equipment in an appropriate location, which, if on the Premises, shall be approved by Landlord in the exercise of its sole and absolute discretion.

10. **Plumbing Equipment.** The toilet rooms, urinals, wash bowls, drains and sewers and other plumbing fixtures, equipment and lines shall not be misused or used for any purpose other than that for which they were constructed, and no foreign substance of any kind shall be deposited therein. The expense incurred due to any breakage, stoppage or damage resulting from a violation of this provision shall be borne by Tenant, who shall, or whose employees, invitees or agents shall, have caused such breakage, stoppage or damage.

11. **Exhaust System; Grease Traps; Odor Control.** If Tenant operates a business on the Premises in which smoke and/or odor cannot be avoided by an exhaust termination location design, Tenant shall, at Tenant's sole cost and expense, provide an exhaust air pollution control system approved by Landlord. If Tenant operates a restaurant, prior to opening for business, Tenant shall install and thereafter maintain, at Tenant's sole cost and expense, a grease containment system, approved by Landlord, and in compliance with Legal Requirements, on all roof exhaust fans serving the Premises. In addition, Tenant shall properly maintain, clean, repair and replace adequate grease traps. Landlord will install a 2000 gallon grease trap interceptor. Tenant shall clean all grease interceptors no less than four times per year. Notwithstanding anything to the contrary contained in these Rules and Regulations and the Lease, Tenant shall use reasonable and diligent efforts to promptly resolve any odor problems arising from its use of the Premises during the Term.

12. **Roof; Awnings and Projections.** Tenant shall not install any aerial, antennae, satellite dish or any other device on the roof, exterior walls or Common Areas of the Center without obtaining Landlord's prior written consent, provided that Tenant shall be permitted to install, at Tenant's sole cost and expense, cable television service to the Premises. Tenant may install and have access to the HVAC System only to the extent approved in writing or required by Landlord from time to time in connection with Tenant's obligations under this Lease. No awning or other projection shall be attached by or for Tenant to the exterior walls of the Premises or the Building. Any item set forth in this Section installed without the prior written consent of Landlord shall be subject to removal by Landlord without notice to Tenant all at Tenant's sole cost and expense.

13. **Overloading Floors.** Tenant shall not overload any floor or part thereof in the Premises, Building or Center, including any public corridors or elevators therein, and Landlord may designate the location of safes, vaults and all other heavy articles and require supplementary supports of such material and dimensions as Landlord may deem necessary to properly distribute the weight at Tenant's expense (including expenses for structural review and engineering).

14. **Locks and Keys.** Upon termination of this Lease or Tenant's right to possession, Tenant shall: **(A)** return to Landlord all keys, parking stickers or key cards, and in the event of loss of any such items, shall pay Landlord therefor; and **(B)** advise Landlord as to the combination of any vaults or locks that Landlord permits to remain in the Premises.

15. **Unattended Premises.** Before leaving the Premises unattended, Tenant shall close and securely lock all doors or other means of entry to the Premises and shut off all lights (except signs required to be illuminated hereunder), water faucets and other utilities in the Premises (except heat to the extent necessary to prevent the freezing or bursting of pipes). This provision shall not

imply that Tenant may leave the Premises unattended in violation of the operating requirements set forth elsewhere in this Lease.

16. **Heating Facilities.** If the Premises are equipped with heating facilities separate from those in the remainder of the Center, Tenant shall keep the Premises at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.

17. **Food and Beverages; Game and Vending Machines.** Except to the extent expressly permitted under this Lease, Tenant shall not: **(A)** use the Premises for the manufacture, preparation, display, sale, barter, trade, gift or service of food or beverages, including, without limitation, intoxicating liquors; or **(B)** install, operate or use any video, electronic or pinball game or machine, or any coin or token operated vending machine or device to provide products, merchandise, food, beverages, candy, cigarettes or other commodities or services, including, but not limited to, pay lockers, pay toilets, scales and amusement devices; PROVIDED, HOWEVER, that Tenant may install vending machines for the sale of non-alcoholic beverages, food and candy in an area not visible from the sale area or exterior of the Premises for the exclusive use of Tenant's employees.

18. **Labor Relations.** Tenant shall conduct its labor relations and relations with employees so as to avoid strikes, picketing and boycotts of, on or about the Premises or Center. If any of Tenant's employees strike, or if picket lines or boycotts or other visible activities objectionable to Landlord are established, conducted or carried out against Tenant, its employees, agents, contractors or subcontractors in or about the Premises or Center, Tenant shall remove or cause to be removed all such employees, agents, contractors and subcontractors until the dispute has been settled.

19. **Landlord's Trade Name and Trademarks.** No symbol, design, name (other than the name of the Center in Tenant's advertising as permitted or required by this Lease), mark or insignia adopted by Landlord for the Center or picture or likeness of the Center shall be used by Tenant without the prior written consent of Landlord.

20. **Prohibited Activities.** Tenant shall not: **(A)** use strobe, flashing lights or rotating spotlights in or on the Premises (or other areas of the Center) or in any signs for the Premises; **(B)** use, sell or distribute leaflets, handbills, bumper stickers, other stickers or decals, balloons or other such articles in the Premises (or other areas of the Center); **(C)** operate any loudspeaker, telephone set, phonograph, radio, CD player or other musical or sound producing instrument or devise that can be heard outside the Premises; **(D)** operate any electrical or other device which interferes with or impairs radio, television, microwave, or other broadcasting or reception from or in the Center or elsewhere; **(E)** make or permit objectionable noise, vibration, smoke, fumes, vapors or odors to emanate from the Premises unless, in the case of smoke, fumes, vapors, or odors, Tenant installs and maintains a grease containment system or, if applicable, skin and hair salon odor control system, approved by Landlord in writing; **(F)** do or permit anything in or about the Premises or any other areas of the Center that is unlawful, immoral, obscene, pornographic, or which tends to create or maintain a nuisance or do any act tending to injure the reputation of the Center; **(G)** use or permit upon the Premises or other areas of the Center anything that violates the certificates of occupancy issued for the Premises or the Center, or causes a cancellation of Landlord's insurance policies or increases Landlord's insurance premiums (and Tenant shall comply with all requirements of Landlord's insurance carriers, the American Insurance Association, and any board of fire underwriters); **(H)** use the Premises for any purpose, or permit upon the Premises or any areas of the Center anything that may be dangerous to parties or property (including, but not limited to, flammable oils, fluids, paints,

chemicals, firearms or any explosive articles or material(s); **(I)** cause, conduct, permit or advertise any auction or closing-out or wholesale business in the Premises; or any distress sale, fire sale, bankruptcy sale, liquidation, relocation sale, closing sale, going-out-of-business sale, sheriff's sale, receiver's sale, or any other sale that, in Landlord's opinion, adversely affects the reputation of the Center or suggests that the business operations are to be discontinued in the Premises; nor **(J)** do or permit anything to be done upon the Premises or any other areas of the Center in any way tending to disturb, bother or annoy any other tenant at the Center or the occupants of neighboring property.

21. **Responsibility for Compliance.** Tenant shall be responsible for ensuring compliance with these Rules and Regulations, as they may be amended from time to time, by Tenant's employees and, as applicable, by Tenant's agents, invitees, contractors, subcontractors and suppliers.

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EXHIBIT D

FORM OF COMMENCEMENT DATE MEMORANDUM

THIS COMMENCEMENT DATE MEMORANDUM ("**Memorandum**") dated as of _____, 20__, by and between, **CITY OF AVONDALE, an Arizona municipal corporation** ("**Landlord**"), and, **CARLOS O'BRIEN'S SCOTTSDALE, L.L.C., an Arizona limited liability company** ("**Tenant**").

RECITALS:

A. By that certain Center Lease dated as of _____ between Landlord and Tenant (the "**Lease**"), Landlord leased to Tenant and Tenant leased from Landlord the Premises, subject to the conditions and limitations therein contained.

B. **ITEM 7** of the Cover Sheet of the Lease provides that, upon determination of the Commencement Date, Landlord and Tenant shall execute a memorandum which shall set forth, among other things, the Commencement Date, the exact Floor Area of the Premises, the date when Tenant may exercise its Option Term pursuant to **ITEM 8** of the Cover Sheet of the Lease, and the date on which the initial term of the Lease shall expire (subject to Tenant's right, if any, to extend the Term of the Lease as provided therein), and shall evidence Tenant's acceptance of the Premises and agreement that Landlord has fully complied with Landlord's covenants and obligations.

C. The Commencement Date and such other dates have been determined and, accordingly, the parties desire to enter into this Memorandum.

D. Unless otherwise provided herein, all capitalized words and terms in this Memorandum shall have the same meanings ascribed to such words and terms in the Lease.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Delivery Date was _____.

2. The Commencement Date is _____. Tenant's obligation to pay Minimum Rent and other charges payable by Tenant under the Lease shall commence as of the Commencement Date set forth above.

3. The Floor Area of the Premises is _____ square feet.

4. Tenant shall exercise its right to the Option Term, if at all, before _____, subject to the conditions and limitations set forth in _____ of the Lease.

5. The date on which the initial Term of the Lease shall expire, unless such Term is extended by Tenant as provided in the Lease, is _____.

6. Tenant hereby acknowledges Tenant's acceptance of possession of the Premises and agrees that Landlord has fully complied with Landlord's covenants and obligations under the Lease.

7. Tenant acknowledges that all Rent is payable to Landlord at the following address, unless further notified:

City of Avondale
11465 W. Civic Center Drive, Suite 250
Avondale, Arizona 85323
Attn: Accounts Receivable

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

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum as of the day and year first above written.

LANDLORD:

CITY OF AVONDALE,
an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Date Executed: _____

ATTEST:

_____
Carmen Martinez, City Clerk

TENANT:

CARLOS O'BRIEN'S SCOTTSDALE, L.L.C., an Arizona limited liability company

By: _____

Name: _____

Title: _____

Date Executed: _____

EXHIBIT E

FORM OF LEASE GUARANTY

In order to induce City of Avondale, an Arizona municipal corporation, its successors and assigns ("**Landlord**"), to enter into that certain Lease Agreement dated _____, (the "**Lease**") between Landlord and Carlos O'Brien's Scottsdale, L.L.C., ("**Tenant**"), and in consideration of the benefits inuring to the undersigned (the "**Guarantor**") under said Lease, the receipt and sufficiency of which are represented by the Guarantor to Landlord to be sufficient and adequate, the Guarantor hereby unconditionally guarantees the performance of all of Tenant's obligations under the Lease, including, without limitation, the payment of rental as provided therein, but subject to a maximum guaranteed amount of $714,000 during Year One and $612,000 during Year Two. This Guaranty shall remain in full force and effect for the first seven lease years, unless Guarantor does not provide a Substitute Guaranty in which event this Guaranty will remain in force and effect for the initial seven year term of the Lease. Subject to the earlier termination provisions set forth herein, this Guaranty shall terminate and be of no force and effect upon the expiration of the initial seven year term of the Lease, and Guarantor shall automatically be released of any and all obligations under this Guaranty after the expiration of such initial seven year term.

After the end of the second Lease Year, Guarantor will have the option to provide a bond, letter of credit, or other substitute guaranty (the "**Substitute Guaranty**"). The Substitute Guaranty shall be executed in the form attached hereto as **Exhibit F**, Form of Substitute Guaranty, duly executed by Sean O'Brien as Principal and having a Surety thereon which is approved by the City and holds a Certificate of Authority issued by the Arizona Department of Insurance to transact surety business in the State of Arizona. Individual sureties are unacceptable. All Insurers and Sureties shall have at the time of submission of the Substitute Guaranty an A.M. Best's Key Rating Guide of "A-" or better as currently listed in the most recent Best Key Guide, published by the A.M. Best Company. Once the Substitute Guaranty is executed, it shall be substituted for and take the place of this Guaranty during all such times when the Substitute Guaranty is available to and fully enforceable by the City.

The Substitute Guaranty, or to the extent a Substitute Guaranty is not provided and this Guaranty remains in full force and effect during the initial term of the Lease, shall secure the following amounts for Years Three through Seven:

Year Three:	$510,000.00
Year Four:	$408,000.00
Year Five:	$306,000.00
Year Six:	$204,000.00
Year Seven:	$102,000.00

Guarantor agrees that the Substitute Guaranty issued pursuant to the schedule above must be taken out for the full amount listed and shall be in full force and effect for the remaining portion of this lease until or unless Landlord receives and accepts a replacement Substitute Guaranty according to the schedule above. If any Substitute Guaranty is terminated at any time during the Term of the Lease, the original Guaranty, as provided for in the first two lease years, shall be automatically reinstated and enforceable without further act from either party. After the end of the seventh Lease Year, Guarantor is released from all obligations related to such guaranty or substitute.

Guarantor hereby waives notice of acceptance of this Guaranty agreement and all other notices in connection herewith or in connection with the liabilities, obligations and duties guaranteed hereby, including notices to it of default by Tenant under the Lease, and hereby waives diligence, presentment, protest and suit on the part of Landlord in the enforcement of any liability, obligation or duty guaranteed hereby. Guarantor(s) hereby waive the provisions of Section 12-1641 et. seq. of the Arizona Revised Statutes.

Guarantor further agrees that Landlord shall not be first or concurrently required to enforce against Tenant or any other person, any liability, obligation or duty guaranteed hereby before seeking enforcement thereof against Guarantor. The liability of Guarantor shall not be affected by any indulgence, compromise, settlement, or variation of terms which may be extended to Tenant by Landlord, or agreed upon by Landlord or Tenant, and shall not be affected by any assignment or sublease by Tenant of its interest in the Lease, nor shall the liability of the Guarantor be affected by the insolvency, bankruptcy (voluntary or involuntary), or reorganization of Tenant, nor by the voluntary or involuntary liquidation, sale or other disposition of all or substantially all of the assets of Tenant or by action of Landlord, including but not limited to any assignment, pledge, conveyance or transfer of the Lease. Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments, or other covenants respecting the Lease as they may deem appropriate and Guarantor shall not be released thereby, but shall continue to be fully liable for the performance of all obligations and duties of Tenant under the Lease as so modified, extended or amended.

Guarantor further agrees: **(A)** to indemnify, defend and hold Landlord harmless from and against any claims, damages, expenses or losses, including to the extent permitted by law, the reasonable fees of an attorney, resulting from or arising out of any breach of the Lease or any term of the Lease by Tenant or by reason of Tenant's failure to perform any of its obligations thereunder; and **(B)** to the extent permitted by law, to pay any costs or expenses, including the reasonable fees of an attorney, incurred by Landlord in enforcing this Guaranty or the Lease. The Guarantor acknowledges that Landlord shall or may assign its rights under the Lease to anyone as security for a loan to be made by such institutional investor to Landlord OR FOR ANY OTHER REASON, and as long as any indebtedness of Landlord shall be outstanding AND/OR such assignment of the Lease shall exist, such lender or any assignee shall be entitled to bring any suit, action or proceeding against the undersigned for the enforcement of any provision of this Guaranty and it shall not be necessary in any such suit, action or proceeding to make Landlord a party thereto. This Guaranty may not be modified or amended without the prior written consent of such assignee of Landlord's interest in the Lease and any attempted modification or amendment without such consent shall be void. This Guaranty shall be binding upon Guarantor, his heirs, legal representatives, successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns. This Guaranty shall be governed by and construed and enforced in accordance with the laws of the State of Arizona. If there is more than one Guarantor, the liability of each Guarantor shall be joint and several.

IN WITNESS WHEREOF, **Guarantor** has caused this instrument to be executed this _____ day of _____, 20__.

"**GUARANTOR**"

_____
Sean O'Brien

Address: 7111 East Bell Road
Scottsdale, Arizona 85254
SSN: _____

Date Executed: _____

1353713.7 12/27/2010
2623619v2/21850-0001

EXHIBIT F

FORM OF SUBSTITUTE GUARANTY

KNOW ALL PERSONS BY THESE PRESENTS:

THAT, _____ an Arizona corporation (hereinafter called Principal), as Principal, and _____, a corporation authorized to do business in the State of Arizona by the Department of Insurance pursuant to Title 20, Chapter 2, Article 1, Arizona Revised Statutes, organized and existing under the laws of the State of _____, with its principal office in the City of _____, (hereinafter called the Surety), as Surety, are held and firmly bound unto the City of Avondale (the "**Obligee**") in the amount of _____ (Dollars) ($_____), for the payment whereof, the said Principal and Surety bind themselves, and their heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written Lease Agreement with the Obligee, dated _____, 20__, for construction of Tenant Improvements and operation of a business related to Tenant's Premises containing approximately 4,600 square feet of Floor Area and approximately 1,800 square feet of patio space, located at Corporate Drive and 114th Avenue, in the retail component of the mixed-use development associated with the Sports Facility in Avondale, Arizona (the "**Agreement**"), which is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, the condition of this obligation is that if the principal faithfully performs and fulfills all of the undertakings, covenants, terms, conditions of the Agreement during the original term of the Agreement and any extension of the Agreement, with or without notice to the surety, and during the life of any guaranty required under the Agreement, and also performs and fulfills all of the undertakings, covenants, terms, and conditions of all duly authorized modifications of the Agreement that may hereafter be made, notice of which modifications to the surety being hereby waived, the above obligation is void. Otherwise it remains in full force and effect. The prevailing party in a suit on this bond shall recover as part of the judgment reasonable attorney fees that may be fixed by the court.

Witness our hands this _____ day of _____, 20__.

_____
Principal
Seal

By:_____

_____
Surety Seal

By:_____

_____
Agency of Record

DEVELOPMENT SERVICES

SUBJECT:
Public Hearing and Ordinance 1439-111 – Holy Cross Special Use Overlay Rezoning (PL-10-0063)

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Sue McDermott, Development Services and Engineering Director (623) 333-4211

THROUGH: Charlie McClendon, City Manager (623) 333-1015

REQUEST: Hold a public hearing and adopt the ordinance for case PL-10-0063, a zoning request to establish the Special Use Overlay District (SUD) on the subject property.

PARCEL SIZE: Approximately 75.1 gross acres

LOCATION: Southwest corner of 99th Avenue and Thomas Road (Exhibits A, B, and C)

APPLICANT: Mr. Ed Bull, Burch & Cracchiolo, P.A. (602) 234-9913

OWNER: Mr. Gary Brown, Diocese of Phoenix Catholic Cemeteries & Mortuaries, (602) 267-1329

BACKGROUND:

Holy Cross Cemetery was founded between 1959 and 1964 while under Maricopa County jurisdiction; the subject parcel was not annexed into the City until October 2, 1989. The existing cemetery occupies approximately 21 acres of the 75.1 acre site. Aerial photographs document the incremental growth of the cemetery since its inception (Exhibit E).

The property has been zoned AG (Agricultural) since August of 1990; the zoning history of the parcel prior to 1990 is unavailable. Prior to the Zoning Ordinance Text Amendment to Section 2, Residential Districts in 2007, cemeteries required a Conditional Use Permit when located within the AG Zoning District. Currently, the Zoning Ordinance allows cemeteries in any zoning district with City Council approval of a Special Use District Overlay. Because the Special Use Overlay has not been approved for Holy Cross Cemetery, the use of the property is considered legal non-conforming and, as such, limitations are imposed on the expansion of the use. For that reason, the applicant and property owner wish to gain approval of the Special Use Overlay in order to continue the expansion of the Holy Cross Cemetery that has been ongoing since 1964.

The General Plan land use designation for this property is Open Space. The General Plan states that, “Open Space is planned to set aside areas of active and passive recreation for Avondale residents and to preserve areas of critical natural habitat.” A cemetery use is often considered passive open space as vast portions of land remain undeveloped and free from structures or buildings. The use of the property for a cemetery is consistent with the General Plan's land use designation.

The property is bordered to the north by Thomas Road and to the east by 99th Avenue. The uses and current zoning of the surrounding properties are listed in Exhibit D, “Summary of Related Facts”.

SUMMARY OF REQUEST:

1.The applicant is seeking approval of a Special Use District (SUD) Overlay on the 75.1 acre subject property to allow for expansion of the existing Holy Cross Cemetery. The purpose of the Special Use District is to allow for the development and/or expansion of certain specified uses that do not conform to the broad use categories found in traditional zoning districts. It allows these specified special uses, including cemeteries, to be established on any parcel of land in any zoning district if required findings are met taking into consideration the characteristics of the use, the site, the proposed development plan, and the surrounding area. Site specific development standards and performance requirements are established at the time of overlay zoning in a narrative booklet.

2.In accordance with Zoning Ordinance Section 13, Overlay Districts, the applicant has submitted a Special Use Overlay Narrative (Exhibit F) which sets the parameters for the future development of the site. The narrative contains text detailing permitted land uses, development standards, architectural design criteria, site design criteria, landscaping/open space/amenities, signs, infrastructure, and maintenance. Additionally, the narrative contains a proposed land use development map depicting the site at completion, including the approximate locations of new buildings, new driveways, and burial areas. The contents of the Holy Cross Cemetery Special Use Overlay Narrative are discussed throughout the remainder of this report.

3.The permitted land uses listed within the narrative are standard cemetery-related uses. These include sub-surface burial areas, mausoleums, columbariums (above ground buildings designed with niches for urns containing cremated remains), a crematorium, a mortuary, a chapel, religious memorials/monuments, and other similar uses.

Exhibit 6 of the narrative shows the anticipated size and location of these uses on the site, as follows:

- Two large mausoleum complexes are shown at the primary entryway approximately 200 feet south of Thomas Road.
- Three new, smaller mausoleums are shown in the immediate vicinity of the original chapel and mausoleum complex located on the southern boundary of the property.
- An additional mausoleum complex is planned on the east half of the property approximately 300 feet from 99th Avenue.
- Several garden mausoleums, smaller in scale than traditional mausoleum buildings, are planned near the west and south property lines and around the existing pond.
- A crematorium is shown on the southeast quadrant of the site approximately 50 feet north of the southern property line. The narrative requires that any crematorium built on the site be operated in accordance with the Maricopa County Air Quality Department's rules and regulations for such facilities, which include safeguards to ensure that these facilities do not create noise, smoke, or odor that will impact adjoining properties.
- A mortuary is planned for the northeast corner of the site near the intersection of 99th Avenue and Thomas Road. The proposed land use development map shows two alternate locations for the mortuary, one closer to 99th Avenue and the second closer to Thomas Road. Whichever alternative is not chosen will be utilized as additional burial area.
- New sub-surface burial areas are planned for the remainder of the property not developed with structures or drive aisles.

Approval of a Master Site Plan in general conformance with the proposed land use development map will be required prior to construction of any new structures on the site. Exact locations, sizes, and architecture of buildings will be determined at that time.

4.Development standards contained within the narrative are tailored towards cemetery development and, in some cases, vary from Zoning Ordinance requirements. Additionally, because cemeteries have very different components from traditional commercial or industrial development, the narrative includes standards and requirements for items not listed in the Zoning Ordinance. A comprehensive list of development standards can be found in the Holy Cross Special Use Overlay Narrative. A summary of some of the more significant deviations from City standards is as follows:

- Building setbacks adjacent to 99th Avenue and Thomas Road must be a minimum of 25 feet. The Zoning Ordinance requires a minimum 20 foot street setback in all commercial districts.

- Perimeter fences are allowed to be constructed at the property line. Typically, perimeter walls are required to be setback a minimum of 20 feet in order to allow additional space for landscaping on the perimeter of a development. Because the nature of a cemetery includes landscaping throughout in what can be described as a park-like setting, the need for a deep landscape setback on the perimeter is less significant. Landscaping on the outside of perimeter walls within the public right-of-way is still required in a fashion similar to what is existing on the already developed portions of the site.

- A setback of 3 feet from rights-of-way for subsurface burials is included to ensure that work within the right-of-way (e.g. sidewalk repair, etc.) does not interfere with gravesites. The Zoning Ordinance has no equivalent standard.

- A maximum building height of 45 feet is proposed. Depending on the Zoning District, the City's Zoning Ordinance allows for maximum building heights between 30 and 45 feet. The applicant states that the maximum end of allowable building heights was chosen for this project in order to preserve more open space containing pedestrian connections, pathways, and public art. The proposed height complies with the North Avondale Specific Plan. Additionally, the applicant has stated that the mortuary planned at the northeast corner of the property is anticipated to be a maximum of two stories; the 45 foot allowable height could potentially be utilized for mausoleum buildings located more towards the interior of the site.

- Parking requirements are largely in accordance with City standards except where equivalent standards aren't contained in the Zoning Ordinance. For instance, the applicant has proposed parking standards for uses such as mausoleums. In addition to surface parking lots, parking will be provided throughout the cemetery in the form of parallel spaces along internal drive aisles adjacent to the burial areas to allow easy access to all grave sites.

- 3'6” parking screen walls adjacent to public streets will not be required as all parking areas will be located inside the cemetery area which will be entirely enclosed by six foot walls.

5. The architectural and site design criteria contained within the SUD narrative are intended to ensure that future development on the site complements the existing architecture. To this end, the narrative includes language pertaining to exterior materials, colors, roofs, and building form. Perimeter fencing along Thomas Road and 99th Avenue will continue the existing design which utilizes stucco and wrought iron. Additionally, new site lighting will comply with the City's recently adopted Outdoor Lighting Code, Zoning Ordinance Section 707.

6.For consistency, landscaping requirements for the SUD are also designed to continue the existing themes for the already developed portion of the cemetery, particularly the arterial street frontages.

Continuation of existing themes does require some variation from the Arizona Department of Water Resources recommended list of plants that require low water use. Because the area devoted to turf and other landscape materials is so large, irrigation will not be provided by the City's water system but rather by a private well currently existing on the property. Domestic water service (e.g. restrooms), however, will be from the City's system. Additionally, trees located inside the perimeter walls on the property will not be required to conform to minimum caliper sizes unless those plants are required in a parking area and are needed for shade. Excess, non-required landscaping provided for beautification purposes will not be subject to strict size requirements.

7.Signage for the proposed SUD is in accordance with City requirements with only a few exceptions. A variable message sign, possibly an electronic message display, will be allowed to be incorporated into the monument sign at the intersection of 99th Avenue and Thomas Road. This sign will be used to announce Veteran's Day remembrances and other similar special events occurring at the cemetery. Additionally, the maximum signage area allowed for the freestanding signs exceeds what is typically allowed for commercial development. For example, the primary monument at 99th Avenue and Thomas Road is allowed to be 200 square feet. Single-tenant monument signs in Avondale are typically limited to 80 square feet per side. A larger sign may be appropriate, however, due to the size of the cemetery and its prominent location at the intersection of two arterial streets.

8.As part of the project, several off-site infrastructure issues will be addressed as part of the first new phase of development, as follows:

- **99th Avenue:** The developer will provide 15 feet of right-of-way to the City in order for 99th Avenue to be widened to its ultimate design. The developer will fund the improvements, including construction of one traffic lane, bicycle lane, curb, gutter, sidewalk, street lighting, right-of-way landscaping, bus bay, and relocation/undergrounding of an existing SRP transmission line. In addition, the developer will provide the City with an additional 35 feet of right-of-way which will be used to underground the currently open SRP canal which runs north/south adjacent to 99th Avenue. Lastly, an 8 foot public utility easement will be dedicated to the City paralleling 99th Avenue.

- **Thomas Road:** The developer will provide the City with additional right-of-way on Thomas Road to allow for construction of an eastbound to southbound right turn lane onto 99th Avenue. The developer will fund these improvements which will include curb, gutter, sidewalk, and relocation of SRP transmission poles.

9.The Planning Commission and City Council will review a master site plan prior to development of the first new phase. Any proposed master site plan will be required to be in general conformance with the Proposed Land Use Development Map contained within this SUD narrative.

PARTICIPATION:

The applicant conducted a neighborhood meeting on October 12, 2010 at the Avondale Civic Center, Mojave Conference Room. The neighborhood meeting was advertised in the West Valley View on September 21, 2010. On September 27, 2010, letters were mailed to 80 property owners whose parcels were located within 500 feet of the Holy Cross Cemetery property. A sign was posted on the property on September 27, 2010. Additionally, the City of Phoenix was notified of the proposal due to its proximity to the Holy Cross site. According to the applicant's report, no citizens attended the neighborhood meeting.

A notice of the Planning Commission hearing was published in the West Valley View on November 30, 2010. On November 30, 2010, the sign was updated to reflect the date and time of the Planning Commission meeting. On November 30, 2010, letters were mailed to 80 property owners whose parcels were located within 500 feet of the Holy Cross Cemetery property. One citizen, a resident in the Los Arbolitos community, spoke in favor of the request at the Planning Commission meeting.

A notice of the City Council hearing was published in the West Valley View on December 14, 2010. On December 8, 2010, the sign was updated to reflect the date and time of the City Council meeting. On December 14, 2010, letters were mailed to 80 property owners whose parcels were located within 500 feet of the Holy Cross Cemetery property. No comments have been received to date.

PLANNING COMMISSION ACTION:

The Planning Commission conducted a public hearing on December 16, 2010, and voted 4-0 to recommend **APPROVAL** of this request subject to the following stipulations (Exhibit G):

1. The development shall be in substantial conformance with the Holy Cross Cemetery Special Use Overlay Narrative date stamped December 16, 2010, except as modified by these stipulations.
2. Unless otherwise specified within the SUD Narrative, development shall be in accordance with the City of Avondale General Engineering Requirements Manual and City of Avondale Supplement to MAG Uniform Standard Specifications and Details.
3. Dedication of right-of-way along 99th Avenue and Thomas Road, as specified and graphically depicted within the SUD Narrative, shall be made prior to permit issuance for any part of the project.
4. All half-street improvements that are specified within the SUD narrative as being the developer's responsibility shall be completed with the first phase of development. The City Engineer may accept a financial contribution in lieu of completing the improvements if circumstances are such that there will be a benefit to the City from completing the improvements as part of a larger improvement project for 99th Avenue.
5. Financial assurance for all work within the public right-of-way shall be paid prior to issuance of the first construction permit.

Chairperson Iwanski, Commissioner Carrillo, and Commissioner Long were excused from the meeting.

ANALYSIS:

General Plan and North Avondale Specific Plan

The subject property is designated as “Open Space” on the General Plan Land Use Map. The proposed expansion of the cemetery use is consistent with passive open space and furthers several goals, objectives, and policies. The cemetery serves as a buffer for the residential neighborhoods to the west from the Loop 101 corridor which will ultimately be developed with a mix of high intensity office, retail, and employment uses. All goals, objectives, and policies relating to protecting neighborhoods and providing ample buffering are furthered by the expansion of Holy Cross Cemetery.

Furthermore, the subject property is located within the boundaries of the North Avondale Specific Plan (NASP). The NASP states that, “The City's northern tier is meant to evidence a clear, but compatible, contrast from the highly urbanized freeway corridor to the south...nonresidential uses are scaled to portray a more open, spacious environment.” A cemetery is an open, spacious environment.

Additionally, the NASP identifies the 99th Avenue corridor as a gateway into Avondale and places an importance on the physical appearance of that streetscape in particular. In addition to substantial landscape enhancements both on the perimeter of the site and internal to the cemetery, the appearance of 99th Avenue itself will be improved with addition of curb, gutter, sidewalks, and street lighting. Furthermore, above ground utility lines and the large SRP irrigation channel that parallels 99th Avenue will be undergrounded. Relocation of these utilities will allow landscaping to the edge of the street, further enhancing the corridor's appearance.

Lastly, building heights up to four stories are permitted by the NASP if certain conditions are met. The proposed SUD would allow buildings up to 45 feet in height (four stories) if the conditions of the NASP are met at the time of design review submittal. Some of these conditions include requirements for public art on site, public transit stops on adjacent streets, extraordinary design quality, and pedestrian connections. It is anticipated that the proposed expansion will meet required conditions as set forth in the NASP.

Compatibility With Adjacent Properties

In regards to compatibility with surrounding residential properties, cemeteries are low impact uses which do not produce significant noise, smoke, dust, vibration, odor, or illumination that would be detrimental to residences. Additionally, except on holidays and for short periods of time before and after funeral services, cemeteries generate a minimal amount of traffic. When compared with other land uses such as shopping centers and office complexes, the volume of traffic generated by a cemetery of this size is insignificant.

As part of the notification requirements, the applicant was required to notify all property owners located within 500 feet of the cemetery property's boundaries on two separate occasions thus far - before the neighborhood meeting and before the Planning Commission hearing. There has been no concern about this proposal by any of the surrounding property owners and no persons attended the neighborhood meeting. One resident of nearby Los Arbolitos spoke in favor of the rezoning request at the Planning Commission meeting.

In summary, the proposed expansion will not expected affect the compatibility of this site with surrounding sites.

Permitted Uses

The applicant is proposing an array of permitted uses typically associated with a full service cemetery. The majority of these uses, such as mausoleums, chapels, mortuaries, and burial areas, are low impact uses which cause no noise, odor, or sound. Adequate conditions are required by the Maricopa County Air Quality Department to ensure that the proposed crematorium will have no negative impacts on surrounding properties. Per the narrative, “The crematorium equipment will operate without outside noise, smoke, or odor and will not have an impact on adjacent properties.”

The uses permitted in this SUD are compatible with nearby residential uses.

Development, Design, Landscaping, and Signage Standards

The majority of development, design, signage, and landscaping standards proposed are in conformance with the City's Zoning Ordinance. Where standards deviate due to the dissimilar nature of cemetery development compared to commercial development, significant care has been taken to protect the aesthetic goals of the City. The resulting development will significantly enhance the appearance of this gateway intersection into Avondale by enhancing landscaping, not only along street frontages but across the entire 75.1 gross acre property. Furthermore, new structures and statuary art will be complementary of the existing, elegant architecture on the site. Overall, the standards will produce a high-quality project in Avondale that is compatible with surrounding development.

Infrastructure

As part of the expansion project, Holy Cross Cemetery will dedicate right-of-way needed to improve the capacity of 99th Avenue and the usability of Thomas Road. In addition to dedicating right-of-way, the developer will in many instances fund the improvements, including the construction of an

additional traffic lane on 99th Avenue and a dedicated right turn lane on Thomas Road. Additionally, the project will tie into the City's water and sewer systems.

The cemetery and related uses will be adequately served by public infrastructure and services.

Conclusion:

Staff recommends approval of the rezoning request as recommended by the Planning Commission.

FINDINGS:

The proposed application of the Special Use Overlay district meets the following required findings:

- The proposal will further the objectives of the General Plan and not adversely affect the character of the community.
- The proposal is compatible with other existing and planned land uses in the immediate area.
- The proposal will be adequately served by public infrastructure and services.
- The proposal will not create excessive truck traffic or ongoing traffic congestion.

RECOMMENDATION:

The Planning Commission recommends that the City Council **APPROVE** the proposed application subject to the following five stipulations:

1. The development shall be in substantial conformance with the Holy Cross Cemetery Special Use Overlay Narrative date stamped December 16, 2010, except as modified by these stipulations.
2. Unless otherwise specified within the SUD Narrative, development shall be in accordance with the City of Avondale General Engineering Requirements Manual and City of Avondale Supplement to MAG Uniform Standard Specifications and Details.
3. Dedication of right-of-way along 99th Avenue and Thomas Road, as specified and graphically depicted within the SUD Narrative, shall be made prior to permit issuance for any part of the project.
4. All half-street improvements that are specified within the SUD narrative as being the developer's responsibility shall be completed with the first phase of development. The City Engineer may accept a financial contribution in lieu of completing the improvements if circumstances are such that there will be a benefit to the City from completing the improvements as part of a larger improvement project for 99th Avenue.
5. Financial assurance for all work within the public right-of-way shall be paid prior to issuance of the first construction permit.

PROPOSED MOTION:

I move that the City Council accept the findings and **ADOPT** the Ordinance approving Application PL-10-0063, a request to apply the Special Use Zoning Overlay District (SUD) to the Holy Cross Cemetery property, subject to the five stipulations recommended by Planning Commission.

ATTACHMENTS:

Click to download

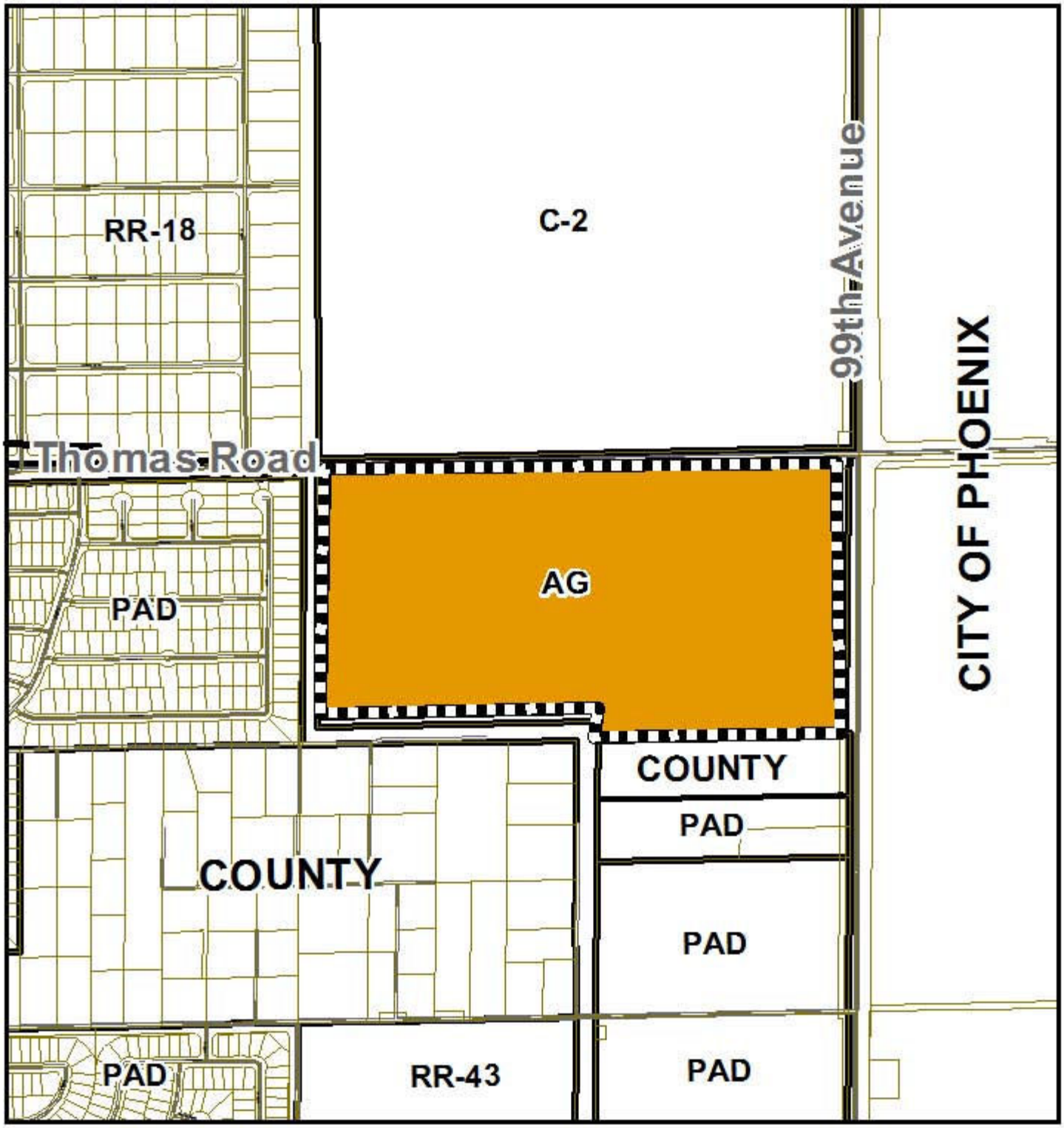
- Exhibit A - Zoning Vicinity Map
- Exhibit B - 2010 Aerial Photograph
- Exhibit C - General Plan Land Use Map
- Exhibit D - Summary of Related Facts

- Exhibit E - Historical Aerial Photographs of Subject Property (Years: 1964, 1979, 1992/93, 1996/97, 2005/06)
- Exhibit F - Holy Cross Cemetery Special Use Overlay Narrative, date stamped December 16, 2010 (Part I of II)
- Exhibit F - Holy Cross Cemetery Special Use Overlay Narrative, date stamped December 16, 2010 (Part II of II)
- Exhibit G - Excerpt of the Draft Planning Commission Meeting Minutes from December 16, 2010
- Ordinance 1439-111

PROJECT MANAGER:

Ken Galica, Planner II (623) 333-4019

Exhibit A



Zoning Vicinity Map

Avondale

Subject Property

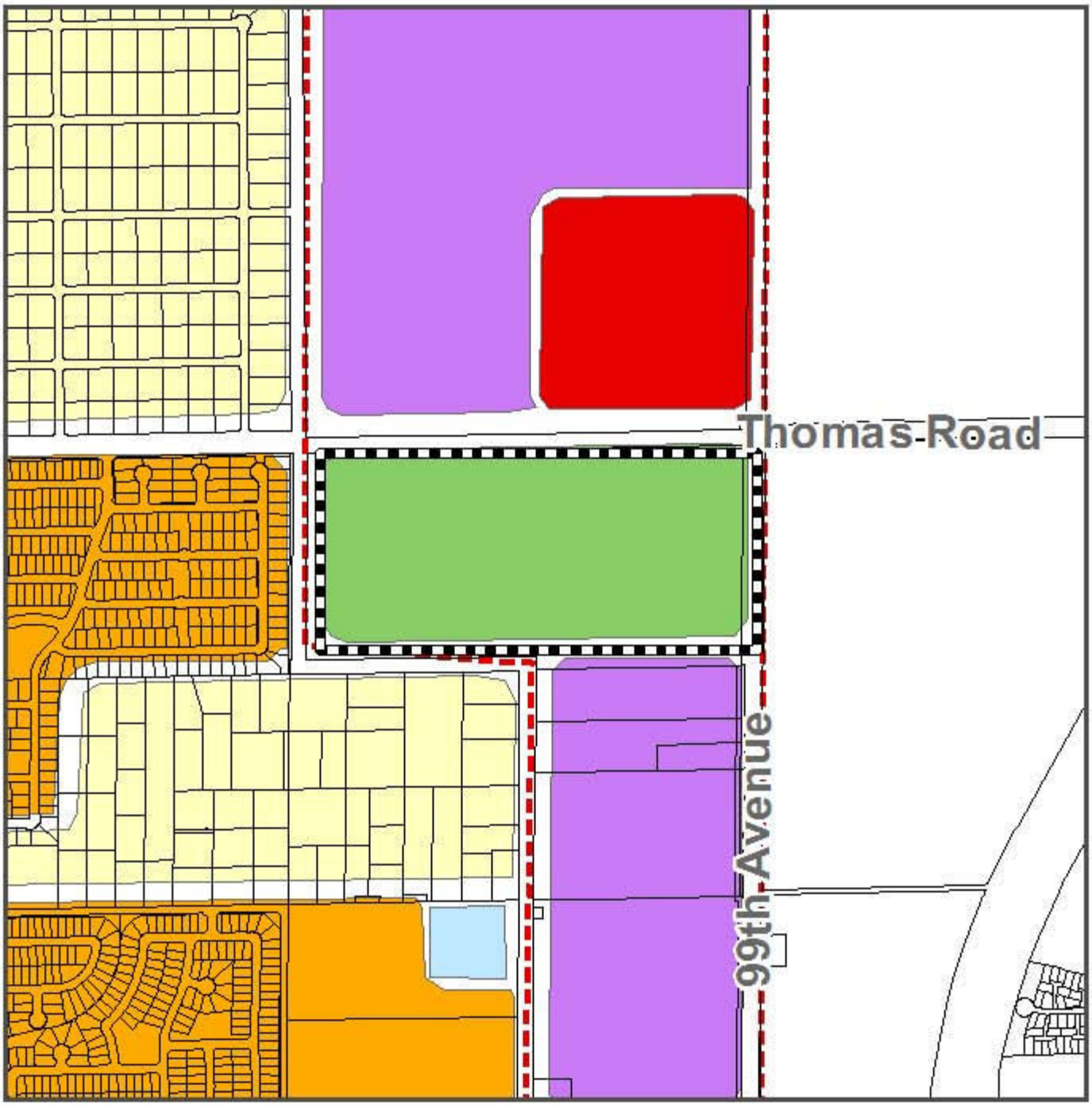
Exhibit B

Aerial Photograph

Avondale

Subject Property

Exhibit C



General Plan Land Use Map

- Parcel_Extended
- Commercial Corridor, Commercial Corridor
- Growth Area, Growth Area
- Commercial
- Employment
- Freeway Commercial
- High Density Residential
- Low Density Residential
- Medium Density Residential
- Medium High Density Residential
- Mixed Use
- Multi Family Residential
- Open Space
- Public Facilities

Subject Property

SUMMARY OF RELATED FACTS
APPLICATION PL-10-0063

THE PROPERTY	
PARCEL SIZE	Approximately 75 gross acres
LOCATION	Southwest corner of 99th Avenue and Thomas Road
PHYSICAL CHARACTERISTICS	A relatively flat, rectangular shaped parcel with frontage on 99th Avenue and Thomas Road.
EXISTING LAND USE	Holy Cross Cemetery currently utilizes approximately 21 acres of the parcel; the remaining 54 acres are currently vacant.
EXISTING ZONING	AG (Agricultural)
ANNEXATION AND ZONING HISTORY	The subject site was annexed on October 2, 1989. The site has been zoned AG since August 1990.
DEVELOPMENT AGREEMENT	There is no outstanding development agreement for the subject property.

SURROUNDING LAND USE AND ZONING	
NORTH	Farmland, zoned C-2 (Community Commercial)
EAST	Farmland located within the City of Phoenix's jurisdiction, zoned Phoenix C-2 (Intermediate Commercial) and Phoenix S-1 (Ranch/Farm)
SOUTH	Unincorporated (Maricopa County) rural-residential single-family lots and farmland zoned Maricopa County Rural-43 (1 lot/acre).
WEST	Single Family Residential Subdivision, zoned PAD (Los Arbolitos)

GENERAL PLAN
The property is designated as "Open Space" on the 2002 General Plan Land Use Map.

PUBLIC SCHOOLS	
SCHOOL DISTRICT(S)	Pendergast Elementary and Tolleson Union High School
ELEMENTARY SCHOOL	Rio Vista Elementary School
HIGH SCHOOL	Westview High School

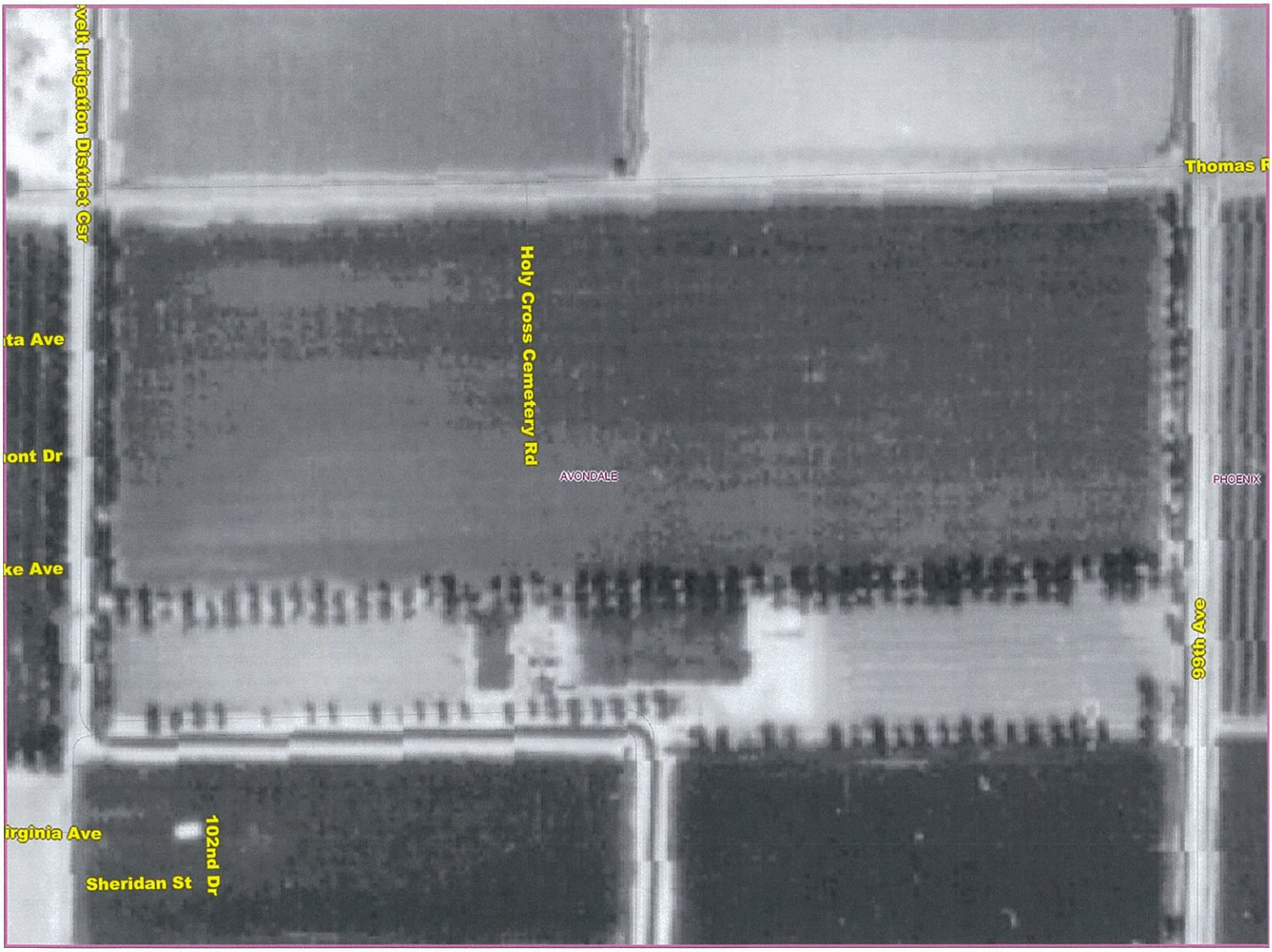
STREETS	
99th Avenue	
Classification	Arterial (City of Phoenix Standard Section)
Existing half street ROW	55 feet
Standard half street ROW	70 feet
Existing half street improvements	Two traffic lanes.
Standard half street improvements	Two traffic lanes with median. Bike lane. Curb, gutter, sidewalk, landscaping and street lights.

Thomas Road	
Classification	Arterial (Thomas Road Modified Section)
Existing half street ROW	55 Feet
Standard half street ROW	55 Feet
Existing half street improvements	One traffic lane with center turn lane/striped median. Curb and gutter, detached sidewalk, and streetlights.
Standard full street improvements	One traffic lane with center turn lane. Curb, gutter, detached sidewalk, landscaping and street lights.

Utilities
There is an existing 18" sanitary sewer line that will need to be extended to the east to serve the subject property. Likewise, there is an existing 16" water line located in Thomas Road which will need to be extended to the east to serve domestic water to the subject property. Extension fo the water line is currently programed into the City's CIP. Irrigation for landscaping will continue to be provided by private wells located on the Holy Cross property.

Flood Control District of Maricopa County (FCDMC) - Unofficial Document
Aerial year: 1964

EXHIBIT E



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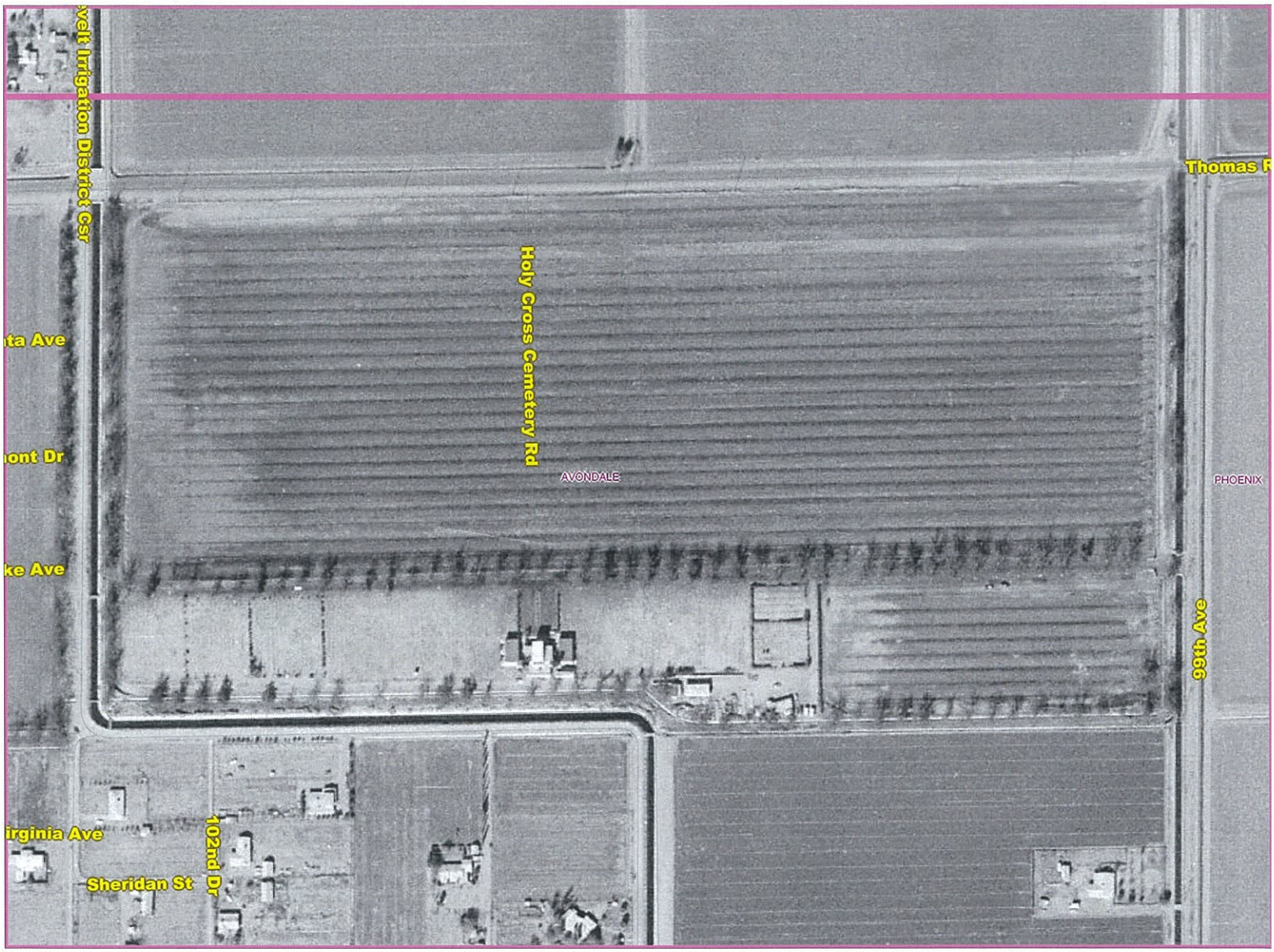

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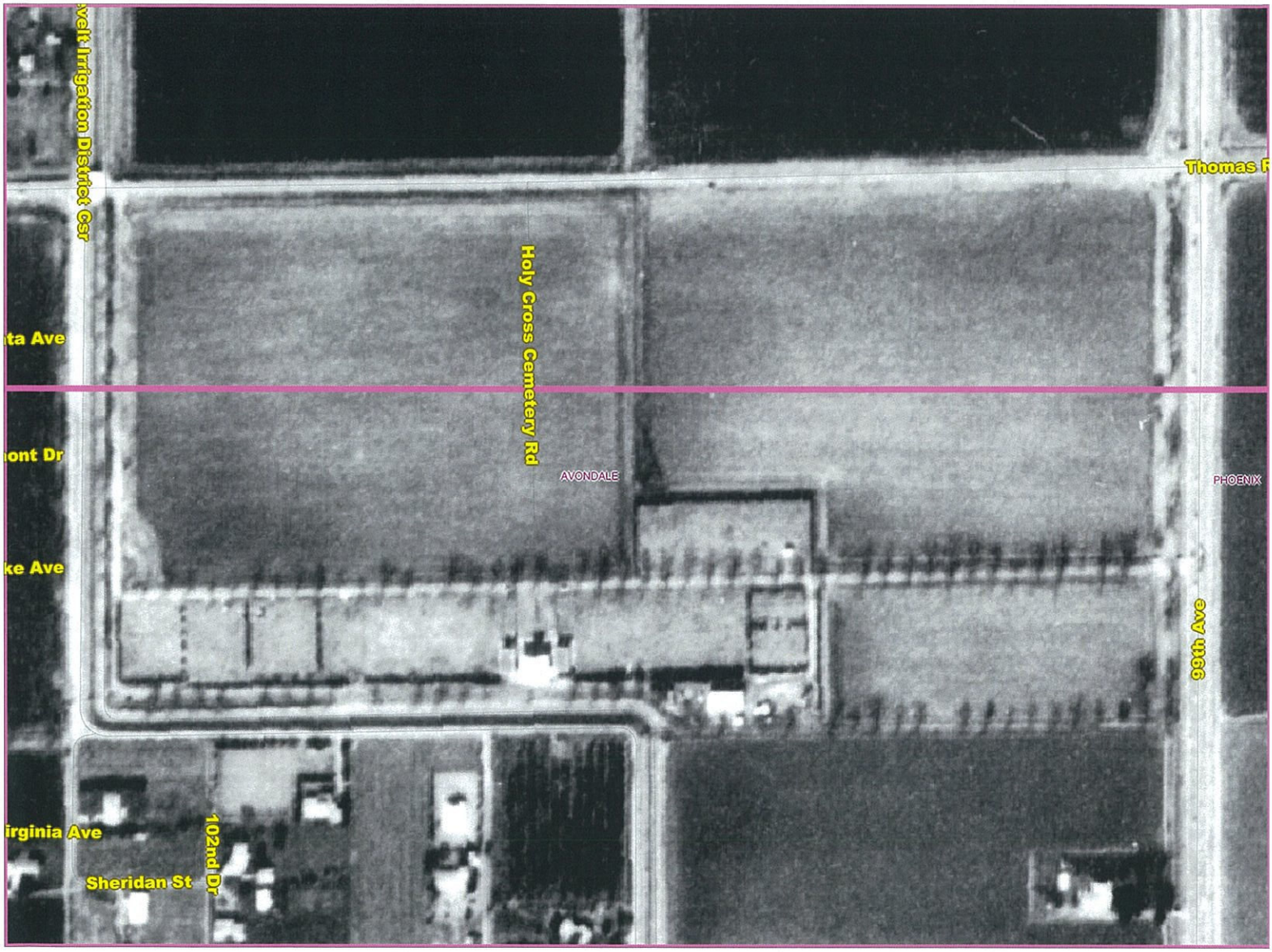

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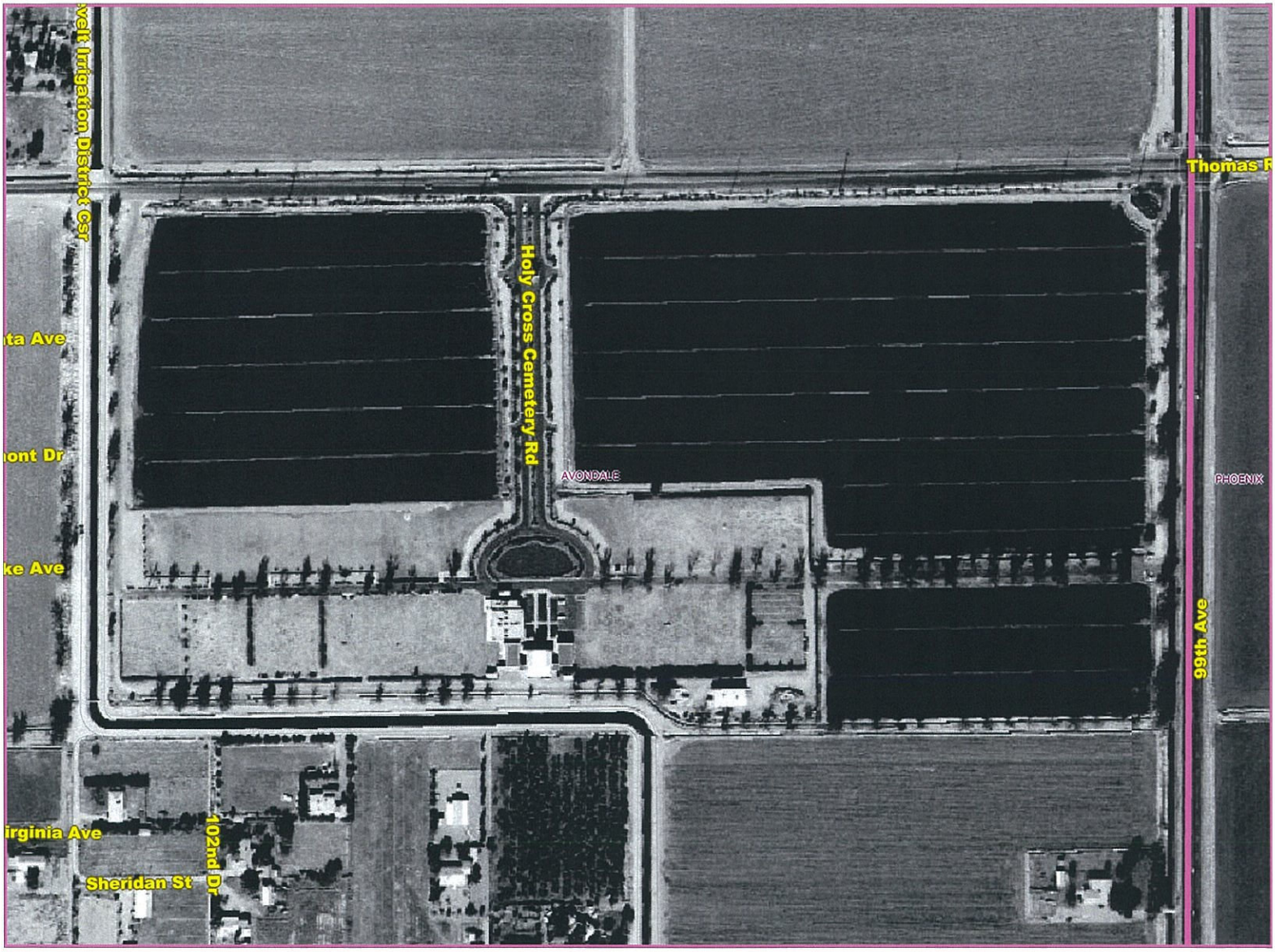

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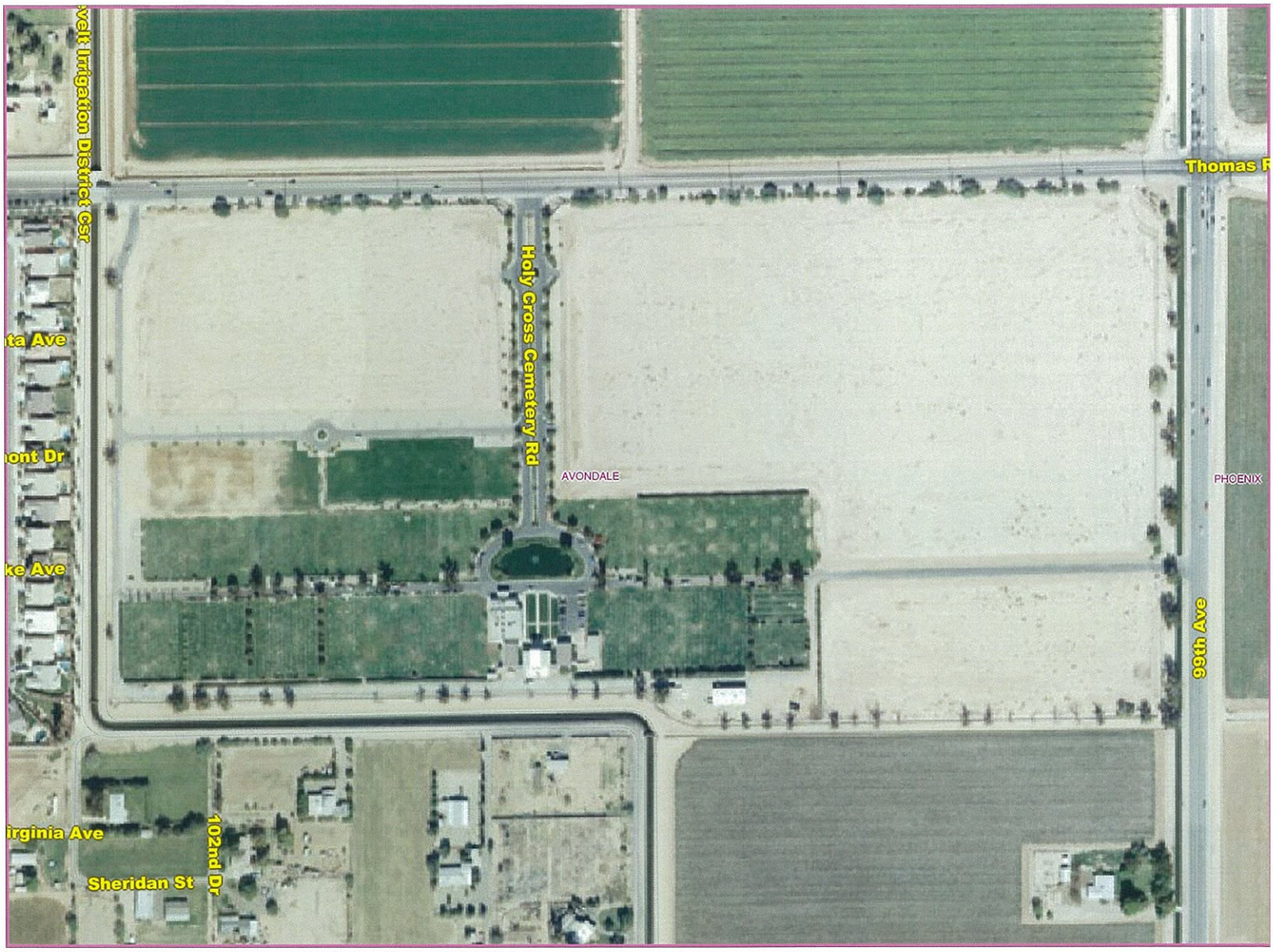

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Exhibit F

DIOCESE OF PHOENIX CATHOLIC CEMETERIES AND MORTUARIES

HOLY CROSS CEMETERY

SPECIAL USE OVERLAY

LOCATED AT:

99TH Avenue & Thomas Road, Avondale, Arizona

10/06/2010
Revised 11/19/2010
Revised 12/06/2010

Application No.: PL-10-0063

Holy Cross Cemetery

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Holy Cross Cemetery

Table of Exhibits

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Exhibit 6 – Proposed Land Use Development Map

Exhibit 7 – Maricopa County Air Quality Department Permit Conditions

Exhibit 8 – Proposed Phasing Plan

Exhibit 9 – PUE, SVT and SDT Plan

Exhibit 10 – Avondale Zoning Ordinance Section 707 Regarding Exterior Lighting

Exhibit 11 – Thomas Road Existing Fence/Wall Photographs

Exhibit 12 – Existing Internal Landscape Theme Photographs

Exhibit 13 – Thomas Road Existing Landscape Theme Photographs

Exhibit 14 – Development Area (Stormwater Retention)

Exhibit 15 – Preliminary Campus Plan

Exhibit 16 – Avondale Zoning Ordinance Section 106 Regarding Site Plan Approval

HOLY CROSS CEMETERY

I. INTRODUCTION

Holy Cross Cemetery ("Holy Cross" or "Cemetery") was founded approximately 45 years ago in the mid-1960s. Holy Cross is partially developed with burials, mausoleums, and various cemetery-related amenities and improvements. Pursuant to Section 1301(B)(1) of Avondale's Zoning Ordinance, as the owner of Holy Cross Cemetery, the Diocese of Phoenix Catholic Cemeteries and Mortuaries ("DOPCCM") desires to update Holy Cross' Campus Plan through this Special Use Overlay for a "[Cemetery] which may include mausoleums, columbariums, crematoriums, [a] mortuar[y] and other related accessory uses."

II. PROPERTY DESCRIPTION

Holy Cross Cemetery is located on approximately 75.10 gross/68.75 net acres[1] at the southwest corner of 99th Avenue and Thomas Road in Avondale, Arizona (the "Site"). An aerial of the Site and surrounding area is provided at **Exhibit 1**. The legal description of the Site is provided at **Exhibit 2**.

This Special Use Overlay is requested on the entire Site.

Properties to the north and west of the Site are located in Avondale; properties to the south of the site are located in unincorporated Maricopa County; and properties to the east of the Site are located in Phoenix. Properties to the west and part of the south of the Site are developed with single-family homes; properties to the north, east and part of the south of the Site are vacant. Zoning on the Site and adjacent properties is depicted on the Zoning Map provided at **Exhibit 3**.

III. PROJECT DESCRIPTION

Holy Cross Cemetery is planned to be a full-service cemetery including burials, mausoleums, columbariums, a crematorium, a mortuary, a chapel[2], and other cemetery-related uses and accessory uses.

The project theme and character of new Holy Cross facilities will continue the existing building theme, which is to project warmth, comfort, permanence and integrity. Building massing will emphasize the religious nature of the chapel, with the balance of the mortuary building deferring to the chapel in importance by being lower in scale and simpler in detailing. Human scale elements and high quality materials in earthy hues will serve to underscore the quiet dignity of the services provided. The buildings will feature earth toned stucco and high quality natural stone and synthetic stone veneer. Dark toned metal roofing and/or russet colored tile roofing will balance parapeted building masses.

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[1] As is detailed in Section III: "gross" acreage is measured to the centerlines of 99th Avenue and Thomas Road; "net" acreage is net of existing and future rights-of-way ("R-O-W"), including a 15' wide future R-O-W for widening 99th Avenue and a 35' wide future R-O-W for piping of SRP's existing canal along 99th Avenue.

[2] The chapel is planned to include approximately 200 seats. The chapel will be consecrated and blessed by the Bishop of the Phoenix Diocese and, as such, will be available for visitations and both cemetery-related and other masses and services.

As a cemetery, Holy Cross is a low-impact and compatible neighbor that is typically quiet and serene. Environmental impacts are related to minimal traffic and noise associated with services and typically quiet and respectful visitors. Due to the nature of the land uses, Holy Cross' impact on the public infrastructure system (domestic water, sewer and streets) will be minimal. Irrigation water for landscaping will continue to be provided by a DOPCCM-owned and operated well(s) pursuant to DOPCCM's Type I Non-Irrigation Grandfathered Groundwater Right.

The Site abuts 99th Avenue on the east and Thomas Road on the north. The existing 55' west half-street R-O-W for 99th Avenue is to be widened to 70'. DOPCCM will also need to provide to the City (a) an additional 35' of R-O-W to be used to underground SRP's existing north-south canal adjacent to 99th Avenue (this 35' R-O-W is also available for roadway improvements such as a bus pullout on 99th Avenue as long as the improvements are not near or over the SRP pipe) and (b) an additional 8' wide Public Utilities Easement ("PUE") also paralleling 99th Avenue. A Plan View and an X-Section of the existing and future 99th Avenue R-O-W are provided at **Exhibit 4**.

The Site also abuts Thomas Road on the north. The existing south half-street R-O-W for Thomas Road is 55'. Holy Cross will need to expand the Thomas Road R-O-W to 65' for approximately 250 lineal feet west of 99th Avenue for an east-to-southbound right turn lane on Thomas Road at the 99th Avenue and Thomas Road intersection. A Plan View of the future Thomas Road R-O-W is provided at **Exhibit 5**.

Although the gross acreage of the Site (to the R-O-W centerlines of 99th Avenue and Thomas Road) is approximately 75.10 gross acres, the existing and future R-O-Ws (99th Avenue, SRP pipe and Thomas Road) and future PUE reduce the net acreage of the Site to approximately 68.52 acres (inclusive of internal drives, building setbacks, etc.). The Net versus Gross acreage calculations are as follows:

75.10	Gross Acres
- 2.08	70'west half-street R-O-W for 99th Avenue
- 1.00	35' R-O-W for SRP pipe (includes Bus pull-out on 99th Avenue)
- 3.22	55' south half-street R-O-W for Thomas Road
- 0.05	Additional R-O-W to accommodate eastbound-to-southbound right turn lane on Thomas Road
68.75	Total Acres Net of public street and SRP pipe R-O-Ws
- 0.23	8' wide PUE adjacent to 99th Avenue
68.52	Total Acres Net of public street and SRP R-O-Ws and PUE

IV. PROPOSED LAND USE DEVELOPMENT MAP

Holy Cross' Proposed Land Use Development Map, including major access points, circulation system and general land uses in a bubble diagram format, is provided at **Exhibit 6**. Actual locations of the general land uses may be adjusted in accordance with community needs and market demand, and may be finalized administratively by the Zoning Administrator without further City Council action.

Holy Cross' proposed internal circulation system is also generally depicted on **Exhibit 6**. Internal circulation consists of an existing main entry private drive from Thomas Road, which is approximately 64' in width (which includes a 20' median) and smaller existing and proposed drives approximately 28' in width[3]. The private drives will typically be improved with asphalt and ribbon curbs. Limited internal lighting will be provided. We will provide some lighting on internal drives to serve evening access to mortuary functions. Other drives without night lighting will be gated to prohibit after-hours traffic through the Cemetery. For example, Holy Cross anticipates that lockable gates will be provided in the locations generally depicted on the Preliminary Campus Plan that is described in Section XIV below and provided at **Exhibit 15**.

The development of Holy Cross Cemetery has been "phased" over the past 45 years in accordance with community need and market demand and will continue to be phased accordingly through build out. Holy Cross' Proposed Phasing Plan, showing both existing facilities and currently anticipated future development, is provided at **Exhibit 8**. Notwithstanding the anticipated phasing that is depicted on **Exhibit 8**, Holy Cross Cemetery will be developed in accordance with community need, market demand and construction efficiencies whereby phases may be developed in whole or in part in the order shown or in a different sequence.

V. LAND USES

As is described in Section III above, Holy Cross Cemetery is planned to be a full-service cemetery. Currently proposed land uses include the following:

A. Permitted Uses
   1. Burials,
   2. Mausoleums,
   3. Columbariums,
   4. Crematorium[4],

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[3] The existing east-west internal drive connecting to 99th Avenue approximately 900' south of Thomas Road will be limited to egress only and will be gated with a lockable gate.

[4] Holy Cross will operate a full service cemetery which may include a crematorium. The crematorium equipment will be tested by an independent testing laboratory against standards set forth by the federal government. The tests may include particulate emissions, carbon monoxide, visible emissions and oxygen. A permit ("Crematorium Permit") to install and operate the crematorium will be required from the Maricopa County Air Quality Department ("MCAQD") in accordance with MCAQD's then-applicable Rules and Regulations ("Rules"). The Crematorium Permit will be subject to "Permit Conditions" based on MCAQD's then-applicable Rules. A representative set of Permit Conditions, which will be customized as appropriate by MCAQD for the Holy Cross Crematorium, is attached as **Exhibit 7**. Such site-specific Permit Conditions will serve as development standards for the proposed crematorium. In accordance with the Rules and Permit Conditions, the crematorium equipment will operate without outside noise, smoke or odor and will not have an impact on adjoining properties.

5. Mortuary,
6. Chapel,
7. Cemetery-related memorials, monuments, religious art features and similar improvements, and
8. Other Cemetery-related Uses and Buildings.
9. Those Permitted Uses that are listed above shall be interpreted liberally as an administrative function by the Zoning Administrator to include other uses that are appropriate within a full-service cemetery and have similar impact to the listed uses.

B. Accessory Uses
1. Cemetery-related parking,
2. Cemetery-related accessory uses and buildings incidental thereto, and
3. Cemetery-related memorials, monuments, religious art features and similar improvements, and
4. The outdoor storage of Cemetery-related materials, equipment or other items provided that such storage shall be located or screened in accordance with below Section VIII(B)(3).
5. Those Accessory Uses that are listed above shall be interpreted liberally as an administrative function by the Zoning Administrator to include other uses that are appropriate within a full-service cemetery and have similar impact to the listed uses.

VI. DEVELOPMENT STANDARDS

A. Building Placement
1. Front (east/99th Avenue) property line setback to building: 25'
2. Side (north/Thomas Road) property line setback to building: 25'
3. Side (south) property line setback to building: greater of 25' or 1' of setback per each 1' of building height.
4. Rear (west) property line setback to building: greater of 10' or 1' of setback per each 1' of building height.
5. Perimeter fences and monument signs not over 6 feet in height property line setback to fence or sign: 0'; provided however, except as may be approved by the Zoning Administrator or City Engineer under unusual circumstances, perimeter fences and monument signs will not be allowed within public utility easements ("PUEs"), required site visibility triangles ("SVTs"), or site distance lines ("SDTs")[5].
6. Architectural encroachments such as balconies, chimneys, cantilevered parapets, shade structures, and eaves may encroach into required setbacks

[5] The currently anticipated locations of PUEs, SVTs and SDTs are generally depicted on the PUE, SVT and SDT Plan provided at **Exhibit 9**. This Exhibit is illustrative only and is provided merely to provide some visual context for the requirement that perimeter fences and monument signs will not typically be allowed within PUEs, SVTs, or SDTs. In particular, existing and currently proposed fences do not conflict with any currently existing or proposed PUEs, SVTs, or SDTs. Further, Holy Cross' monument sign at the Thomas Road/99th Avenue intersection (which will be relocated in conjunction with construction of the Mortuary) will not interfere with the SVT that will exist at such intersection.

so long as such encroachments do not interrupt City-required visibility triangles and/or circulation (both vehicular and pedestrian).

7. Burials setback from perimeter rights-of-way and PUEs: 3'
8. Burials setback from perimeter property lines not abutting rights-of-way or PUEs: 0'

B. Parking and Driveway Placement and Shade Canopies
   1. Driveways shall be at least 10 feet away from buildings.
   2. Parking shall be at least 10 feet away from buildings.
   3. Parking shade canopies may be provided but are not required. If parking canopies are provided, their color shall be compatible with the adjacent building's color and an individual canopy shall not exceed twelve parking stalls in length.
   4. Spaces between buildings and adjacent parking, driveways and/or parking shade canopies shall be landscaped and may include sidewalks where appropriate.

C. Building Profile
   1. Building height maximum 45 feet from adjacent grade[6].
   2. Architectural features such as church spires, crosses, belfries, cupolas, flagpoles, clock towers, chimneys, architectural embellishments, or similar features may extend beyond maximum building height in accordance with Section 704(A) of the Zoning Ordinance[7].

D. Parking Requirements
   1. Mortuary/funeral home: 1 space per 300 square feet.
   2. Mausoleum (enclosed) 1 space per 5000 square feet.
   3. Mausoleum (garden): 0 assigned; however, see below Section VI(D)(7)
   4. Maintenance and accessory facilities: 1 space per 2 employees.
   5. Storage: 0
   6. Crematorium: 1 space per 300 square feet.
   7. Additional parallel parking will be provided along internal approximately 28' wide drives.

E. Zoning Ordinance Section 7 Requirements and Exceptions
   1. This Special Use Overlay includes numerous development standards, regulations and requirements that are contained, for example, within Sections VI - XI of this narrative (the "SUO Development Standards,

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[6] Maximum building height of 45 feet will preserve more space onsite for development of people places with pedestrian connections, planned pathways, and art. The Cemetery's mission is to serve the public into perpetuity, and toward that end the buildings will be constructed of high quality, enduring materials. In keeping with its mission to serve with dignity and provide comfort to the families of the deceased, the public facilities designed for this site will be of high quality. In addition to these elements supporting the proposed building height, there will also be a public transit stop adjacent to the site on land that will be dedicated to the City of Avondale by Catholic Cemeteries for this purpose.

[7] Zoning Ordinance Section 704.A currently provides: "Attached church spires, crosses and other religious symbols, belfries, cupolas, flagpoles, clock towers, domes or similar features may extend above the roof no more than the height of that building. Detached features shall be no greater than twice the height of the highest building on site."

Regulations and Requirements"). Except to the extent that the SUO Development Standards, Regulations and Requirements provide a different standard than is set forth in Section VII of the Zoning Ordinance ("Supplementary Regulations"), the City's general requirements within the Section VII Supplementary Regulations that are determined by the Zoning Administrator to be reasonable and practically applicable to a full service cemetery shall also apply to Holy Cross Cemetery, except for the following:

a) Section 707(d) shall apply only to new structures and site improvements. Existing lighting shall not be subject to review.
b) Because Holy Cross Cemetery is zoned R-43 SUO, rather than a commercial or employment zoning district, Section 709 shall not apply to Holy Cross Cemetery.
c) Sections 7's Supplementary Regulations, and Reviews shall not apply to existing building, uses and/or site improvements at Holy Cross.

VII. ARCHITECTUAL DESIGN CRITERIA

A. Architecture
1. All buildings shall have four-sided architecture.
2. Incorporate a variety of architectural forms to reduce building massing and create human scale interfaces.
3. Exterior colors shall complement existing colors, such as desert tans, grays, beiges, russet reds and sage greens.

B. Exterior Materials
1. The following materials are permitted for exterior walls: stucco, stone, glazing, masonry, tile, brick, integrally colored concrete block, exposed aggregate concrete, integrally colored concrete, and similar materials; provided however, standard grade CMU smooth face block may not be used as a primary building material that is exterior exposed.
2. The following materials are permitted for exterior wall accents and detailing: stucco, stone, glazing, wood, decorative cast concrete or cantera stone, metal, tile, stained glass, and similar materials.

C. Roofs
1. Roofs may be flat or sloped.
2. Size, shape and slope of roof forms shall be compatible with and enhance the architectural character and scale of the particular building.
3. Flat roofs shall be screened with parapet, decorative roof/eave form or other architectural feature to screen view of the roof.
4. Sloped roof forms shall conform to the following standards:
   a) Permitted roofing materials are standing seam metal roof systems, clay tile, concrete tile, photovoltaic tile, and composite shingles;
   b) Roof colors shall be compatible with building color standards;
   c) All flashings shall be of non-reflective metals, the color of flashings shall coordinate with the colors of the roofing material and eave; and
   d) Roof mounted equipment will be screened from view.

D. Eaves, Porches, Trellises and Awnings
   1. Awnings, where provided, must be an integral part of the building elevation design.
   2. Permitted materials are metal and fabric.

E. Fenestration
   1. Glazing shall be energy responsible.
   2. Window frames shall be made of anodized aluminum, steel, or clad wood.

F. Exterior doors may be made of wood, metal and/or glass.

G. Utilitarian Metals
   1. The following materials and colors are permitted for guardrails, handrails and gates: painted metal in black, complementary or high visibility color, rusted, powder coated or stainless steel.

H. Exterior Lighting
   1. Any new private, on-site outdoor lighting for buildings and structures, parking lots, landscaping, signage and other outdoor lighting shall be regulated in accordance with Section 707 of Avondale's Zoning Ordinance (provided at **Exhibit 10**).
   2. Down lighting or decorative wall-mounted sconce lighting is permitted.
   3. Primary light fixtures shall be energy responsible.
   4. Light fixtures shall be compatible with scale and character of the buildings and grounds.

VIII. SITE DESIGN CRITERIA

A. Site Walls and Fencing
   1. Site walls and fencing along Thomas Road and 99th Avenue, along the west perimeter property line for approximately 100' south of the Thomas Road R.O.W., and along the south perimeter property line for approximately 100' west of the 99th Avenue R.O.W. will continue Holy Cross' existing Thomas Road fence/wall theme[8] or have other high quality appearance. Permitted materials are stone, painted or integral colored concrete masonry and metal.
   2. Site walls and fencing along south and west perimeter property lines will continue Holy Cross' existing fence theme. Permitted materials are concrete masonry and metal, including chain link; provided however, chain link fencing may not be provided within 100' of the 99th Avenue and/or Thomas Road rights-of-way.

[8] Photographs of Holy Cross' existing Thomas Road fence/wall are provided at **Exhibit 11**. A decorative fence/wall with wrought iron and masonry pilasters, generally like the existing fence/wall shown in **Exhibit 11**, will be provided in the locations described in Section VIII.A.1 above.

B. Screen Walls and Landscape Buffers
   1. Parking lot screening is not required beyond the arterial street fencing and landscaping and parking lot landscaping that will be reviewed and approved through the site plan approval process.
   2. Service and loading areas will be screened with a combination of walls and/or landscaping to a height of 6 feet.
   3. Except for exterior display of grave markers and memorials in designated areas, the outside storage of materials, equipment or other items shall be located or screened to a height of 6 feet so as to not be visible from adjoining streets or properties.

C. Miscellaneous
   1. Utility and/or mechanical equipment shall be screened:
      a) Service electrical system panels shall be recessed into building elevations or screened with doors, landscaping or a solid wall built of similar materials to utility company requirements.
      b) To the extent possible, ground mounted utility cabinets will be placed where they do not conflict with prominent site views and where they can be screened from major streets and public areas. Cabinets and screen walls will be painted to match or harmonize with the principal structure.
      c) Ground mounted equipment shall be screened from view by walls and/or landscaping. No ground mounted equipment, other than those installed based on specific utility company criteria, shall be permitted in required setbacks.
      d) Roof or ground mounted solar energy collection panels, photovoltaic panels or other sustainable energy technology must be neatly arrayed but are not required to be screened.
   2. Trash enclosures:
      a) Trash collection areas shall be screened by a minimum 6' foot high wall constructed of masonry and/or metal, to be compatible with building design.
      b) Enclosure gates shall complement the building design.
      c) Refuse collection areas shall not be permitted in any required setback.

IX. LANDSCAPING, OPEN SPACE AND AMENITIES

A. Landscaping
   1. Landscaping shall continue the existing Cemetery landscape theme with areas of turf and desert[9].
   2. Landscaping may include water features, but water features are not required.
   3. Surface retention areas will be landscaped with turf and/or desert.
   4. Landscaping in R.O.W. along Thomas Road and 99th Avenue (exclusive of R.O.W. provided for SRP's pipe adjacent to 99th Avenue) will continue the existing theme that is provided along Thomas Road[10].

[9] Photographs of Holy Cross' existing internal landscape theme are provided at **Exhibit 12**.
[10] Photographs of Holy Cross' existing landscape theme along Thomas Road are provided at **Exhibit 13**.

5. Landscaping in R.O.W. containing SRP's pipe adjacent to 99th Avenue will consist of ground cover and shrubbery.

B. Zoning Ordinance Section 12

1. Because it is a cemetery and because irrigation water for landscaping will continue to be provided by a DOPCCM-owned and operated well(s) pursuant to DOPCCM's Type I Non-Irrigation Grandfathered Ground Water Right, Holy Cross Cemetery shall be exempt from Section 12 of the Zoning Ordinance except for the following sections of Section 12 to the extent that such sections are determined by the Zoning Administrator to be reasonably and practically applicable to a full service cemetery:
   a) Section 1203(A)(1) in accordance to the ADWR Low Water Use/Drought Tolerant Plant List for all public street frontage and right-of-way new plantings. The interior new plantings will also be in accordance to the list with the following additions:
      (1) Ash Tree (Fraxinus species);
      (2) Elm Tree (Ulmus species) in lieu of only Ulmus parvifolia cv. 'Sempervirens';
      (3) Orchid Tree (Bauhinia species) in lieu of Bauhinia lunaroides or congesta only; and,
      (4) Purple Plum Tree (Prunus species).
   b) Section1203(A)(2) calling for tree sizes in accordance with the standards of the Arizona Nursery Association's "Recommended Average Tree Specifications."
   c) Section 1203(A)(3) requiring that plants be placed to maximize survivability.
   d) Section 1203(A)(4) prohibiting the future planting of certain plant material varieties.
   e) Section 1203(A)(5) accepting of non-ADWR materials by the Zoning Administrator or authorized designee. See Section 1203(A)(1) above for the addition of four species.
   f) Section 1203(A)(6) calling for tree size minimum standards for required tree quantities; however, excluding required trees in parking lots located adjacent to Thomas Road and/or 99th Avenue, all trees located within/inside the Cemetery's perimeter walls/fences may have a reduced minimum caliper size of 0.75.
   g) Section 1203(A)(7) providing tree and shrub quality.
   h) Section 1203(A)(8) calling for shrub and vegetative groundcover minimum criteria. The 5 gallon minimum size and criteria shall be applicable to the right-of-way areas only, with the on-site shrub minimum size being 1 gallon.
   i) Section 1203(A)(9) prohibiting artificial plant materials to meet Section requirements.
   j) Section 1204(A)(4) calling for the use of plant material to aid screening of parking, dumpsters, outdoor storage areas, utility cabinets, transformers, backflow preventers, and service and utility areas.

k) Section 1203(B)(2)(a) establishing minimum standards for decomposed granite. Decomposed granite shall be ¾" select material or larger and installed in the right-of-way areas only. On-site decomposed granite material sizes may be smaller and installed at a 1" depth of cover in areas for dust control measures.
l) Section 1204(A)(9) calling for the mounding and contouring of landscaped areas so long as slopes shall not exceed a 4:1 side slope ratio.
m) Section 1204(A)(10) prohibiting the use of required landscaped areas for parking of vehicles or display of merchandise. The owner will not allow use of required landscape areas for display of merchandise. The owner will provide designated landscaped areas for the display of grave markers and memorials. The owner will allow occasional overflow parking along the internal driveways where visitors may have two wheels resting on decomposed granite or turf adjacent to concrete ribbon curbs.
n) Section 1204(C)(2)(a-c) calling for right-of-way landscaping; provided however, these sections shall not apply to the portion of Holy Cross' Thomas Road frontage that is already improved with decorative fencing and landscaping and further provided that the currently unimproved Thomas Road frontage will be landscaped in general conformity with the currently improved frontage.
o) Section 1204(C)(4) establishing standards for enhanced landscaping at arterial/arterial intersections:
   (1) At the intersection of two (2) arterial roads, a planting easement shall be provided at each corner. The planting easement shall cover the area contained within a triangle drawn as follows: Beginning at the point where lines drawn from the back of the street curbs adjacent to each corner intersect (the "Starting Point") and measuring fifty (50) feet along each street curb from the Starting Point (each such point being referred to as an "End Point") and then completing the triangle by connecting the End Points.
   (2) Landscape and planting materials shall be provided in this landscape easement in quantities not less than those required for a median greater than ten (10) feet in width, as set forth in Section 1204(C)(2)(h) of the Zoning Ordinance.
   (3) All landscape treatments and signage within this planting easement shall meet the requirements adopted by the City relating to sight visibility.
p) Section 1204(C)(6) calling for parking lot landscaping.
q) Section 1204(C)(7) calling for retention basin landscaping.
r) Section 1204(C)(9) providing criteria for landscaping installed in a Site Visibility Triangle.
s) Section 1205(A-C) providing requirements for landscape plans.
t) Section 1206(A-C) providing for landscape inspections.
u) Section 1208 providing maintenance requirements.

X. SIGNS

A. Signage

1. Signs may be constructed of masonry, stone, concrete block, brick, metal, and glass or plastic.
2. All signs on cemetery property may be illuminated or electronic, further defined as any of the below:
   a) "Direct lighting" shall mean a sign designed to provide artificial light through exposed lighting on the sign face, such as neon.
   b) "Electrical sign" shall mean any sign or advertising device which has electrical wiring in or attached to it.
   c) "Internal lighting" shall mean a source of illumination entirely within the sign which makes the sign content visible at night by means of light being transmitted through a translucent material, but wherein the source of the illumination is not visible.
   d) "Internal indirect lighting" shall mean a source of illumination entirely within the sign which makes the design visible at night by means of lighting the background upon which free-standing characters or letters are mounted. The characters or letters themselves shall be opaque, and thus will be silhouetted against the background. The source of illumination shall not be visible.
   e) "Variable message sign" shall mean a sign or portion of a sign designed to allow the immediate and frequent change of copy by manual, mechanical, or electronic means. Up to fifty percent (50%) of the sign area of an allowed freestanding identification sign may be used for a variable message sign[11].
3. Placement of freestanding signs will be identified on the applicable site plan.
4. Placement of building mounted signs will be shown on building elevations.
5. Building artwork and verbiage that conveys the spiritual messages of Catholic Cemeteries is not considered a sign.
6. The monument sign facing the intersection of 99th Avenue and Thomas Road may be up to 200 square feet and may have sculptural features.
7. Driveway entries on Thomas Road may have sculptural features and signage area up to 150 square feet on each side.
8. Directional and Directory signs are freestanding signs to assist with circulation and wayfinding through the cemetery, further defined as:
   a) "Directional sign" shall mean a sign of non-commercial nature which indicates the location of facilities onsite or indicates traffic circulation patterns.
   b) "Directory sign" shall mean a sign designed to show the relative locations of the several activities within the cemetery property.
9. Directional and Directory signs shall conform to the following:
   a) Maximum height: 6 feet;
   b) Maximum area: 20 square feet each;
   c) Quantity: as necessary to enhance wayfinding.

[11] A variable message sign will be incorporated into the monument sign facing the intersection of 99th Avenue and Thomas Road which will be used to disseminate critical information to the community regarding Veteran's Day remembrances and similar important activities. Small variable message signs will also be used along interior driveways to assist with wayfinding for memorial services.

10. Building mounted signs:
    a) Signage areas shall be integrated into building design;
    b) Building mounted signs shall not exceed 100 square feet per building elevation or 5% of the area of the elevation, whichever is less;
    c) Window signs / graphics are limited to twenty-five percent of the first floor window area.
11. Awning signs are permitted and are counted as part of the building mounted signage area.
12. No illuminated signage will be allowed to face west within 150' of Holy Cross' west perimeter property line and no illuminated signage will be allowed to face south within 150' of Holy Cross' south perimeter property line to the extent such south property line is adjacent to properties that are used for residential uses or are zoned for residential uses.

B. The provisions of Avondale's sign ordinance shall not apply to:
    1. Flags, pennants or insignias of any nation, state, county, city or other political unit, any military branch of the United States, or any church or religious organization.
    2. Tablets, grave markers, headstones, statuary or remembrances of persons or events non-commercial in nature.
    3. Works of art when not displayed in conjunction with a commercial enterprise where direct commercial gain may be derived from such display.
    4. Temporary decorations or displays (banners) celebrating the occasion of traditionally accepted patriotic, religious or local holidays or events.

XI. INFRASTRUCTURE

A. Roadway Improvements, Rights-of-Way, Easements and Utilities
    1. The DOPCCM is providing the necessary R-O-W and PUE for proposed 99th Avenue roadway infrastructure improvements including the City's roadway widening, the relocation and undergrounding of the SRP irrigation channel, the relocation and undergrounding of SRP power lines and miscellaneous public utilities.
    2. The DOPCCM is providing funding for improvements of one lane of the proposed 99th Avenue roadway improvements including bicycle lane, vertical curb, gutter, sidewalk, street lighting, landscaping, relocation and undergrounding of the SRP power line, and bus bay.
    3. The DOPCCM is providing additional R-O-W along Thomas Road to accommodate an eastbound right turn deceleration lane, and funding for the right turn deceleration lane on Thomas Road including vertical curb, gutter, sidewalk, and relocation of two power poles.

B. Site Grading and Drainage
    1. According to the Flood Insurance Rate Map #04013C2085G, dated September 30, 2005, a portion of this property is located in Zone "X", and a portion of the property is in a Special Flood Hazard Area delineated as Zone "A".

Zone "X" is defined as "areas of 0.2% annual chance flood; areas of 1% annual chance flood with average depths of less than 1 foot or with drainage areas less than 1 square mile; and areas protected by levees from 1% annual chance flood."

The Special Flood Hazard Area is defined as "the 1% annual chance flood (100-year flood), also known as the base flood, is the flood that has a 1% chance of being equaled or exceeded in any given year. The Special Flood Hazard Area is the area subject to flooding by the 1% annual chance of flood. Areas of special flood hazard include Zones A, AE, AH, AO, AR, A99, V and VE. The base flood elevation is the water-surface elevation of the 1% annual chance flood."

The approximate location of the Special Flood Hazard Area limits are indicated on the ALTA Survey by Development Engineering, Inc. dated September 13, 2010 based on data obtained from the Maricopa County GIS records and FEMA firm maps.

2. The DOPCCM will provide stormwater retention for additional development to occur on the property as provided on **Exhibit 14**. The existing Cemetery development including areas which are developed are "grandfathered" and therefore do not require stormwater retention. The retention provided will include the runoff from a 100-year, 2-hour storm from the proposed future development areas and from the adjacent ½ street R-O-W for Thomas Road and 99th Avenue per standard City criteria. The proposed grading and drainage for the Site is provided in the Master Drainage Report separately transmitted with this application.

XII. OWNERSHIP AND MAINTENANCE

Holy Cross Cemetery is owned and maintained by the Diocese of Phoenix Catholic Cemeteries and Mortuaries.

XIII. CONFORMANCE WITH GENERAL PLAN

Holy Cross is a well-established Cemetery that is an important part of the greater-Avondale community. Retaining Holy Cross Cemetery in Avondale and planning for its future development meets several of the goals and policies of the General Plan including, for example:

A. Avondale's General Plan Land Use Map identifies the Site as Open Space. Holy Cross Cemetery is not "open space" akin to an active recreation area such as a park; however, it is akin to passive open space to be respectfully and passively used and preserved for the families and friends of the deceased and the greater-Avondale community.

B. Land Use Element Goal 2 – Ensure land uses meet the long-term social and economic goals of the community. The proposed Special Use Overlay takes into

consideration the long-term benefits of Holy Cross Cemetery to the greater-Avondale community.

C. Land Use Element Goal 3, Objective A and Policy 3 – Reduce conflicts between land uses and prohibit the location of uses within or adjacent to existing neighborhoods that are incompatible with residential uses or that could negatively impact the safety or health of its residents. The Cemetery acts as a buffer between the residential to the west and south and the major arterial intersection at 99th Avenue and Thomas Road. The Cemetery is a compatible use and will have very little impact on the surrounding community.

D. Conservation, Redevelopment and Rehabilitation Goal 1 – Maintain and protect the character of established residential neighborhoods. Holy Cross Cemetery has been operating at this site for approximately 45 years. The Special Use Overlay will protect the existing Cemetery and will provide site specific development standards that will assure compatibility with the surrounding neighborhoods.

E. Circulation Element Goal 1, Objective E – Provide facilities appropriate to a variety of traffic volumes. The Cemetery will create minimal traffic and will dedicate substantial additional right-of-way along 99th Avenue and Thomas Road to minimize the impact of any additional traffic and to facilitate piping the existing SRP canal that parallels 99th Avenue.

XIV. PRELIMINARY CAMPUS PLAN AND SITE PLAN REVIEW

As is described in Section IV above, Holy Cross Cemetery's Proposed Land Use Development Map is provided at **Exhibit 6**. The Proposed Land Use Development Map, together with the 99th Avenue and Thomas Road details that are provided at **Exhibits 4 and 5**, provide the basis for the Preliminary Campus Plan[12] (provided at **Exhibit 15**) and future development-specific Site Plans (i.e, the Master Site Plan for the overall Cemetery and Final Site Plans that may be provided for a given phase or building(s)).

Preliminary Campus Plan approval illustrating the uses and general layout of the overall Cemetery is requested in conjunction with this Special Use Overlay. A Master Site Plan of the overall Cemetery will also be approved through the Planning Commission and City Council processes. Development-specific Final Site Plans that do not (a) materially change the uses or the intensity of uses described in the Special Use Overlay or (b) significantly increase the offsite impacts of the uses may be approved administratively by the Zoning Administrator. For example, as is generally depicted on the Preliminary Campus Plan, DOPCCM has not yet determined whether the mortuary building will best be oriented in an east-west orientation (generally paralleling Thomas Road) or in a north-

[12] Holy Cross Cemetery's "Preliminary Campus Plan" is an illustrative exhibit that is included with this Special Use Overlay as an indication of how the Cemetery may develop in the future subject to future Site Plan Approvals. The Preliminary Campus Plan will help guide future development of the Cemetery; however, it does not replace or eliminate the need for the City's future review and approval of the Master Site Plan for the overall Cemetery and development-specific Final Site Plans in accordance with this Special Use Overlay and other applicable City requirements.

south orientation (generally paralleling 99th Avenue). Such building orientation will be determined during the development-specific Final Site Plan Review and Approval of the mortuary building and associated improvements.

All new buildings and uses of land constructed or developed at Holy Cross after the effective date of this Special Use Overlay shall be submitted for development-specific Final Site Plan Review and Approval by the Planning Department of a given building(s) or phase(s) of the Cemetery's development in accordance with Section 106 of Avondale's Zoning Ordinance (provided at **Exhibit 16**); provided, however, Section 106 is hereby modified as follows:

A. Notwithstanding Section 106(C)(3), each building, phase or component of the development-specific site plan shall be independent of other buildings, phases or components of the site plan. Each building shall be required to be substantially completed and such building's required parking area(s), landscaping and other improvements shall be substantially constructed and completed in accordance with the approved site plan prior to issuance of a Certificate of Occupancy for the given building; however, it shall not be necessary to have those items completed for any other building in order for the given building to move forward with Occupancy.

B. Notwithstanding Section 106(C)(4), an approved Master Site Plan (for the overall Cemetery) and an approved Final Site Plan (for a given phase or building(s)) shall be valid for a period of 2 years and may be extended in accordance with the Zoning Ordinance. Issuance of a permit to construct either a building or a portion of the site walls and fencing along Thomas Road and/or 99th Avenue in accordance with Section VIII(A) above shall satisfy the 2 years requirement for the Master Site Plan. Issuance of a permit to construct the subject building(s) shall satisfy the 2 years requirement for a given Final Site Plan.

C. Notwithstanding Section 106(E), the names, addresses and stamped envelopes shall be provided for all property owners within 500' of a proposed building rather than within 500' of the Cemetery's overall property boundary.

XV. PROJECT TEAM

Owner:
Diocese of Phoenix Catholic Cemeteries and Mortuaries
Attn: Gary Brown
2033 North 48th Street
Phoenix, Arizona 85008-3347

Architect:
Vehr/Webb Studio
Attn: Maret Webb
5101 E. Monterey Way
Phoenix, Arizona 85018-6623

Civil Engineering:
Development Engineering, Inc.
Attn: Peter Vesecky
8125 E. Indian Bend Road, Suite 105
Scottsdale, Arizona 85250

Zoning & Entitlements:
Burch & Cracchiolo, P.A.
Attn: Ed Bull
702 E. Osborn Road, Suite 200
Phoenix, Arizona 85014

XVI. FINDINGS

The information provided in this Special Use Overlay Narrative Report and Exhibits hereto demonstrate that the following Findings are met:

A. The cemetery-related uses described herein will further the objectives of the General Plan and not adversely affect the character of the community.

B. The cemetery-related uses described herein will be compatible with other existing and planned, future land uses in the immediate area.

C. The cemetery-related uses described herein will be adequately served by public infrastructure and services.

D. The cemetery-related uses described herein will not create excessive truck traffic or ongoing traffic congestion.

XVII. CONCLUSION

Holy Cross Cemetery was founded approximately 45 years ago and is partially developed with burials, mausoleums and various cemetery-related amenities and improvements. Although Holy Cross Cemetery can continue to operate pursuant to its existing AG Zoning and Conditional Use Permit, City Staff and DOPCCM have concluded that it would be best for the City and DOPCCM to use the City's Special Use Overlay District to plan for the future development of Holy Cross' approximately 75 gross/69 net acres. In accordance with Section 5.1(B)(1) of the Avondale Zoning Ordinance, this Special Use Overlay provides the required information and demonstrates that the Ordinance-required Findings are met. We request approval of this Special Use Overlay for Holy Cross Cemetery.

Diocese of Phoenix Catholic Cemeteries and Mortuaries

_____

Gary L. Brown – President

Exhibit 1

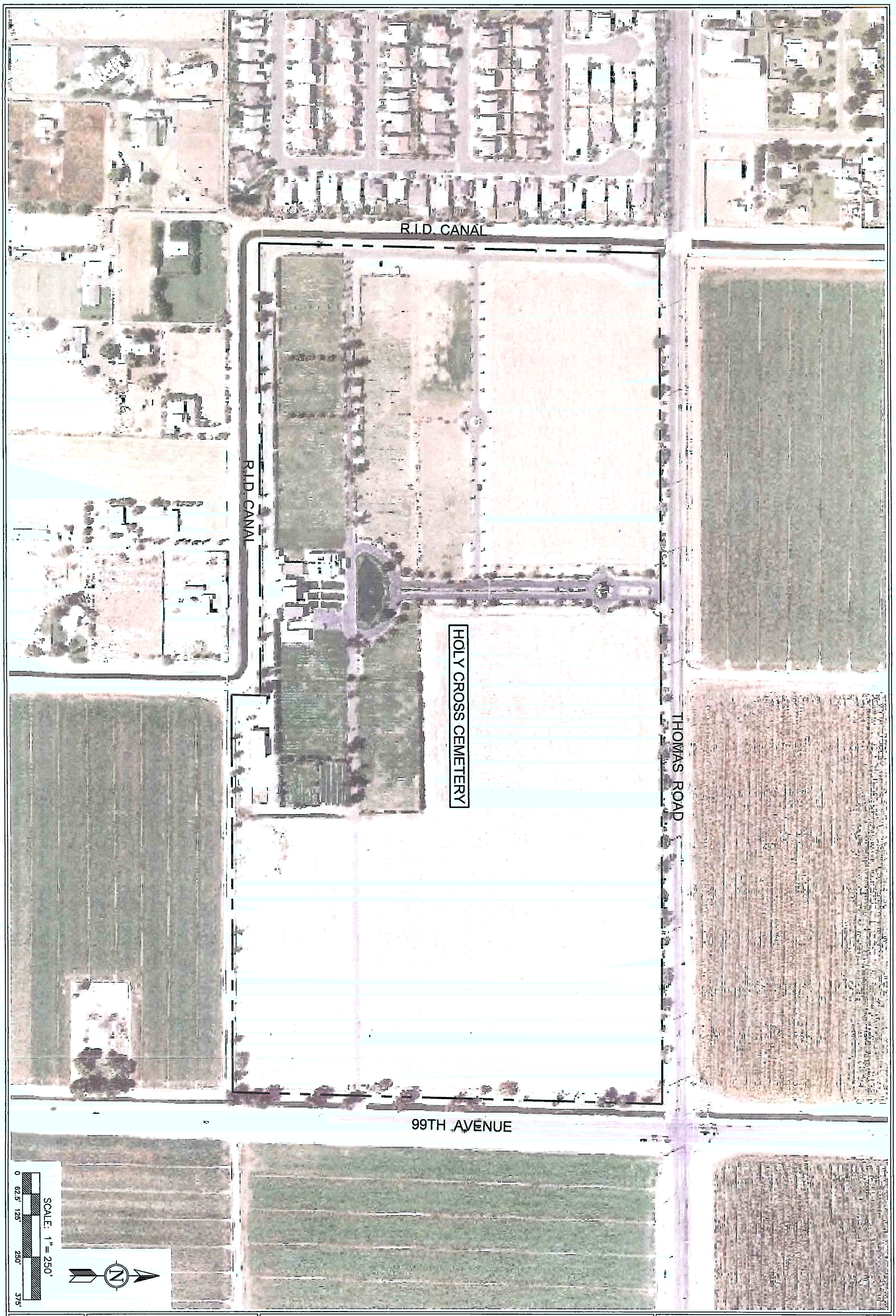


EXHIBIT
1
1 of 1

HOLY CROSS CEMETERY

SWC 99TH AVENUE & THOMAS ROAD - AVONDALE, AZ

OVERALL EXISTING AERIAL - EXHIBIT 1

DATE. 09/22/10	PROJ. NO: 09109	SCALE. 1"=250'	CAD FILE: 09109_Exhibit 1	DRAWN: CAP

de INC
- Since 1982

Development Engineering, Inc.
8504 E. Gary Road
Scottsdale, AZ 85260
Ph: (480) 393-3640
Fx. (480) 393-3639

Exhibit 2

development engineering
INCORPORATED

REGISTERED LAND SURVEYOR
CERTIFICATE NO.
16913
PETER
VESECKY
Date Signed 7.27.10
ARIZONA, U.S.A.
Expires 09/30/2010

LEGAL DESCRIPTION

HOLY CROSS CEMETERY
AVONDALE, ARIZONA

The north half of the northeast quarter of Section 32, Township 2 North, Range 1 East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona,

Except the north 55.00 feet of the northeast quarter of said Section 32; and

Except the east 55.00 feet of the north half of the northeast quarter of said Section 32; and

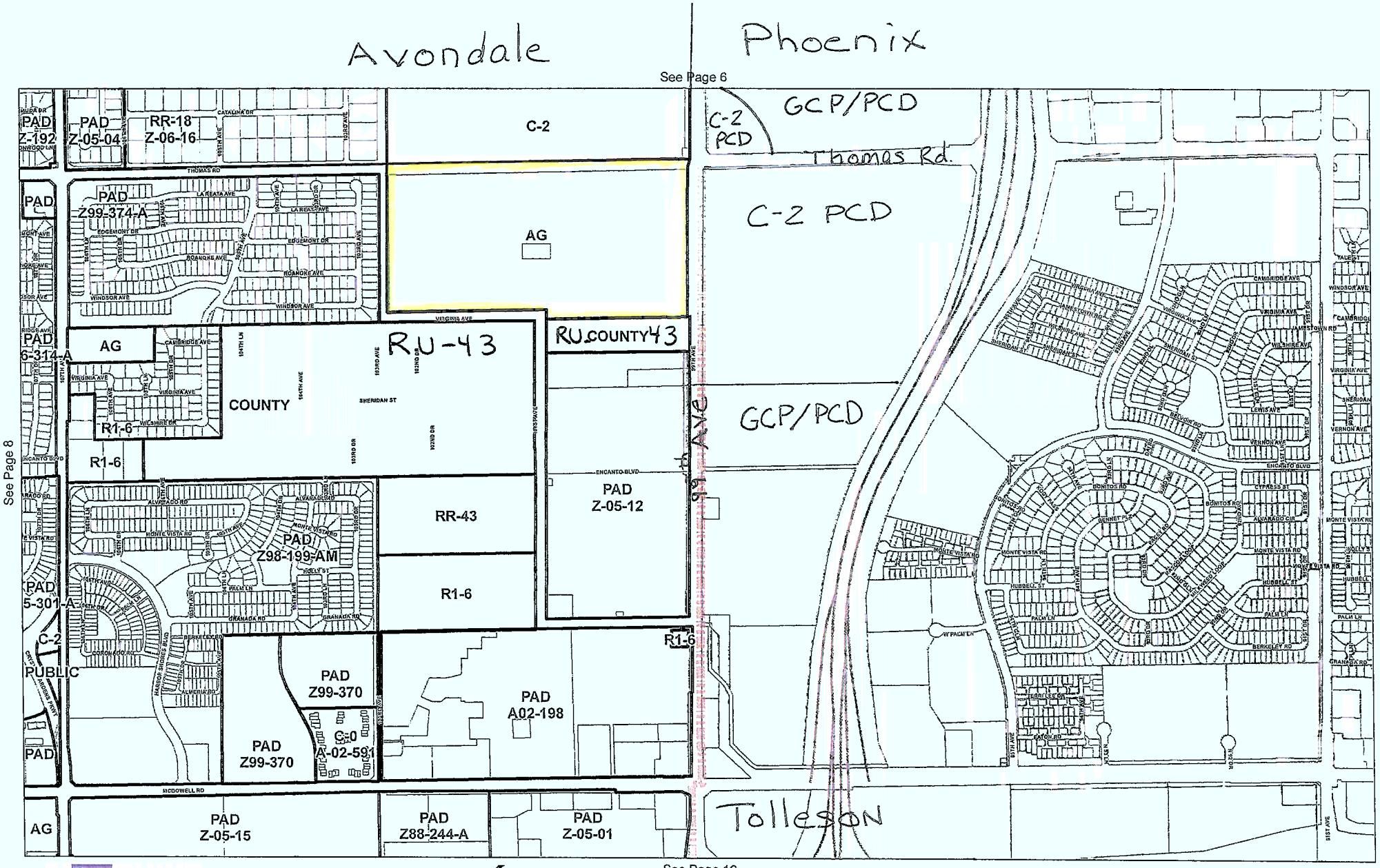
Except the west 80.00 feet of the north half of the northeast quarter of said Section 32; and

Except the south 85.00 feet of the northwest quarter of the northeast quarter of said Section 32; and

Except the west 90.00 feet of the south 85.00 feet of the northeast quarter of the northeast quarter of said Section 32.

Said parcel containing approximately 68.75 net acres.

Exhibit 3



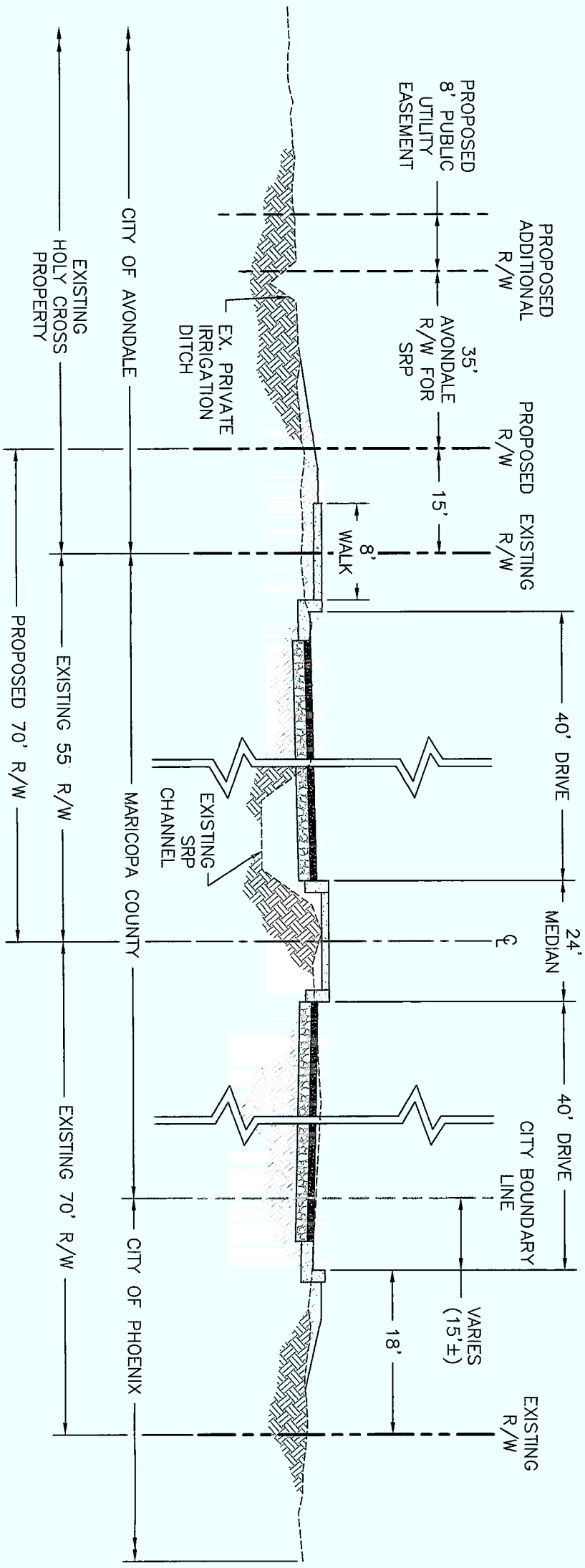
Legend
- RIVER
- CITY BOUNDARY
- ZONING BOUNDARY

Approximate Scale
1 inch = 700 feet

City of Avondale Zoning Atlas

JANUARY 2009

Exhibit 4



99TH AVENUE – LOOKING NORTH

N.T.S.

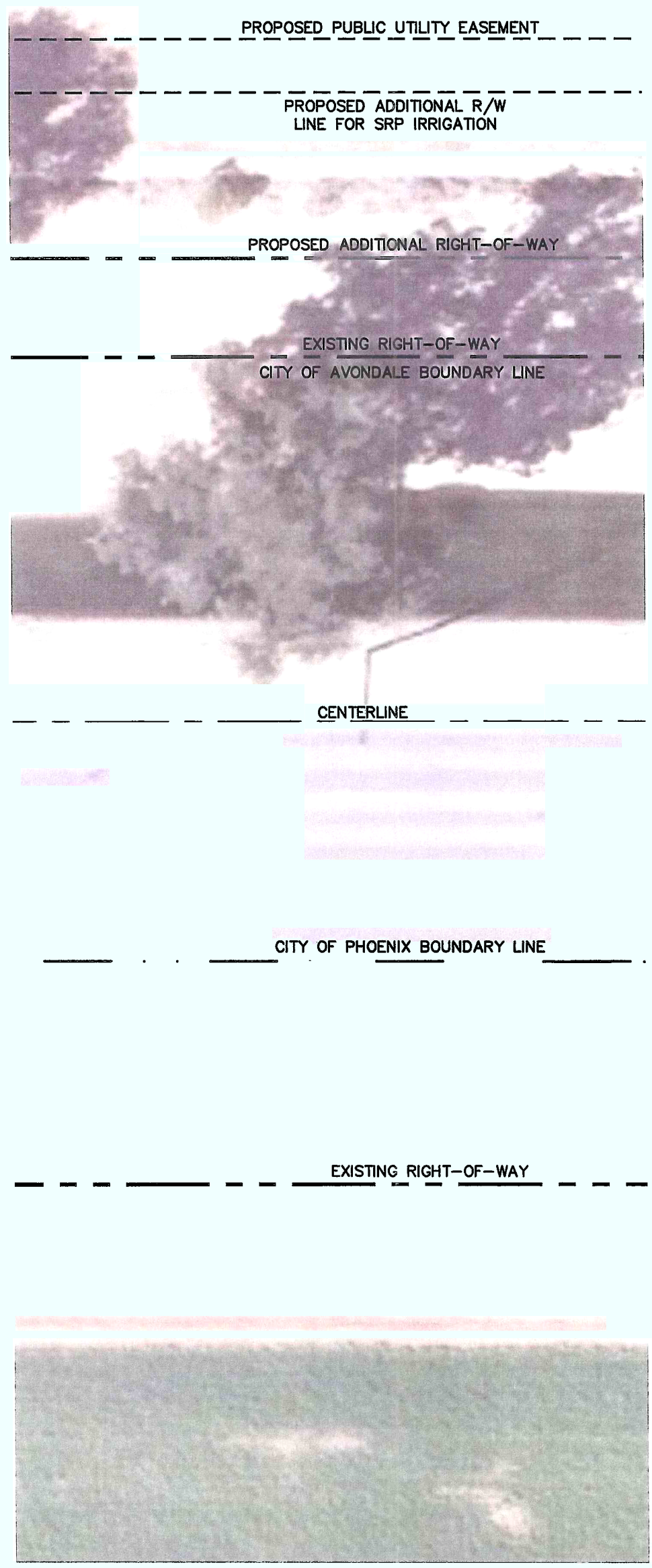


EXHIBIT 4

CATHOLIC CEMETERIES
DIOCESE OF PHOENIX

2033 N. 48TH STREET
PHOENIX, AZ 85008
(602) 267-1329

PROPOSED 99TH AVENUE CROSS SECTION

HOLY CROSS CEMETERY

SWC OF 99TH AVE. & THOMAS RD - AVONDALE, AZ

DATE. 09/09/10	PROJ. NO: 09019	SCALE. N.T.S.	CAD FILE: 09019 99th Section	DRAWN: CAP

de INC
- Since 1982 -

Development Engineering, Inc.
8504 E. Gary Road
Scottsdale, AZ 85260
Ph: (480) 393-3640
Fx. (480) 393-3639

Exhibit 5

de INC
Since 1982 -

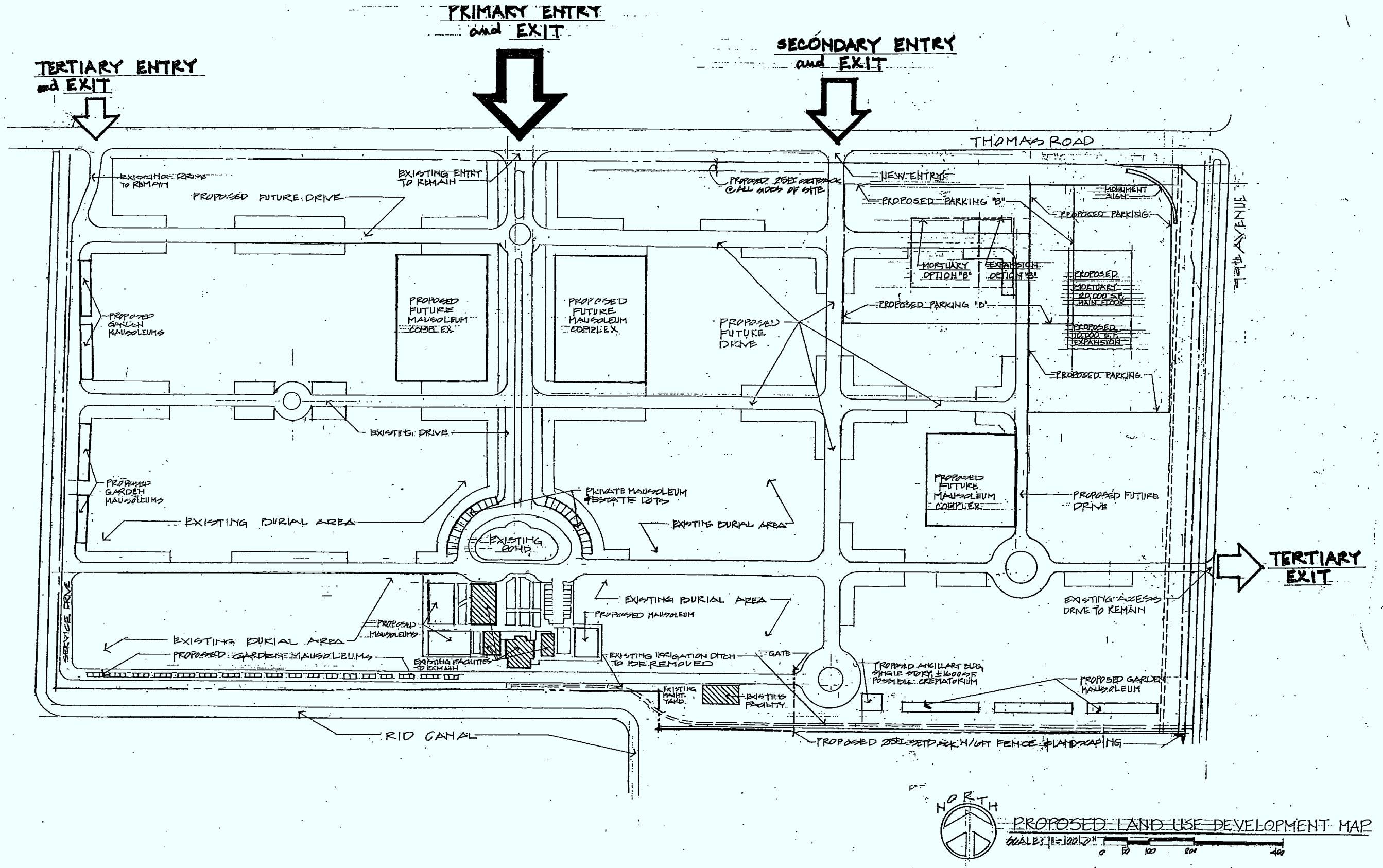
Development Engineering, Inc.
5820 E. Kings Avenue
Scottsdale, AZ 85254
Ph: (480) 393-3640
Fx: (480) 393-3639

THOMAS ROAD - DECEL LANE
HOLY CROSS CEMETERY
SWC THOMAS ROAD & 99TH AVENUE AVONDALE, AZ

DATE: 09/09/10 | SCALE. N.T.S. | PROJ. NO: 09109 | CAD FILE: 09109_Exhibit 5

EXHIBIT
5

Exhibit 6



Holy Cross Mortuary

SWC 99th Ave. & Thomas Rd., Avondale, AZ

Proposed Land Use Development Map

5101 East Monterey Way/ Phoenix, AZ 85008 602-957-0653

Vehr/Webb Studio

Project: 09-220
Date: To AUG 2010

Sheet

6 of 11

Exhibit 7

PERMIT CONDITIONS

Permit Number '

Date Issued: xx/xx/xxxx
Revision: 0.0.0.0
Revision Date: xx/xx/xxxx
Expiration Date: xx/xx/xxxx

The numerical section references in this Permit are based on Maricopa County Air Quality Department Rules and Regulations (Rules) in effect on the date of issuance of these Permit Conditions. In the event that these Rules are revised to change the content and numerical references during the term of this Permit, the revised Rules and numbering system will apply to this permit.

GENERAL CONDITIONS:

1. **Certification:**

   Any document which is required to be submitted by this Permit or the Rules shall contain certification by a responsible official of truth, accuracy and completeness. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.

   [Rule 100, §200.97; Rule 220, §301.5 and §302.14]

2. **Confidentiality Claims:**

   Except as provided for in Rule 100, any records, reports, or information obtained from the Permittee pursuant to the County Rules or this Permit shall be available to the public unless the Control Officer has notified the Permittee in writing and unless a person:

   a. Precisely identifies the information in the permit(s), records, or reports which is considered confidential.

   b. Provides sufficient supporting information to allow the Control Officer to evaluate whether such information satisfies the requirements related to trade secrets.

   A claim of confidentiality shall not excuse a person from providing any and all information required or requested by the Control Officer and shall not be a defense for failure to provide such information.

   [Rule 100, §200.110, §402 and Rule 200, §411]

3. **Controls:**

   Except as provided by the applicable Rules or these Permit Conditions, the Permittee shall not operate any equipment or process unless air pollution controls, required by either this Permit or the Rules, are in place, are operating without bypass, and are operating within their key system operating parameters, as identified in the approved Operation and Maintenance Plans, and in accordance with any other conditions specified in this Permit.

   This requirement to operate any required air pollution control equipment may be conditionally waived due to malfunction in an emergency situation provided that the Permittee fulfills the notification requirements in accordance with Rule 100, §501, and Rules 130 and 140.

PERMIT CONDITIONS

Permit Number

[Rule 100, §501, Rules 130 and 140]

The Permittee shall notify the Control Officer, in accordance with Rule 220, before making any additions, modifications or replacements to any required air pollution control equipment. This notification requirement does not apply to normal maintenance and repair activities.

[Rule 220, §404 and §405]

4. **Duty to Supplement or Correct Application:**
The Permittee who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a proposed permit.
[Rule 220, §301.5]

5. **Duty to Comply:**
The Permittee shall comply with all conditions of this Permit including all applicable requirements of Federal laws, Arizona laws, and Maricopa County Air Pollution Control Rules and Regulations.
[Rule 200, §309]

It shall not be a defense for the Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with these Permit Conditions.
[Rule 220, §302.10]

6. **Fees:**
The Permittee shall pay, in a timely manner, an annual fee for this Permit as determined by the Control Officer in accordance with Rule 280.
[Rule 280, §302]

7. **Fugitive Dust:**
The Permittee shall take all reasonable precautions to minimize the emissions of fugitive dust in accordance with §300 of Rule 310.
[Rule 310, §300]

8. **Leased/Rented/Borrowed Equipment:**
If the Permittee leases, rents or lends any equipment covered by this Permit to a second party, the Permittee shall provide the second party with a copy of this Permit. It is the responsibility of the person using the equipment to make sure that the equipment is properly permitted and operated. If the Permittee does not provide the second party with a copy of this Permit, both the Permittee and the second party shall be responsible

for operating the source in compliance with the Permit and for any violation thereof.
[Rule 200, §410.3]

9. **Malfunctions (Emergency Upsets) and Excess Emissions:**
Emergencies, malfunctions, and other excess emissions shall be reported as required by Rule 100, Section 500.
[Rule 100, §400 and §500; Rule 130, §400; Rule 140, §400 and §500]

10. **Material Containment:**
Materials including, but not limited to, solvents or other volatile compounds, paints, acids, alkalies, pesticides, fertilizer and manure shall be processed, stored, used and transported in such a manner and by such means that they will not unreasonably evaporate, leak, escape or be otherwise discharged into the ambient air so as to cause or contribute to air pollution.
[Rule 320, §302]

11. **Modifications:**
The Permittee shall notify the Control Officer, in accordance with Rule 220, of changes, replacements or additions to the source which are not covered by this Permit.
[Rule 200, §313.3 and Rule 220, §400]

12. **Odors:**
The Permittee shall not emit gaseous or odorous air contaminants from equipment, operations or premises under his control in such quantities or concentrations as to cause air pollution.
[Rule 320, §300]

13. **Permit Term, Permit Transfer, and Permit Renewal:**

a. This Permit shall remain in effect for no more than 5 years.
[Rule 220, §402]

b. Except as provided in Rule 200, this Permit may be transferred to another person if the person who holds the permit gives notice to the Control Officer in writing at least 30 days before the proposed transfer and complies with the permit transfer requirements of Rule 200 and the administrative permit amendment procedures pursuant to Rule 220.
[Rule 200, §400 and Rule 220, §405.1]

c. The Permittee shall file an application for a permit renewal at least six months, but not more than 18 months, before the expiration date of this Permit.
[Rule 220, §301.3a]

14. **Record Keeping:**
The Permittee shall maintain accurate records as required by these Permit Conditions and by Section 500 of all applicable Rules. These records shall be kept in a form, which allows easy verification of compliance with these Permit Conditions and any applicable

Rules.

All records shall be kept for the time as specified. All records required to demonstrate that each required air pollution control device is being operated properly shall be retained for five years.

All records required by this Permit should be made available for inspection upon request by a representative of the Control Officer.

[Rule 100, §504; Rule 220, §302.7; and §500 of All Applicable Rules]

15. **Reopening For Cause:**
This Permit shall be reopened or revised prior to expiration under any of the following conditions:

a. Either the Control Officer or the Administrator of the United States Environmental Protection Agency (Administrator) determines that this Permit contains a material mistake or that inaccurate statements were made in establishing the emission standards or other terms or conditions of this Permit Revision, or

b. Either the Control Officer or Administrator determines that this Permit must be revised or revoked to assure compliance with the applicable requirements.

[Rule 200, §402]

16. **Reporting:**
If notified, the Permittee shall submit an annual emissions inventory report to the Control Officer. The report shall summarize the activities and air pollution emissions from the facility during the previous calendar year in accordance with §505 of Rule 100. The report shall be filed on a form supplied by the Control Officer and shall be due by April 30 or 90 days after the Control Officer makes the forms available, whichever is later.

The Permittee shall furnish to the Control Officer, within a reasonable time, any information that the Control Officer may request in writing to determine whether cause exists for revising or revoking and reissuing this Permit or to determine compliance with this Permit.

Upon request, the Permittee shall furnish to the Control Officer copies of records required to be kept by this Permit.

The Permittee shall file any additional reports required by the Control Officer in a complete and timely manner.

[Rule 100, §501 and §505; Rule 220, §302.8 and §302.13]

17. **Right to Entry:**
The authorized representative of the Control Officer, upon presentation of credentials,

shall be permitted:

a. To enter upon the premises where the source is located or emission-related activity is conducted, or where records are required to be kept under the conditions of this Permit and,

b. To have access to and copy, at reasonable times, any records that are required to be kept under the conditions of this Permit, and

c. To inspect, at reasonable times, any source(s), equipment (including monitoring and air pollution control equipment), practices or operations regulated or required under the Permit, and

d. To sample or monitor, at reasonable times, substances or parameters for the purpose of assuring compliance with the Permit or other applicable requirements, and

e. To record any inspection by use of written, electronic, magnetic, and photographic media.

No claim of confidentiality for trade secrets or commercial information available to the Permittee under Arizona Revised Statutes (ARS) 49-487 or Rule 200 §400 can limit the scope of or otherwise interfere with an on-site inspection by a representative of the Control Officer. However, a claim of confidentiality may be made on any information gathered during the inspection to the extent identified in ARS 49-487 or Rule 200 §400.

[Rule 100, §200.110 and §402; Rule 200, §411; Rule 220, §302.17-21]

18. **Rights and Privileges:**
This Permit does not convey any property rights nor exclusive privileges of any sort. [Rule 220, §302.12]

19. **Severability:**
The provisions of this Permit are severable, and, if any provision of this Permit is held invalid, the remainder of this Permit shall not be affected thereby. [Rule 220, §302.9]

20. **Start-up Notification:**
If a performance test is required, the Permittee shall give written notification to the Department, Attention: Compliance Division Manager, at least 7 days but no more than 30 days before the initial start-up of any new pollution abatement equipment or process that requires a test. Start-up of the subject equipment or process, shall be defined as the earliest occurrence of one of the following dates:

a. The date that achieved maximum (or permitted) capacity occurs; or

b. The date that a marketable product has been produced; or

c. The date that achieved sustained product manufacturing occurs; or

d. The date that the production line(s) or processes, exhausted to the air pollution abatement equipment that require the test, have been qualified to produce product that meets customer requirements.

This startup notification does not apply to processes or equipment recognized by the Control Officer as being trivial or insignificant activities.

[Rule 270, §400]

SPECIFIC CONDITIONS:

21. **Operating Limits:**

a. The Permittee shall not burn more than ... pounds per day and tons per year, facility-wide, in the crematory units.

b. The Permittee shall not conduct any burning in the crematory units between sunset and the following sunrise.

c. The Permittee shall limit the amount of chlorinated plastics incinerated for each crematory to a maximum of ten (10) pounds per month.

[Rule 220 §302.2, Rule 313 §304.1]

22. **Operations and Maintenance:**

a. The crematory shall be installed, operated and maintained by properly trained personnel.

b. The Department will accept "Adequate Maintenance" as a source who has conducted maintenance for each crematory per manufacturer's recommendations or at least once a year per a written maintenance program commonly adopted by the crematory industry, whichever is more stringent. The maintenance program and record shall be available onsite upon inspection.

[Rule 220 §302.2]

23. **Controls:**

Each crematory unit shall only be used for the cremation of remains (human or animal), body parts, and associated wrappings and shall use the following air pollution control equipment when in operation:

a. Crematory units shall consist of an incinerator with at least two chambers. The secondary compartment or afterburner shall operate at a minimum temperature of at least 1600°F with a residence time of at least 1 second during the period of combustion in order to destruct the combustion products. The burner in the primary

chamber shall not be ignited until the secondary chamber combustion zone temperature is equal to or greater than 1000°F.

[Rule 313 §301.3]

b. Cremating Large Bodies: If alternate operating temperatures and special procedures are required for the cremating of large bodies (over 300 lbs) that are different than the temperatures or residence times in the afterburner set forth above, the Permittee shall demonstrate compliance of these alternate times and temperatures with the test methods listed in Rule 313 §504.

[Rule 313 §301.5]

c. If the manufacturer's optimum design specifications for the minimum temperature or residence time of a secondary chamber or afterburner at an existing crematory unit is different than the temperatures or residence times above, the manufacturer's specifications may be used instead, providing that the owner or operator demonstrates compliance according to the test methods listed in Rule 313 §504.

[Rule 313 §301.4]

[Rule 313 §207]

24. **Opacity**

The Permittee shall not discharge into the ambient air from any single source of emissions any air contaminant, other than uncombined water, in excess of 20% opacity.
[Rule 300 §301]

a. If complaints for visible emissions (excluding water vapor) are reported or if visible emissions (excluding water vapor) reoccur subsequent to implementing corrective action(s), the Permittee shall determine compliance with the opacity limit by having a certified Visible Emissions Evaluator determine opacity using the techniques specified in EPA Reference Method 9, 40 CFR Part 60, Appendix A, as modified by EPA Reference Method 203B.

[Rule 300 §501]

b. If visible emissions (excluding water vapor) exceed the above opacity standards, the Permittee shall shut down the applicable equipment and institute repairs or changes necessary to ensure compliance prior to resuming operations.

[Rule 220 §302.2]

25. **Emission Standards:**

Particulates: The Permittee shall not allow or permit particulate matter into the atmosphere from the crematory unit which exceeds 0.080 grain per cubic foot of dry flue gas at standard conditions adjusted to 7 percent oxygen (O_2) in the exhaust gases and calculated as if no auxiliary fuel had been used.
[Rule 313 §303]

26. **Monitoring:**

PERMIT CONDITIONS

Permit Number

The Permittee shall properly install and maintain in calibration, in good working order and in operation, devices that indicate temperatures, pressures, rates of flow, or other operating conditions necessary to determine if the air pollution control equipment is functioning properly.
[Rule 313 §305]

27. **Performance Testing:**

a. Testing Requirements: The Permittee shall conduct performance tests on one of the crematory units within 60 days after the permit issuance date or within 60 days after the new applicable equipment has achieved the capability to operate at its maximum production rate on a sustained basis, whichever occurs last. The selection of the crematory unit to be tested may initially be requested by the Permittee and included in the test protocol. However, the Department reserves the right to modify any crematory unit selection as warranted.

The testing deadline may be extended by the Control Officer for good cause, but in no case shall the testing deadline, including test report submittal, extend beyond 180 days after the permit issuance date or 180 days after the new applicable equipment has achieved the capability to operate at its maximum capacity, whichever occurs last.

[County Rule 200 §309][County Rule 270 §401][SIP Rule 27 §A]

The Permittee shall measure the PM concentration in the crematory exhaust stream to demonstrate compliance with all applicable grain loading and/or emission rate requirements of these permit conditions. A visible emissions evaluation shall demonstrate compliance with the opacity requirement. Compliance shall also be demonstrated with the residence time requirement. Following the initial performance test for this permit, the Permittee shall conduct performance tests every 5 years (within 58 to 62 months of the previous test).

b. Testing Criteria: Performance tests shall be conducted and data reduced in accordance with the test methods and procedures specified in the Test Methods section of this permit condition unless otherwise specified by the Control Officer. The Control Officer may specify or approve minor changes in methodology to a reference method, approve the use of an equivalent test method, approve the use of an alternative method that has been determined to be acceptable for demonstrating compliance, or waive the requirement for performance tests because the Permittee has demonstrated by other means that the source is in compliance with the standard.
[County Rule 270 §402][SIP Rule 27 §B]

c. Test Methods: Sampling sites and velocity traverse points shall be selected in accordance with EPA Test Method 1or 1A. The gas volumetric flow rate shall be measured in accordance with EPA Test Method 2, 2A, 2C, 2D, 2F, 2G or 19. The dry molecular weight shall be determined in accordance with EPA Test Method 3, 3A

or 3B. The stack gas moisture shall be determined in accordance with EPA Test Method 4. These methods must be performed, as applicable, during each test run.

[County Rule 270 §301.1][SIP Rule 27 §B]

PM testing shall be conducted in accordance with EPA Test Method 5. The visible emissions evaluation shall be conducted in accordance with EPA Test Method 9.

d. Operating Conditions: Performance tests shall be conducted under representative operating conditions and all equipment shall be operated during testing in accordance with the most recently approved O&M Plan or according to its operations manual if no O&M Plan is required. The Permittee shall make available to the Control Officer any records necessary to determine appropriate conditions for performance tests. Operations during periods of startup, shutdown, and equipment malfunction shall not constitute representative conditions for performance tests unless otherwise specified in the applicable standard or permit conditions.

[County Rule 270 §403]

e. Monitoring Requirements: The Permittee shall record all process and control equipment information that are necessary to document operating conditions during the test and explain why the conditions represent normal operation. Operational parameters shall be monitored and recorded at least once every 30 minutes during each of the required test runs and documented in the test report. The operational parameters monitored shall be capable of indicating that the equipment is operating within the permitted limits, both during and after the performance tests.

[County Rule 270 §301.1][SIP Rule 27 §B]

i. Option 2 – Either 30 or more cremations performed within the last year or any opacity violations documented within the last year: The Permittee shall record the charge weight, primary chamber temperature, afterburner chamber temperature and duration of burn cycle during the performance test.

f. Test Protocol Submittal: The Permittee shall submit a separate test protocol for each performance test to the Department for review and approval at least 30 days prior to each performance test unless otherwise specified in the applicable standard or in this permit. The test protocol shall be prepared in accordance with the most recent version of the Department's "Air Quality Performance Test Guidelines for Compliance Determination in Maricopa County." A completed copy of the Department's "Test Protocol Submittal Form" shall accompany each test protocol.

[County Rule 270 §301.1][SIP Rule 27 §B]

g. Notice of Testing: The Permittee shall notify the Department in writing at least two weeks in advance of the actual date and time of each performance test unless otherwise specified in the applicable standard or in this permit so that the Department may have a representative attend.

[County Rule 270 §404]

h. Testing Facilities Required: The Permittee shall install any and all sample ports or platforms necessary to conduct the performance tests, provide safe access to any platforms, and provide the necessary utilities for testing equipment.

[County Rule 270 §405][SIP Rule 42]

i. Minimum Testing Requirements: Each performance test shall consist of three separate test runs with each test run being at least one hour in duration unless otherwise specified in the applicable standard or in this permit. The same test methods shall be used simultaneously for both the inlet and outlet measurements, if applicable, or justification for any necessary exceptions shall be provided in the test protocol. Emissions rates, concentrations, grain loadings, and/or efficiencies shall be determined as the arithmetic average of the values determined for each individual test run. Performance tests may only be stopped for good cause, which includes forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances beyond the Permittee's control. Termination of a performance test without good cause after the first test run has commenced shall constitute a failure of the performance test.

[County Rule 270 §406]

j. Test Report Submittal: The Permittee shall complete and submit a separate test report for each performance test to the Department within 30 days after the completion of testing unless otherwise specified in the applicable standard or in this permit. The test report shall be prepared in accordance with the most recent version of the Department's "Air Quality Performance Test Guidelines for Compliance Determination in Maricopa County." A completed copy of the Department's "Test Report Submittal Form" shall accompany each test report.

[County Rule 270 §301.1][SIP Rule 27 §B]

k. Compliance with Emission Limits: Compliance with allowable emission limits and standards shall be determined by the performance tests specified in this permit. If test results do not demonstrate compliance with the requirements of these permit conditions, the Permittee shall make the necessary repairs and/or adjustments to the equipment and demonstrate compliance through retesting. In lieu of retesting, the Permittee may be able to submit an application for a permit revision to establish operational limitations or allowable emission limits based on the equipment's actual performance. Neither option will nullify the fact that test results did not demonstrate compliance with the requirements of the permit conditions or nullify any violations that may result from this noncompliance. In addition to compliance demonstrations, test results shall be used for annual emissions inventory purposes if the Permittee is required to complete an emissions inventory survey.

[County Rule 270 §407]

l. Correspondence: All test extension requests, test protocols, test date notifications, and test reports required by this permit shall be submitted to the Department and addressed to the attention of the Performance Test Evaluation Supervisor.

[County Rule 270 §301.1][SIP Rule 27 §B]

m. Authority: The above testing requirements represent the minimum level of testing to monitor for compliance with the emission limits in this permit. Nothing in this section shall prevent the Control Officer from requiring additional performance testing as deemed necessary to ensure permit compliance and protection of the public health and welfare.

[County Rule 200 §309][County Rule 270 §402.5]

28. **Record Keeping:**

The Permittee shall comply with the following record keeping requirements for each crematory unit. Records shall be retained for five years and shall be made available to the Control Officer upon request.

a. Incinerated Material: Daily records of the number of bodies cremated, chamber temperatures (secondary chamber temperature at the time of the ignition of the primary chamber and the secondary compartment operating temperature) and dates and times of the day that the crematory unit is operating. The owner or operator of an animal crematory shall account for either the weight of the animal charged or the number and type of remains charged. In addition, if a human or animal crematory burns a large body (over 300 lbs), the approximate weight of the body and the operating conditions shall be noted.

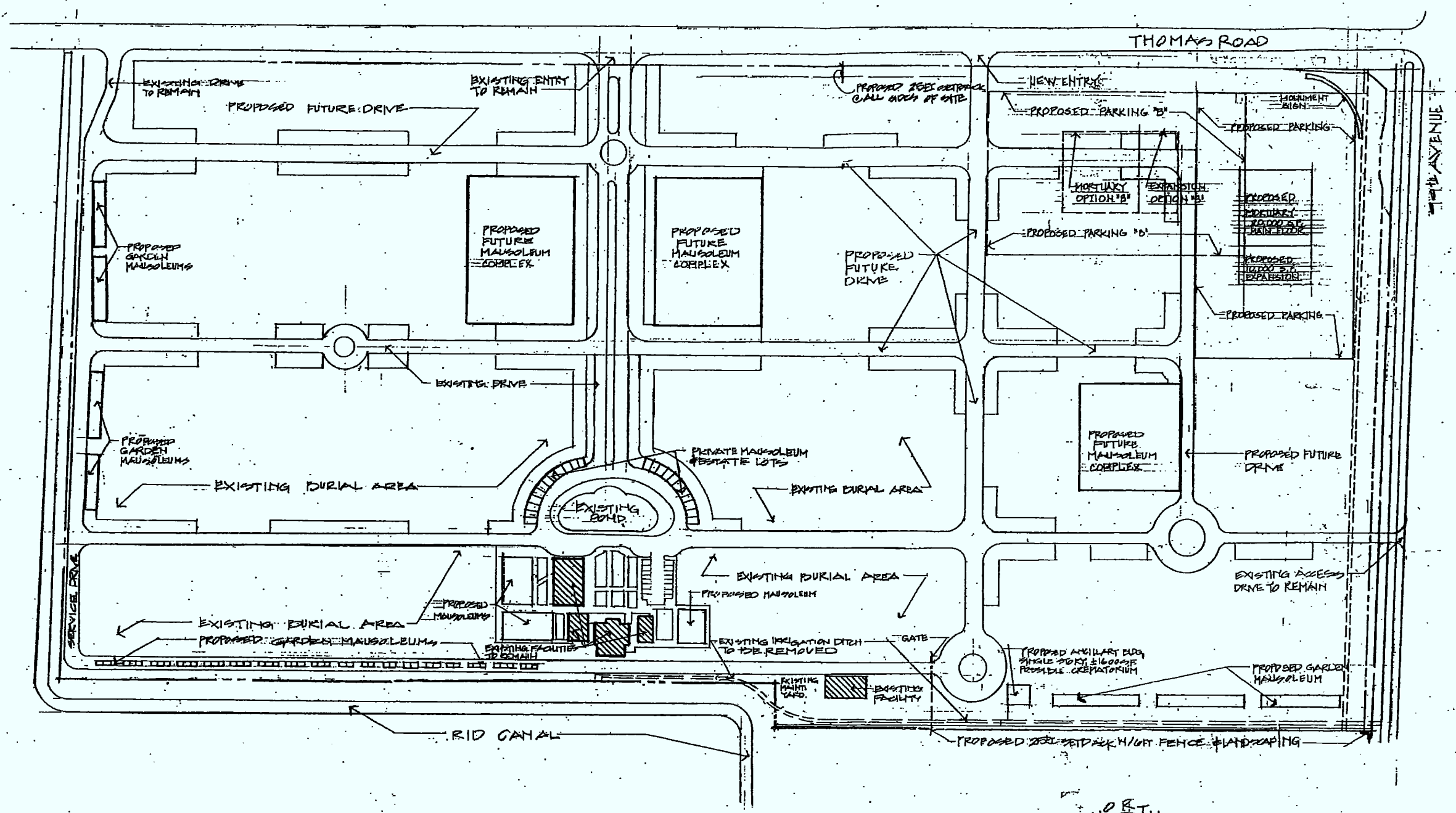
[Rule 313 §501.3]

b. Monthly records of the amount of chlorinated plastics incinerated.

c. Monitoring: The Permittee shall keep records of calibrations, temperatures, pressures, rates of flow, and any other operating conditions necessary to determine if the air pollution control equipment is functioning properly.

[Rule 313 §305]

Exhibit 8



Holy Cross Mortuary

SWC 99th Ave. & Thomas Rd., Avondale, AZ

Proposed Phasing Plan

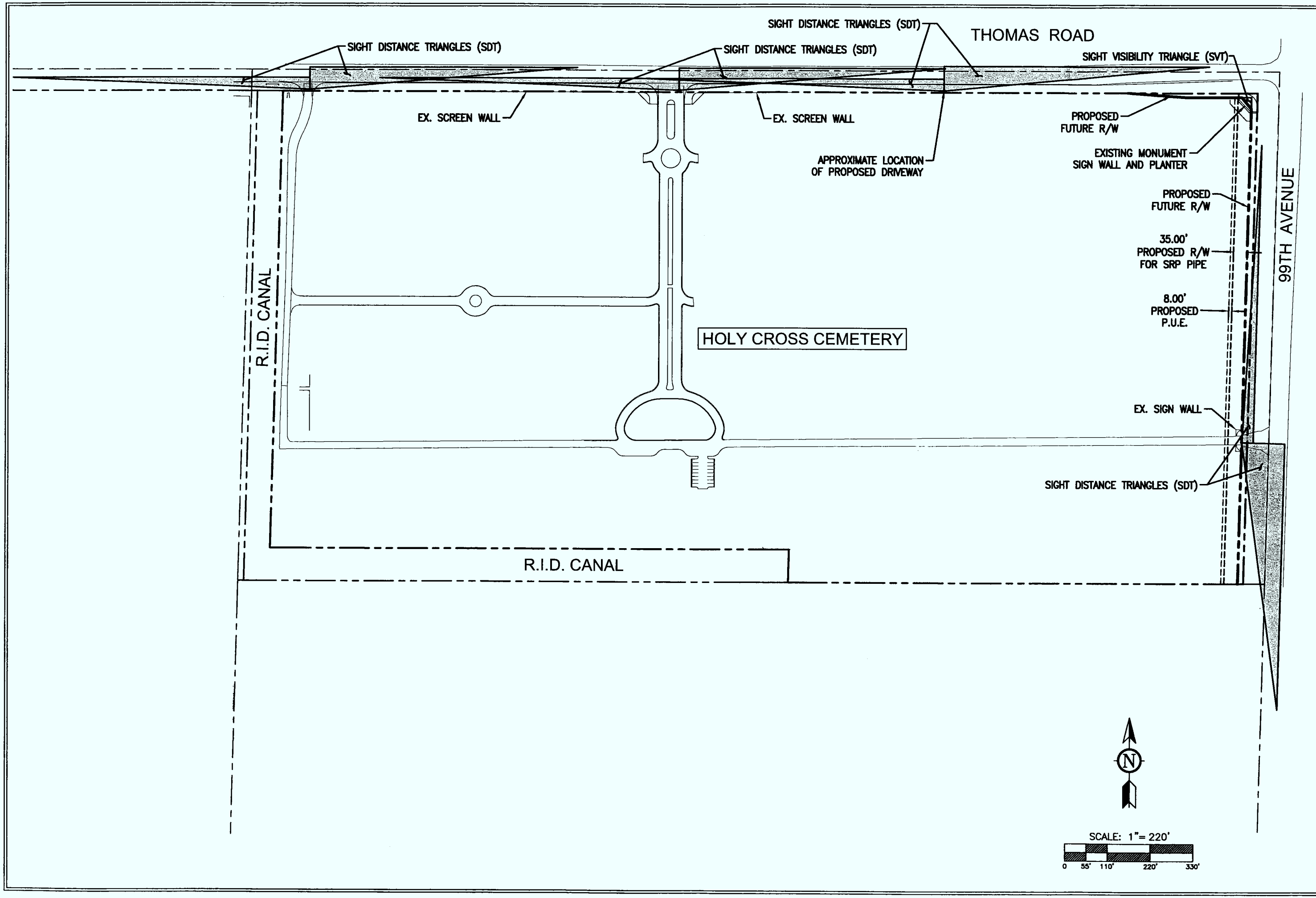
5101 East Monterey Way Phoenix, AZ 85008 602-957-0653

Vehr/Webb Studio

Project: 09-220
Date: 2 AUG 2010

Sheet 1 of 11

Exhibit 9



Development Engineering, Inc.
8504 E. Gary Road
Scottsdale, AZ 85260
Ph: (480) 393-3640
Fx: (480) 393-3639
dei INC
- Since 1982 -

HOLY CROSS CEMETERY

SWC 99TH AVENUE & THOMAS ROAD - AVONDALE, AZ

SIGHT DISTANCE AND VISIBILITY EXHIBIT

DATE: 09/22/10 | PROJ. NO: 09109 | SCALE: 1"=220' | CAD FILE: 09109_Exhibit 9 | DRAWN: CAP

EXHIBIT

9

Exhibit 10

THE CITY OF AVONDALE SUPPLEMENTARY REGULATIONS

Amended and Restated May 17, 2010

707 OUTDOOR LIGHTING

A. Purpose

These regulations are intended to establish procedures and standards that ensure minimal light trespass, reduce glare, and increase energy conservation in order to maintain the quality of Avondale's physical and aesthetic character as well as protect naturally dark skies for astronomical purposes. For the purposes of this section, "visible from contiguous real property" means any light levels that exceed 1-foot candle at the property line, measured at a point ten (10) feet above the ground.

B. Applicability

These regulations shall apply to all new outdoor lighting installed after June 4, 2002, for the following uses, excluding public streetlights:

1. Buildings and structures.

2. Outdoor recreational areas, unless specifically exempted by this Ordinance.

3. Parking lot lighting.

4. Landscape lighting.

5. Other outdoor lighting.

C. Permanent Lighting Standards

1. Small scale recreational lighting.

The following standards apply to the lighting of all outdoor recreational facilities except baseball, softball, soccer, volleyball or football fields; driving ranges; and outdoor arenas and amphitheaters:

a. The height of any light fixture or illumination source shall not exceed twenty-five (25) feet.

b. All lighting or illumination units or sources shall be fully shielded so that they are not visible from any contiguous lot or real property.

c. Lights or illuminating units shall not cause light to be cast upon any contiguous real property, either directly or through a reflecting device.

2. Large scale recreational lighting.

The following standards apply to the lighting of all outdoor recreational facilities, including those facility types exempted from the requirements above:

a. All metal halide lamps shall be filtered by glass, acrylic or translucent enclosures.

b. No lighting of one hundred fifty (150) watts or greater shall be used after 11:00 p.m. contiguous to any residential district or use.

c. Shields shall be provided to control external glare and minimize up-light and offsite light trespass so that light levels do not exceed one foot candle at the property line contiguous to residential districts or uses.

d. Lighting for special events after 11:00 pm shall be permitted pursuant to the terms of the Special Event approval from the City Clerk's Department for areas contiguous to any residential district or use.

3. Sign lighting.

External lighting of the face of signs, where permitted, shall be placed above the sign and shielded in a manner that the illumination source is not be visible from any contiguous lot or real property. All signage shall be constructed in conformance with Section 9 of this Zoning Ordinance.

4. Security, landscape, parking area, architectural, decorative, and other permanent lighting.

a. All outdoor lights, except for small scale recreational lighting and large scale recreational lighting (as set forth in subsections 707(c)(1) and (2) above) shall be fully shielded and directed downward at an angle no greater than forty-five (45) degrees above straight down, with the following exceptions:

1) Lighting for residential uses with an initial output of less than 1,000 lumens.

2) Decorative, landscape and architectural accent lighting, mounted no higher than eight (8) feet off the ground with an initial output of less than 2,000 lumens.

3) Pedestrian and trail lighting, mounted no higher than eight (8) feet off the ground with an initial output of less than 2,000 lumens.

b. Lights or illuminating units shall not cause light to be cast upon, or be visible from, any contiguous real property, either directly or through a reflecting device.

c. The top of building mounted light fixtures shall not be higher than the top of the parapet or roof, whichever is higher.

d. Any pole-mounted lighting shall have a maximum height of twenty-five (25) feet. In or within seventy-five (75) feet of any residential zoning district, any pole-mounted lighting shall not exceed sixteen (16) feet in height. Pole mounted lighting for multi-use trails and other pedestrian oriented spaces shall not exceed twelve (12) feet in height.

e. The installation of mercury vapor fixtures is prohibited.

f. Within parking lots, a uniformity ratio of not greater than 5:1 average-to-minimum is required.

D. Submittals Required

All development and re-development projects shall submit an outdoor lighting plan for the entire site specifying how the standards of this Section 707 are to be met. Submittals shall include a site plan indicating the locations and types of all fixtures on site, luminaire specifications, and a photometric plan indicating light levels across a property (measured in foot candles).

E. Temporary Lighting

1. The temporary operation of searchlights shall be allowed subject to approval of a temporary use permit and to the following conditions:

a. During the months of May through October, searchlights shall not be operated between the hours of 11:00 p.m. and 6:00 a.m. local time, Avondale, Arizona.

b. During the months of November through April, searchlights shall not be operated between the hours of 10:00 p.m. and 7:00 a.m. local time, Avondale, Arizona.

c. Searchlights shall not be operated on residentially zoned properties except for grand openings of new developments.

d. All searchlights shall be pointed skyward such that no direct light therefrom shall shine upon any building or structure.

2. The use of temporary lighting for non-residential uses is permitted pursuant to the terms of the Special Event approval from the City Clerk's Department. This shall not apply to seasonal decorations using low-wattage lamps (e.g. Christmas lights).

F. Nonstandard Lighting

Any lighting that does not meet the standards of this Section 707 shall require approval of a Conditional Use permit, which may be approved or denied by the City Council in its sole discretion.

[redacted]

Exhibit 11

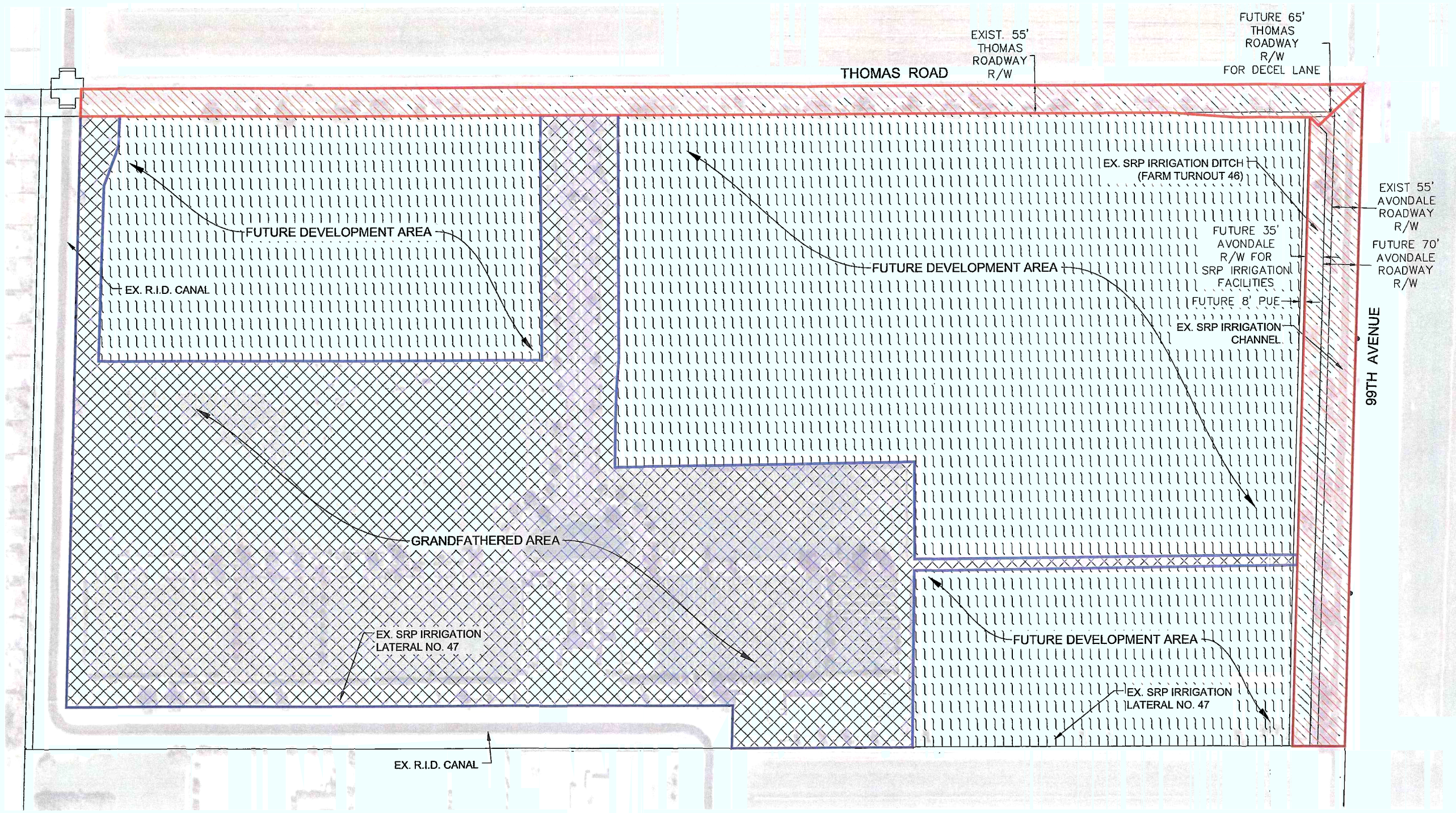
Exhibit 12

LISTING PENDING

Exhibit 13

Exhibit 14

HOLY CROSS CEMETERY
DEVELOPMENT AREA EXHIBIT
(STORMWATER RETENTION)



LEGEND

EXISTING/DEVELOPED AREA (GRANDFATHERED FOR PURPOSES OF STORMWATER RETENTION, NO RETENTION REQUIRED)	27.3 ACRES	FUTURE ROW FOR 99TH AVENUE & SRP PIPE (STORMWATER RETENTION REQUIRED)	3.0 ACRES
PROPOSED/FUTURE AREA (STORMWATER RETENTION REQUIRED)	41.4ACRES	ROW FOR THOMAS ROAD (STORMWATER RETENTION REQUIRED)	3 2 ACRES

N

SCALE: 1"= 100'

0 50' 100' 200' 300'

Development Engineering, Inc.
8504 E. Gary Road
Scottsdale, AZ 85260
Ph: (480) 393-3640
Fx. (480) 393-3639
de INC - Since 1982

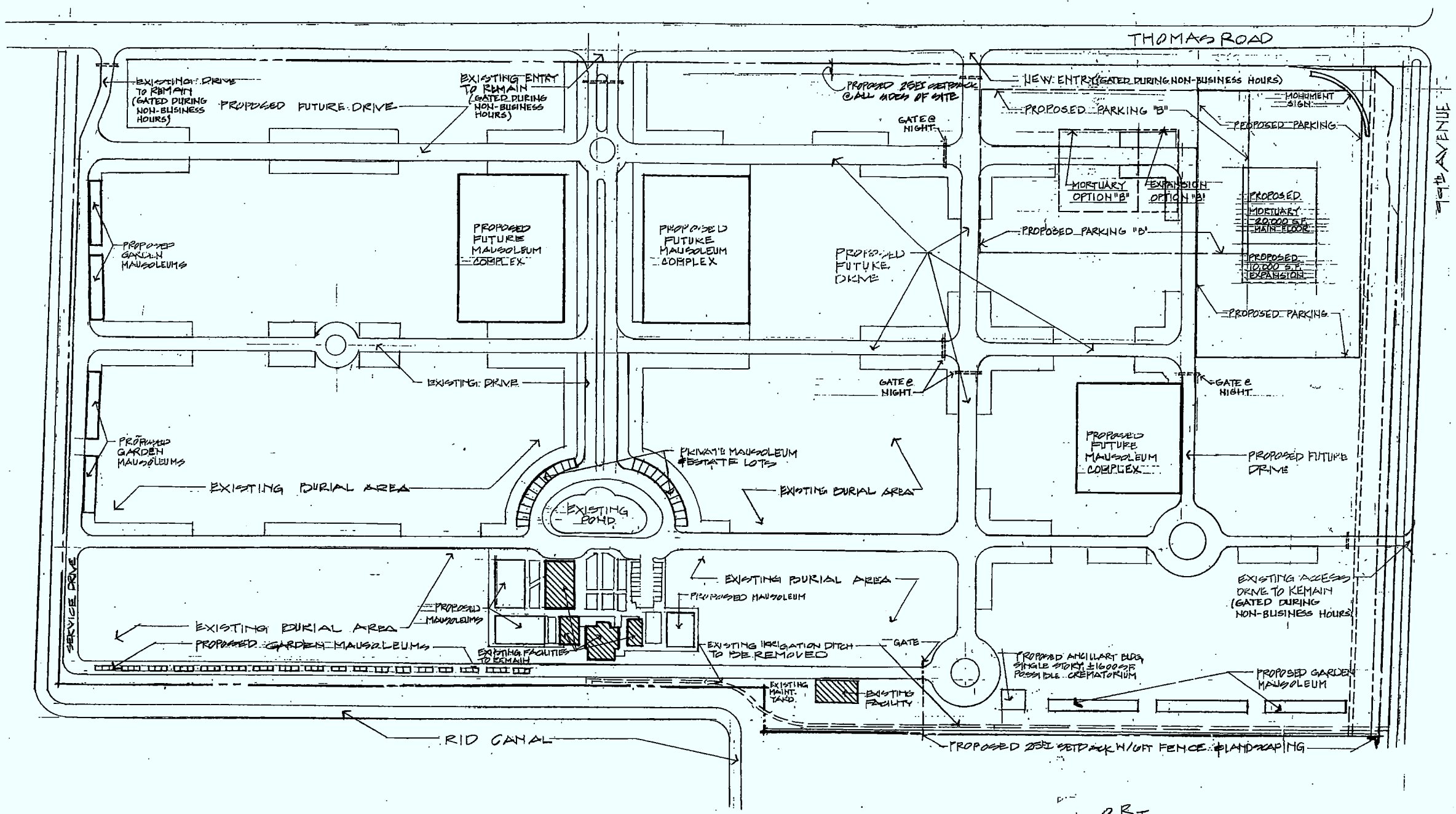
DEVELOPMENT AREA EXHIBIT
HOLY CROSS CEMETERY (STORMWATER RETENTION)
SWC OF 99TH AVE & THOMAS RD. - AVONDALE, AZ

DATE: 09/22/10 | PROJ. NO: 09109 | SCALE: N.T.S. | CAD FILE: DEVAREA.DWG | DRAWN: CSW

CATHOLIC CEMETERIES
DIOCESE OF PHOENIX
2033 N. 48TH STREET
PHOENIX, AZ 85008
(602) 267-1329

EXHIBIT
14

Exhibit 15



PRELIMARY CAMPUS PLAN

SCALE: 1" = 100'-0"

0 50 100 200 400

Holy Cross Mortuary

SWC 99th Ave. & Thomas Rd., Avondale, AZ

Preliminary Campus Plan

5101 East Monterey Way Phoenix, AZ 85008 602-957-0653

Vehr/Webb Studio

Project: 09-220
Date: 2 AUG 2010
20 SEPT. 2010

Sheet 9 of 11

Exhibit 16

106 - Site plan review.

A. Applicability. Prior to or concurrent with the application for a building permit for any building or use in any multifamily, commercial, or industrial district or a planned area development, a site plan shall be submitted for review and approval by the Planning Department. This requirement shall apply to:

1. All new buildings and uses of land constructed or developed after the effective date of this ordinance.
2. Existing properties when a change in the distinguishing characteristics or primary features of the use of a building or land occurs after the effective date of this ordinance. Such changes may include an increase in the size of the building or use or remodeling of an existing building. Criteria used to establish applicability may include, but is not limited to, an increase in parking requirements, a change in occupancy designation, a change in outside storage, or other similar factors.

B. Application. The site plan shall show the proposed location of buildings, parking areas, loading and refuse areas, landscaping, drives, dimensions of improvements, drainage, typical elevations of buildings, and all other improvements. The site plan shall be submitted in accordance with procedures and requirements established by the Planning Department. The department may request additional information concerning the property or waive items not necessary for the project.

C. Procedures.

1. The Planning Department shall refer the site plan to the site plan committee to determine compliance with this ordinance. The committee shall be comprised of the building official, city planner, public works director, fire chief and any other personnel designated by the City Manager. The city planner shall serve as secretary to the committee.
2. The site plan review committee shall have the authority to request modifications to the site plan and may approve conditions consistent with this ordinance deemed necessary to protect the public health, safety, and welfare. A building permit shall only be issued for the project after approval of the site plan by the committee.
3. All buildings, parking areas, landscaping and other improvements shall be constructed and installed in accordance with the approved site plan prior to issuance of a Certificate of Occupancy for the building or use.
4. An approved site plan shall be valid for a period of one (1) year.

D. Appeals. An appeal of the site plan review committee's decision may be made within fifteen (15) days of the said decision. The appeal shall be submitted to the Planning Commission and City Council at regularly scheduled meetings. The commission shall review the site plan and make recommendation to council to approve, approve with modifications, or deny the appeal. A majority vote of council shall be necessary to make a finding on the appeal.

E. Notification of site plan review. The applicant shall furnish the names and addresses and addressed, stamped envelopes for all property owners within five hundred (500) feet of the property. The development services director or authorized designee shall be responsible for mailing a notice of site plan review within five (5) days of the receipt of the application including the addressed, stamped envelopes, by the planning division to each owner of property situated wholly or partly within five hundred (500) feet of the property to which the site plan relates.

Excerpt of the Minutes of the regular Planning Commission meeting held December 16, 2010 at 6:30 p.m. in the Council Chambers.

COMMISSIONERS PRESENT
Angela Cotera, Vice Chair
Lisa Amos, Commissioner
David Scanlon, Commissioner
Sean Scibienski, Commissioner

COMMISSIONERS EXCUSED
David Iwanski, Chairman
Michael Long, Commissioner
Grace Carrillo, Commissioner

CITY STAFF PRESENT
Tracy Stevens, Planning Manager, Development Services Department
Ken Galica, Planner II, Development Services Department
Linda Herring, Development Services Representative
Chris Schmaltz, City Attorney

APPLICATION NO. PL-10-0063

APPLICANT: Mr. Ed Bull
Burch & Cracchiolo, P.A.
(602) 234-9913

PROPERTY OWNER: Mr. Gary Brown
Diocese of Phoenix Catholic Cemeteries & Mortuaries
(602) 267-1329

REQUEST: This is a public hearing before the Planning Commission to review and solicit public input on application PL-10-0063, a request by Mr. Ed Bull, Burch & Cracchiolo, P.A., for approval of the Special Use Overlay District to allow the existing Holy Cross Cemetery to expand easterly toward 99th Avenue onto the cemetery's adjacent vacant land. The existing cemetery that was founded 45 years ago encompasses approximately 25 acres; with expansion, the cemetery will cover approximately 69 acres and will continue to be built in phases over many years. The property is bounded on the east by 99th Avenue, on the north by Thomas Road, and on the south and west by the Roosevelt Irrigation District (RID) canal. The gross acreage to be rezoned is 75.1 acres. Staff Contact: Ken Galica

Ken Galica, Planner II, Development Services Department, stated application PL-10-0063 is a request to apply the Special Use Overlay District (SUD) to a 75.1 gross acre property located at the southwest corner of 99th Avenue and Thomas Road. The subject property is currently zoned Agricultural (AG), with C-2 (Community Commercial) zoning to the north, Planned Area Development (PAD) zoning to the west, and Maricopa County property zoned Rural-43 to the south of the cemetery. Existing land uses in the area include Los Arbolitos, a single family subdivision developed in Avondale, farming to the north, and Glenarm Farms. The General Plan

land use designation for the subject property is private/passive open space, which is set aside for a low intensity type of development.

Mr. Galica showed the Planning Commission a map depicting four existing/proposed entry and exit driveways on the site. He stated the internal roadway network consists of private driveways to allow people access to grave sites and mausoleums. The bulk of the roadway network currently exists, with the remainder to be completed in future phases of development. The City will require a setback from the property line to abutting right-of-way to ensure that work within the right-of-way does not interfere with grave sites. Several mausoleums, a chapel, and a maintenance facility currently exist on the property. Two large mausoleum complexes are proposed to abut the main entrance south of Thomas Road, with additional garden mausoleums around a pond feature and more mausoleums proposed in the core of the cemetery. A crematorium and three small garden mausoleums are proposed by the applicant, as well as a larger mausoleum on the east half of the property. Lastly, the applicant proposes to build a mortuary near the corner of 99th Avenue and Thomas Road; the SUD narrative shows two alternate locations for the mortuary and a final location will be selected at the master site plan stage. All burial areas are landscaped and include plant material.

Mr. Galica stated several off-site infrastructure improvements will have to be made. Thomas Road will require a deceleration and turn lane to allow for southbound turns onto 99th Avenue. 99th Avenue will require an additional traffic lane, curb, gutter, sidewalk, landscaping, street lighting, etc. The open SRP canal which runs north/south adjacent to 99th Avenue will be undergrounded. The applicant will be completing or funding the majority of these improvements; the City will be funding the remainder through CIP and other funding mechanisms already in place.

Mr. Galica said the requested use is a very low intensity type of use which does not present substantial traffic concerns. The crematorium will have to comply with all ADEQ (Arizona Department of Environmental Quality) and Maricopa County Department of Air Quality requirements. These requirements do not allow any sign of activity to escape (no noise, smoke, odor, dust). A setback of one foot for each foot of building height will be required where the property to the south is residential.

Mr. Galica stated there are four required findings to be met before the Planning Commission and City Council can approve a Special Use District Overlay. 1) The proposal will further the objectives of the General Plan and not adversely affect the character of the community. Staff believes the applicant's request furthers the objectives of the General Plan, as it is an open space type of use. The property meets the goals outlined in the North Avondale Specific Plan (NASP). This is an expansion of an existing cemetery, which should not adversely affect the character of the community. 2) The proposal is compatible with other existing and planned land uses in the immediate area. A cemetery is a good neighbor and is a low intensity use, especially when compared to commercial or industrial development. 3) The proposal will be adequately served by public infrastructure and services. With the required improvements, there will be adequate infrastructure and services for this property. Currently the property is not served by City water and sewer, but will be after the expansion, with exception of irrigation of the turf. Turf irrigation will be provided from a private well on the property and will not be a burden to the City's water system. 4) The proposal will not create excessive truck traffic or ongoing traffic congestion. With the exception of a few peak times such as holidays, the cemetery is a low-traffic-generating use.

Staff recommends approval with five standard stipulations primarily related to right-of-way dedication and construction of improvements.

Vice Chair Cotera invited questions.

Commissioner Scibienski stated he has been stopped in traffic by long processions of vehicles and asked where will the vehicles park. Mr. Galica stated cars can park along the side of the burial areas on the internal drive aisles. The mausoleums and mortuaries will have parking facilities in close proximity.

Commissioner Amos asked if the proposed parking lot at Thomas Road and 99th Avenue could be located more interior on the property so the parking will be screened from the street. Mr. Galica stated the plan before the Commission tonight is a conceptual development plan. The applicant will be required to submit a master site plan and exact configurations will be evaluated at that point. In regards to screening of parking areas, there will be a continuation of the whitewashed stucco and wrought iron six foot wall around the property which will help. Perimeter landscaping will serve as further screening as well as the landscaping that will be required in the parking lot.

Commissioner Scanlon referenced Condition of Approval No. 5. "Financial assurance for all work within the public right-of-way shall be paid prior to issuance of the first construction permit." Commissioner Scanlon stated that he believed an assurity bond is usually filed or submitted in that instance. Mr. Galica confirmed that an assurity bond typically the most common instrument, however payment can be taken in other forms.

Commissioner Scanlon referenced page 3 of the narrative, footnote 4, which covers crematorium compliance with Maricopa County and EPA (Environmental Protection Act) requirements. He asked if those requirements would be adhered to as they are in effect at the time the permit is issued. Mr. Galica stated Arizona is a non-compliance state as far as air quality, but in many instances Arizona has stricter standards than the federal government as far as eliminating particulate matter discharge into the air. The federal, state and county standards are very similar. Essentially the goal is that these types of facilities are virtually indistinguishable from any other use.

Vice Chair Cotera asked if one location is chosen for the mortuary, will the other location be used for burial space. Mr. Galica stated if the applicant chooses the site closer to 99th Avenue for the mortuary, the alternate building site not chosen will be used for burial space.

Vice Chair Cotera stated the further the building is set back from 99th Avenue the better, as this is a gateway into Avondale. She is concerned the nice open space will be blocked by the building. Mr. Galica stated the next step would be the master site planning, which will come back to the Planning Commission for approval. The conceptual plan shows the general vicinity of the buildings and Staff can tweak the buildings to make sure the views are as far as possible from the rights-of-way.

Vice Chair Cotera asked if there had been discussion on using reclaimed water for irrigation of the turf. Mr. Galica stated Staff had initially discussed connecting the project to the City municipal water system with the applicant. After additional study, it made better sense for the applicant to use the well on the property for irrigation purposes. Staff has not addressed using reclaimed water with the applicant because of the well arrangements.

Vice Chair Cotera stated a lot of improvements will be made to 99th Avenue and she is surprised more improvements are not required for Thomas Road, which is only one lane in each direction adjacent to the cemetery. Vice Chair Cotera stated right now the right-of-way is consistent with the right-of-way that is between Glenarm Farms and Los Arbolitos because currently that road is four lanes and the road in front of the cemetery is a two lane road. Mr. Galica stated the future improvements to Thomas Road will come from the property to the north so that they line up. When the northern property develops, the road will turn into a four lane road, but not to the extent of the City's standard 130 foot arterial. Mr. Galica stated that Thomas Road is built out as a modified arterial section. It is not as wide as a standard arterial because there is no planned river crossing and less traffic is anticipated for Thomas Road because the distance is only approximately two miles before the dead end at the Agua Fria River.

Vice Chair Cotera asked if the southern boundary had already been improved. Mr. Galica explained that the cemetery had installed their improvements and widened the half street when they improved a portion of the cemetery in 1993/1994. The only requirement remaining is to install a turn lane to southbound 99th Avenue.

Vice Chair Cotera asked if there is a curb or sidewalk. Mr. Galica stated there is a curb, a sidewalk, landscaping, street lights, etc.

Commissioner Amos noted that the purposed mausoleum at 99th Avenue and Thomas Road will be four stories in height. She asked if other conditions of the North Avondale Specific Plan (NASP) are met, will the applicant be allowed a building up to four stories in height. Mr. Galica stated the applicant will be allowed a four story building if the conditions of the NASP are met. However, he believes the four story buildings are planned for the interior of the site.

Commissioner Amos asked if once the applicant submits the master site plan, the City cannot stop the applicant from erecting four story buildings. Mr. Galica confirmed that the zoning allows for buildings 45 feet in height, which is a given if the application meets the conditions for adequate public transit facilities, open space, pedestrian connections, architecture, etc.

Commissioner Amos opined that four story buildings are not a great idea for a corner. Mr. Galica asked if the concern was the proximity of 45 foot buildings to the corner. Commissioner Amos stated her concern was maintaining the open space on entry to the area. Four story buildings that are more internal are more aesthetically pleasing than buildings right on the corner. Mr. Galica pointed out that this is an approximate 75 acre site and the distance between the buildings and Thomas Road and 99th Avenue is probably more than it appears on the conceptual plans. He would estimate that the setback is over 50 feet. He reminded the Commission that only one building will be added. He does not anticipate 45 feet in height for these types of buildings, as mortuaries typically are not more than one or two stories in height.

Vice Chair Cotera noted that signage for the cemetery is allowed to be slightly larger given the pastoral nature of the majority of the site and that electronic signs are permitted. She thinks electronic signs at a cemetery will be out of character and it is hard to keep electronic signs elegant. Mr. Galica stated that Staff will ensure the signage is tastefully done. Electronic message signs are allowed for churches. The signage will be used to announce Veterans Day remembrances and other special events. He does not believe the signage will be garish or tacky.

Vice Chair Cotera asked if the cemetery is run by the Catholic Diocese. Mr. Galica stated he believes a subsidiary of the Diocese runs the cemetery. Vice Chair Cotera stated the Catholic Church has built very beautiful structures and she hopes this will be something nice.

Commissioner Scanlon asked what type of message board would be allowed. Mr. Galica stated the applicant is allowed an electronic message sign that will be prohibited from having certain effects, such as flashing or blinking. It will most likely be a message sign similar to what you see for churches and schools.

Vice Chair Cotera invited the applicant to address the Planning Commission.

Ed Bull, Burch & Cracchiolo, P.A., 702 E. Osborn, stated they are representing Catholic Cemeteries & Mortuaries. They agree with Staff's recommendation for approval and accept the conditions of approval. He thinks the Staff Report is very complete and Mr. Galica did a very good job of addressing the Commissioners' questions. He clarified that whichever mortuary building is built at the northeast corner, it will be a maximum of two stories in height. They may need buildings up to 45 feet in height at other locations on the property for mausoleums.

Vice Chair Cotera invited further questions for the applicant.

Commissioner Scibienski stated he likes the way the plan looks and thinks the cemetery extension will be a great addition to the City.

Vice Chair Cotera asked what is the timeframe for the development. Mr. Bull stated if they get approval from the Planning Commission tonight and from the City Council in early January, Gary Brown and others from the Diocese of Phoenix Catholic Cemeteries & Mortuaries intend to get going right away on the next level of design with respect to the site plan. They anticipate breaking ground on the mortuary building in approximately two years.

Vice Chair Cotera stated it will be nice to have green space on that corner and asked if the green space would be developed as the land is put into use. Mr. Bull stated when they decide on the location of the building, it will have its own parking and landscaping associated with it. There will be additional streetscape landscaping provided in the location along Thomas Road once the right turn/deceleration lane and the fencing is installed.

Vice Chair Cotera asked when they would start filling up the burial space. Mr. Bull replied they will landscape in conjunction with burials.

Vice Chair Cotera opened the public hearing.

Nathan Cotrel, 2763 N. 103rd Avenue, Avondale, AZ, stated he was present to make sure that Staff recommends approval because the cemetery is the best neighbor to have. His fear is that if the area is not rezoned now, it will later be rezoned C-2 (Community Commercial) and they will end up with a shopping mall. The existing building, which is close to 40 feet in height, does not look tall from where they live.

Vice Chair Cotera invited further questions, and hearing none, closed the public hearing.

Vice Chair Cotera called for a motion.

Commissioner Scibienski **MOVED** that the Planning Commission accept the findings and recommended approval of application PL-10-0063, a request to establish the Special Use Overlay District on the subject property, subject to the five Staff-recommended conditions of approval. Commissioner Scanlon **SECONDED** the motion.

1. The development shall be in substantial conformance with the Holy Cross Cemetery Special Use Overlay Narrative date stamped December 16, 2010, except as modified by these stipulations.

2. Unless otherwise specified within the SUD Narrative, development shall be in accordance with the City of Avondale General Engineering Requirements Manual and City of Avondale Supplement to MAG Uniform Standard Specifications and Details.

3. Dedication of right-of-way along 99th Avenue and Thomas Road, as specified and graphically depicted within the SUD Narrative, shall be made prior to permit issuance for any part of the project.

4. All half-street improvements that are specified within the SUD Narrative as being the developer's responsibility shall be completed with the first phase of development. The City Engineer may accept a financial contribution in lieu of completing the improvements if circumstances are such that there will be a benefit to the City from completing the improvements as part of a larger improvement project for 99th Avenue.

5. Financial assurance for all work within the public right-of-way shall be paid prior to issuance of the first construction permit.

Vice Chair Cotera opened the floor to discussion. There was no further discussion. Vice Chair Cotera called for a vote.

ROLL CALL VOTE

Chairperson Iwanski	Excused
Vice Chair Cotera	Aye
Commissioner Long	Excused
Commissioner Amos	Aye
Commissioner Carrillo	Excused
Commissioner Scanlon	Aye
Commissioner Scibienski	Aye

The motion passed 4 to 0.

Vice Chair Cotera thanked the applicant for bringing the project forward.

ORDINANCE NO. 1439-111

AN ORDINANCE OF THE COUNCIL OF THE CITY OF AVONDALE, ARIZONA, AMENDING THE OFFICIAL ZONING ATLAS OF THE CITY OF AVONDALE FOR APPROXIMATELY 75.1 ACRES LOCATED AT THE SOUTHWEST CORNER OF 99TH AVENUE AND THOMAS ROAD AS SHOWN IN FILENAME PL-10-0063, ESTABLISHING THE SPECIAL USE DISTRICT (SUD) OVERLAY ON SUCH PROPERTY AND IMPOSING CONDITIONS UPON SUCH CHANGE.

WHEREAS, the Council of the City of Avondale (the "City Council") desires to amend the City of Avondale Zoning Atlas (the "Zoning Atlas") pursuant to ARIZ. REV. STAT. § 9-462.04; and

WHEREAS, all due and proper notices of public hearings on the intended amendment held before the City of Avondale Planning and Zoning Commission (the "Commission") and the City Council were given in the time, form, substance and manner provided by ARIZ. REV. STAT. § 9-462.04; and

WHEREAS, the Commission held a public hearing on Thursday, December 16, 2010, on the amendment to the Zoning Atlas after which the Commission recommended approval; and

WHEREAS, the City Council held a public hearing regarding the amendment to the Zoning Atlas on January 3, 2011.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AVONDALE as follows:

SECTION 1. The recitals above are hereby incorporated as if fully set forth herein.

SECTION 2. That ± 75.1 acres of real property generally located at the southwest corner of 99th Avenue and Thomas Road as shown in filename PL-10-0063, as more particularly described and depicted in Exhibit A, attached hereto and incorporated herein by reference (the "Property"), are hereby applied the Special Use District (SUD) zoning overlay, subject to the following conditions:

1. The development shall be in substantial conformance with the Holy Cross Cemetery Special Use Overlay Narrative date stamped December 16, 2010 (the "SUD Narrative"), except as modified by these stipulations.

2. Unless otherwise specified within the SUD Narrative, development shall be in accordance with the City of Avondale General Engineering Requirements Manual and City of Avondale Supplement to MAG Uniform Standard Specifications and Details.

3. Dedication of real property to be used as right-of-way along 99th Avenue and Thomas Road, as specified and graphically depicted within the SUD Narrative, shall be made prior to permit issuance for any part of the project.

4. All half-street improvements that are specified within the SUD narrative as being the developer's responsibility shall be completed with the first phase of development. The City Engineer may accept a financial contribution in lieu of completing the improvements if circumstances are such that there will be a benefit to the City from completing the improvements as part of a larger improvement project for 99th Avenue.

5. Financial assurance for all work within the public right-of-way shall be paid prior to issuance of the first construction permit.

SECTION 3. If any provision of this Ordinance is for any reason held by any court of competent jurisdiction to be unenforceable, such provision or portion hereof shall be deemed separate, distinct and independent of all other provisions and such holding shall not affect the validity of the remaining portions of this Ordinance.

SECTION 4. The Mayor, the City Manager, the City Clerk and the City Attorney are hereby authorized and directed to take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Council of the City of Avondale, January 3, 2011.

_____
Marie Rogers Lopez, Mayor

ATTEST:

_____
Carmen Martinez, City Clerk

APPROVED:

_____
Andrew J. McGuire, City Attorney

EXHIBIT A
TO
ORDINANCE NO. 1439-111

[Legal Description and Map]

See following pages.

development engineering
INCORPORATED

LEGAL DESCRIPTION

HOLY CROSS CEMETERY
AVONDALE, ARIZONA

The north half of the northeast quarter of Section 32, Township 2 North, Range 1 East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona,

Except the west 80.00 feet of the north half of the northeast quarter of said Section 32; and

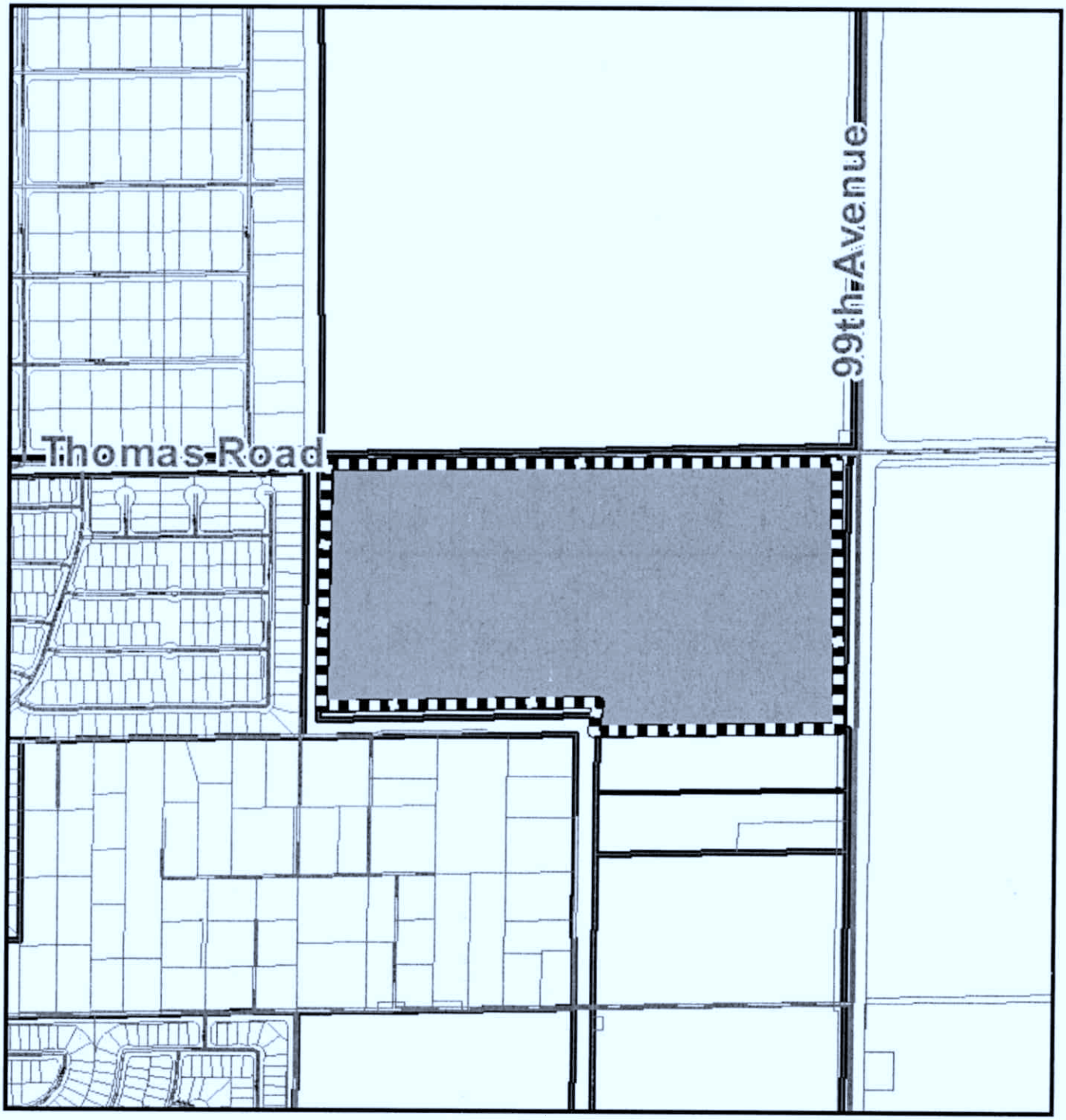
Except the south 85.00 feet of the northwest quarter of the northeast quarter of said Section 32; and

Except the west 90.00 feet of the south 85.00 feet of the northeast quarter of the northeast quarter of said Section 32.

Said parcel containing approximately 75.1 gross acres.

REGISTERED LAND SURVEYOR
CERTIFICATE NO.
16913
PETER
VESECKY
Date Signed 12/8/10
ARIZONA, U.S.A.
Expires 09/30/2012

5820 E. Kings Avenue, Scottsdale, AZ 85254 | Phone 480-393-3640 | Fax 480-393-3839 | www.devenginc.com



Application PL-10-0063

Avondale

Subject Property

CITY COUNCIL REPORT

SUBJECT:
EXECUTIVE SESSION

MEETING DATE:
January 3, 2011

TO: Mayor and Council

FROM: Andrew McGuire, City Attorney (602)257-7664

THROUGH: Charlie McClendon, City Manager

PURPOSE:

The Council may hold an executive session pursuant to ARIZ. REV. STAT. § 38-431.03 (A)(4) for discussion or consultation with the City's Attorney in order to consider its position and instruct the City Attorney regarding the Council's position regarding (a) the *Hurst v.City of Avondale* matter and (b) a potential Economic Development Agreement.

ATTACHMENTS:

Click to download

No Attachments Available