

# PRESCOTT CITY COUNCIL SPECIAL MEETING A G E N D A

**PRESCOTT CITY COUNCIL  
SPECIAL MEETING  
TUESDAY, FEBRUARY 15, 2011  
3:00 P.M.**

**City Hall Council Chambers  
201 South Cortez  
Prescott, Arizona  
(928) 777-1100**

The following Agenda will be considered by the Prescott City Council at its **Special Meeting** pursuant to the Prescott City Charter, Article II, Section 13. Notice of this meeting is given pursuant to Arizona Revised Statutes, Section 38-431.02.

- ◆ **CALL TO ORDER**
- ◆ **PLEDGE OF ALLEGIANCE**      Mayor Kuykendall
- ◆ **ROLL CALL:**

MAYOR AND CITY COUNCIL:

Mayor Kuykendall	
Councilman Blair	Councilwoman Linn
Councilman Hanna	Councilwoman Lopas
Councilman Lamerson	Councilwoman Suttles

1. **The Shops at Prescott Gateway development:**
  - A. Adoption of Resolution No. 4065-1135 – A resolution of the Mayor and Council of the City of Prescott, Yavapai County, Arizona authorizing the City of Prescott to enter into a Development Agreement with ERH Acquisitions, LLC., for the development of a commercial retail center located at the southwest corner of Highway 69 and Lee Boulevard; and authorizing the Mayor and staff to take any and all steps necessary to accomplish the above.
  - B. Adoption of Ordinance No. 4779-1130 – An ordinance of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, authorizing the purchase of real property located at the southwest corner of Highway 69 and Lee Boulevard; and authorizing the Mayor and staff to execute any and all documents to effectuate said purchase.

- C. Adoption of Ordinance No. 4780-1131 – An ordinance of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, authorizing the leasing of real property located at the southwest corner of Highway 69 and Lee Boulevard and authorizing potential sale of such property in conjunction with a Lease Purchase Option and authorizing the Mayor and staff to execute any and all documents to effectuate said purchase.
- D. Adoption of Resolution No. 4066-1136 – A resolution of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, approving the transfer of unencumbered appropriations from the Water Fund to the City Manager Department in the General Fund.
- E. Approval of Site Plan SI11-001 for The Shops at Prescott Gateway.
- F. Approval of Comprehensive Sign Plan CC11-002, for The Shops at Prescott Gateway, dated 2-2-11

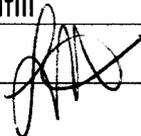
2. Adjournment.

CERTIFICATION OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the foregoing notice was duly posted at Prescott City Hall on \_\_\_\_\_ at \_  
\_\_\_\_\_.m. in accordance with the statement filed by the Prescott City Council with the City Clerk.

\_\_\_\_\_  
Elizabeth A. Burke, City Clerk

<b>COUNCIL AGENDA MEMO – February 15, 2011, Special Meeting</b>
<b>DEPARTMENT:</b> Community Development
<b>AGENDA ITEM:</b> Development Agreement, Property Purchase Agreement, Property Lease Agreement, Transfer of Appropriation, SI11-001 Site Plan approval and CC11-001 Comprehensive Sign Plan for the Shops at Prescott Gateway. Located at the SW corner of Lee Blvd. and SR69. ZONING: BR Owner: VHC, LLC; Agent: Brett Heron / ERH Acquisitions, LLC

<b>Approved By:</b>	<b>Date:</b>
<b>Department Head:</b> Tom Guice	
<b>Finance Director:</b> Mark Woodfill	
<b>City Manager:</b> Laurie Hadley 	

**BACKGROUND:**

The Shops at Prescott Gateway is a proposed retail shopping center consisting of 6 structures totaling 39,007 square feet with 249 parking spaces. Phase I of The Shops includes a 12,000 square foot Trader Joe's store and an 8,000 square foot adjacent retail space. The project is described as a specialty grocer with retail and restaurant uses. Excess parking would allow for 2 or 3 restaurants in the pad buildings. The subject property has over 1800 feet of street frontage. The proposed shopping center location is part of the Prescott Gateway Mall, but has since been sold to a private party. A Development Agreement exists for these properties, DA-98-167 which requires that prior to any building permit being issued the Council must approve final site plans. Other than a proposed Comprehensive Sign Plan (attached) the project meets all Land Development Code requirements, with no waivers or variances requested.

**Development Agreement and Property Purchase Agreement**

In FY12 the City is facing an estimated \$1,035,000 budget shortfall which could be further increased due to pending state legislation. Through prospective agreements with the developer, ERH Acquisitions, LLC of Phoenix, the City has a business opportunity to enable construction of the shopping center that will house a Trader Joe's store, generating sales tax to help offset the shortfall.

The development agreement contains a real estate purchase agreement for the subject 7.1 acre property with a purchase price of \$2,000,000. The Independent Appraised Value of this property is \$2,020,000. The City is responsible for limited site improvements to the SR 69 access. The developer will construct Phase 1 at an estimated cost of \$4 million, and the remaining 4 buildings totaling 19,007 sq. ft. of retail/ restaurant space as the economy recovers. The specific responsibilities of the city and developer are shown in the table below.

**AGENDA ITEM: Shops at Prescott Gateway**

**Development agreement specific activities:**

<b>City</b>	<b>Developer</b>
Purchase the 7.1 acre parcel.	Lease the property from the City.
Commence site improvements by 5/1/11 on Highway 69 access.	Construct 20,000 SF space with infrastructure.
Supply water and sewer service to site.	Pay water and sewer service fees.
Process permits to enable 4/1/11 on site start date.	Commence on-site construction by 4/1/11.
Warrants the site has appropriate zoning.	Design and construct Trader Joe's space.
Approve site plan with agreement.	Break ground within six months of lease.
	Deliver shell space to Trader Joe's in 12 months or less.
	Responsible for maintenance of entire site.
	Make contract opportunities available to locals.
	Night work will be allowed.
	Pay all development and impact fees.

There are funds available for this strategic investment in the Capital Improvement Fund, designated for economic development or improvement of city owned infrastructure. However, appropriation authority will need to be transferred to allow for these funds to be committed in Fiscal Year 2011. The City will be paying less than appraised value to purchase the site. The estimated total municipal cost of \$2,200,000 consists of the purchase price, closing costs, and the cost of site improvements. This investment will be recouped in the following ways:

- Lease payments from developer as specified returns the entire municipal cost in about 14 years, and if not purchased by developer, the city still owns the asset.
- Developer may purchase all or part of property during first 5 years that equals total municipal cost; then in Years 6-10 the purchase price increases by 4%; thereafter, city receives 4% more per year on its investment.
- Lease payments and purchase price escalate to encourage early buyout/repayment of taxpayer investment.

The City retains all real and personal property taxes, all sales and privilege taxes, and benefits of increased jobs and resulting economic activity due to the location of the first and only Trader Joe's store in Northern Arizona within the Prescott City limits.

**Property Lease Agreement**

The developer will pay rent to the City at \$132,000 annually the first 5 years, \$154,000 annually in Years 6 through 10, and \$176,000 annually after Year 10. Sales tax from activity on site for Phase 1 is estimated at \$350,000 to \$450,000 per year. (The estimated annual return from sales tax alone will fund 7 lane-miles of pavement preservation per year plus 3 existing Firefighters for a year, or 3 existing Police Officers for a year, or 15% of the Library's annual budget.) There will be additional tax generated from increased traffic to surrounding businesses. The developer can buy out the City at

**AGENDA ITEM: Shops at Prescott Gateway**

the City's full cost in the project: for the first 5 years, the purchase price shall equal the total municipal cost, then increases by 4% in Years 6-10, and increases 4% per year thereafter.

**Ground Lease Agreement commitments:**

<b>City (Lessor)</b>	<b>Developer (Lessee)</b>
Lease the property to Developer for 45-year term, commencing with issuance of the Certificate of Occupancy for Trader Joe's.	Pay all lease payments on time. After store completion date, pay one-twelfth of City costs multiplied by 6% for the first 60 months (\$132,000). Pay one-twelfth of City costs multiplied by 7% for the next 60 months (\$154,000). Pay one-twelfth of City costs multiplied by 8% for the balance of lease (\$176,000).
	Pays all City fees for construction.
If Lessee fails to construct in 18 months, agreement can be terminated.	Install and maintain any connections between City roads and premises.
	Obtain and maintain required insurance.
	Pay sales/privilege taxes on rents.
	Pay any real property taxes.
	Pay any personal property taxes.
	Pay for and maintain all utilities.
Lessee has option to purchase.	May exercise option any time during term.
For first five years, purchase price shall equal total municipal cost. Purchase price increases by 4% for the period six to ten years,	May purchase all or part of the premises.
After ten years, purchase price escalates by 4% per year.	

**Site Plan Approval:**

The applicant has submitted a site plan as a Planned Area Development (PAD) in accordance with the Land Development Code, to allow for the zero setback between Major "A" and Shops "A". The site plan retains existing driveways featuring full movement access from Lee Blvd. and a right-in only access from SR69. There is a substantial slope along the western boundary of the property, above which is the mall parking area. A minimal retaining wall is proposed west of Pad "A".

**Comprehensive Sign Plan:**

To maximize visibility on this busy intersection, the applicant is requesting three (3) monument signs. The primary monument "Sign Type A", located at the SW corner of SR69 and Lee Blvd., is proposed to be approximately 230 square feet in area and 20 feet in height. The two (2) secondary signs "Sign Type B", located at each of the access points, are proposed to be approximately 70 square feet in area and 12 feet in height. The applicant is asking that there be no setback requirement for these signs from adjacent right-of-way.

The applicant proposes the placement of wall signage at a maximum of 1.5 square feet of signage per 1 linear foot of building frontage up to 300 square feet on each street frontage.

## **AGENDA ITEM: Shops at Prescott Gateway**

Given the two (2) street frontages and proposed linear wall frontage, proposed wall sign area under the proposed plan could be the full 600 square feet in total.

Traffic moving in the East direction will have two (2) opportunities to move to the right turn lane to enter the shopping center. Traffic heading West will have a single opportunity to access the site by turning onto South Lee Blvd. The location of the primary access off S. Lee Blvd. supports the developer's request for a third monument sign for the project.

The proposed zero sign setback is appropriate due to the 240' ROW width along SR69 and 90' to 185' ROW width along Lee Blvd. In addition, there is approximately 70' of open area from each monument sign to SR 69 pavement. The proposed Shops at Prescott Gateway is located in the Commercial Corridor Overlay district which requires that all building sign lighting be turned off one hour after closing or by 10:00 pm, whichever is later. Monument signage may remain on.

### **PLANNING COMMISSION REVIEW AND RECOMMENDATION:**

The Commission reviewed the proposed site plan at its meeting on January 27, 2011, which included a discussion regarding traffic. City Traffic Engineer Ian Mattingly explained that a recent traffic analysis had been performed in anticipation of this development and that recommendations from that analysis are already in place. The discussion concluded with a unanimous vote to forward a positive recommendation to Council, with the conditions as provided in the Suggested Actions, below.

The Commission will be considering the Comprehensive Sign Plan at their Feb. 10<sup>th</sup> meeting. Their recommendation will be presented to Council on Feb. 15<sup>th</sup>.

### **NEIGHBORHOOD RESPONSE:**

- A neighborhood area meeting occurred on Monday January 24, 2011. Approximately 60 participants from the Ranch at Prescott and Yavapai Hills subdivisions discussed the site plan, possible tenants of the project and increased traffic issues. The overall tone of the meeting was accepting of retail at this location with concerns over increased traffic at Lee Blvd.
- Phone inquiries have been received requesting information regarding possible tenants. None of the callers have indicated any concerns and several callers indicated support.
- E-mail messages have also been received.
- Upon the public becoming aware of Trader Joe's as the primary tenant, the overall response is support of the project.

### **FINDINGS:**

The Site Plan conforms to all applicable codes and requirements. The applicant is developing the shopping center using existing zoning and is not requesting any waivers for the design. Lot coverage is 12.6%. Staff has reviewed the site plan and no issues have been identified.

**AGENDA ITEM: Shops at Prescott Gateway**

**Attachments:**

Vicinity and Zoning Map  
Applicant Narrative  
Development Agreement with Exhibits & Resolution  
Property Purchase Agreement with Exhibits & Ordinance  
Property Lease Agreement with Exhibits & Resolution  
Site Plan  
Comprehensive Sign Plan Elevations  
Presentation made to Council February 8, 2011

**SUGGESTED ACTIONS:**

- (1) MOVE** to adopt Resolution No. 4065-1135. (Development Agreement)
- (2) MOVE** to adopt Ordinance No. 4779-1130. (Assignment/Property Purchase)
- (3) MOVE** to adopt Ordinance No. 4780-1131. (Lease Agreement)
- (4) MOVE** to adopt Resolution No. 4066-1136. (Transfer Appropriation)
- (5) MOVE** to approve Site Plan SI11-001 for The Shops at Prescott Gateway with the following conditions:
  - a. Development shall be in substantial conformance to the Site Plan dated 1-8-11 and cited as Exhibit "A"
  - b. Development shall be in substantial conformance to the Landscape Plan dated 1-14-11 and cited as Exhibit "B"
- (6) MOVE** to approve Comprehensive Sign Plan CC11-001 for The Shops at Prescott Gateway, dated 2-2-11.



# The Shops at Prescott Gateway

## Economic Development Project

City Council Presentation - February 8, 2011



## **Presentation**

- I. Introduction**
- II. Financial Benefit**
- III. Site Plan and Project Details**
- IV. Development Agreement and Other Documents**
- V. Summary and Schedule Forward**



## II. Financial Benefit

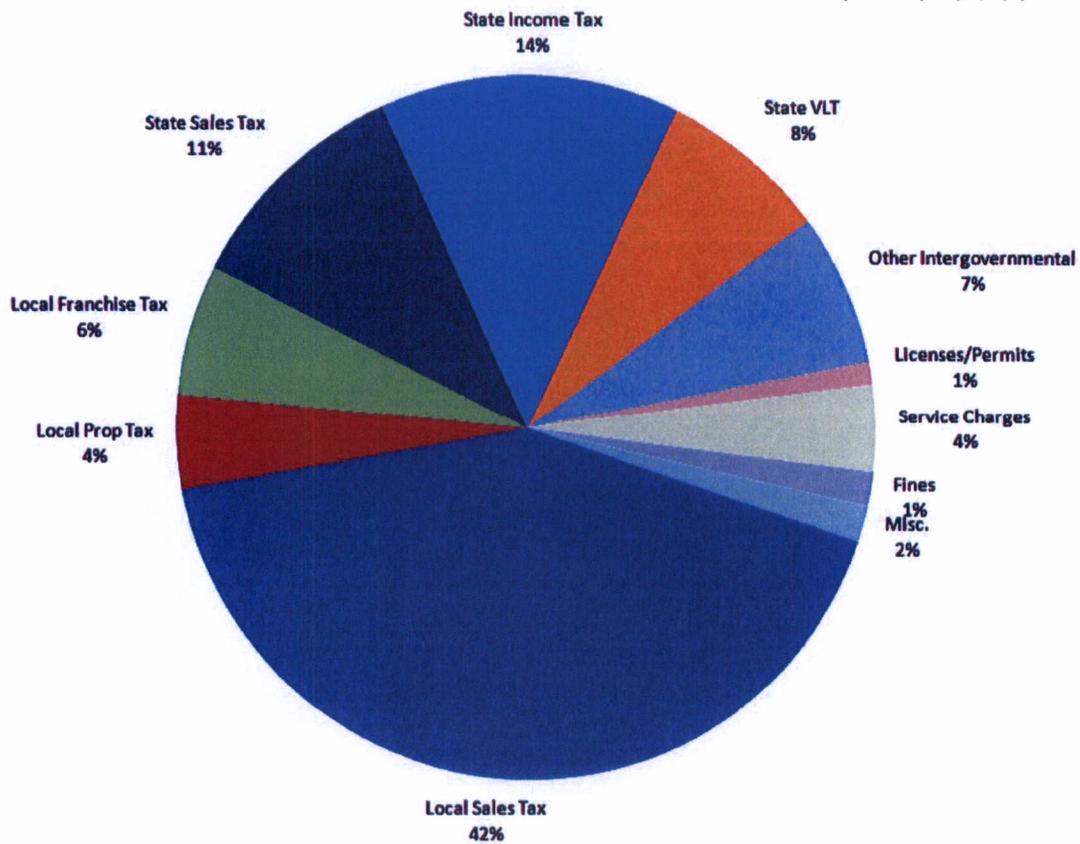


**Why should Prescott residents be interested in this project?**

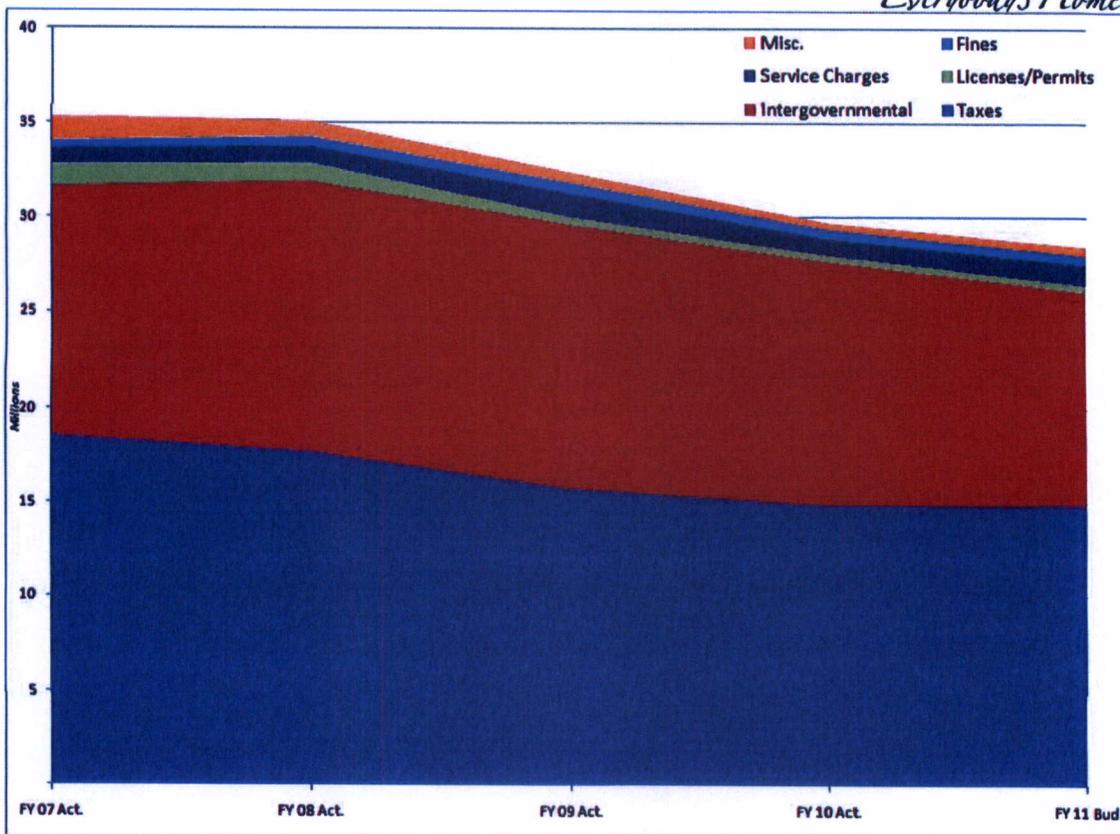
**To answer this question we'll look at:**

- 1. The limited financial means available to assure adequate delivery of core public services by the City, particularly within the General Fund where the majority of expenditures are for public safety (police and fire).**
- 2. The extraordinary financial benefit that a particular retailer, Trader Joe's, will bring to Prescott in spite of the challenging economic times.**

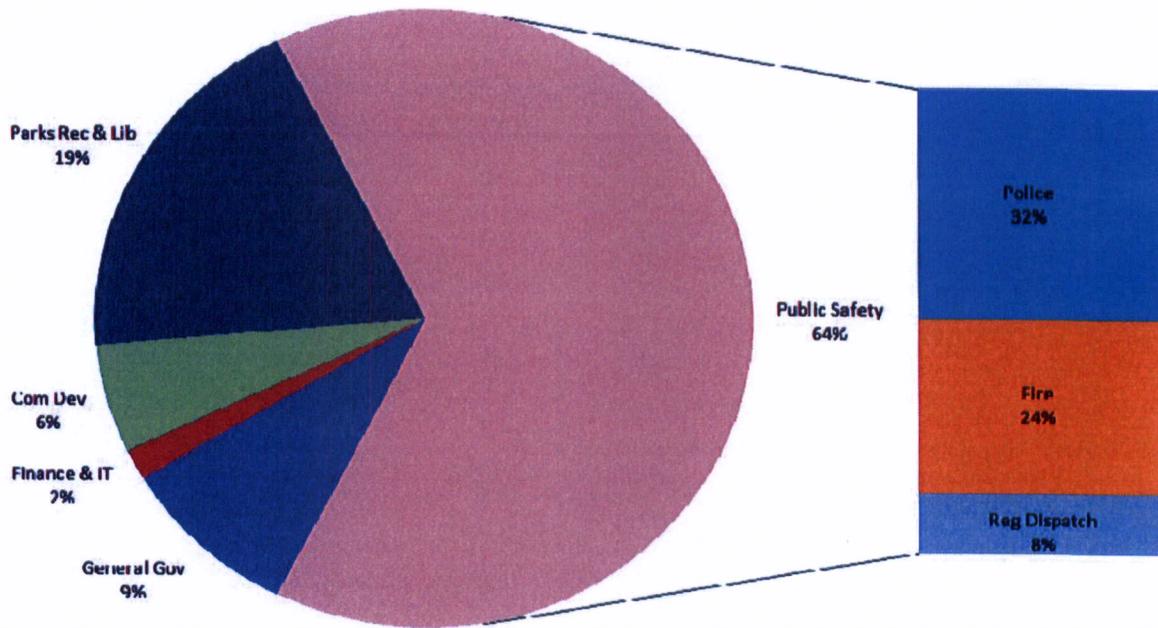
# General Fund Revenues



# General Fund Revenues Trend



# General Fund Expenditures





## Major FY12 Budget Challenges

- 8% decrease in Urban Revenue Sharing      \$320,000
- 5% decrease in Vehicle License Tax      \$115,000
- 5% decrease in Highway User Revenue      \$150,000
- State-mandated retirement system increases      \$450,000



## **Other Potential Challenges** (The State Budget Squeeze)

- S1162/S1210/S1211 Corporate Income Tax Reduction/  
Repeal/Phase-Out
- S1220 Elimination of Model City Tax Code
- S1221 Cap Distribution of State Income Tax to Cities  
to Pay for State Property Leasebacks

## The Investment



- Strategic investment in partnership with developer to position Trader Joe's, a top-flight retailer with regional draw, adjacent to Gateway Mall in the SR 69 corridor.
- City purchases 7.1 acres at corner of Lee Blvd. and Highway 69 for \$2 million (below current appraisal).
- City does minor site improvements (driveway on SR 69), bringing estimated total investment cost to \$2.2 million.
- Developer constructs Phase I, two buildings totaling 20,000 SF (estimated value \$4 million) with Trader Joe's confirmed tenant in 12,000 SF.
- Developer constructs the remaining 4 buildings, an additional 19,007 SF, when supported by economy/market.

# The Return on Investment



## Financial/Economic Return

- The developer will pay rent to the City beginning with issuance of the Certificate of Occupancy of the first shop equal to a rate on the City's total investment of:
  - 6% first five years (\$132,000 per year)
  - 7% years six through ten (\$154,000 per year)
  - 8% after year ten (\$176,000 per year)
- Sales tax from activity on-site (Ph1 est. \$350,000 to \$450,000 per year)
- Retail jobs paying above average will be created (50 for Trader Joe's)
- Jobs to construct the development
- Additional sales tax generated from increased traffic to surrounding businesses (synergy with Gateway Mall)
- Eventual buy out of City involvement at its full cost in the project

## The Return on Investment (cont'd)



### Benefits to City Services and Infrastructure

The estimated annual direct tax revenue of \$350,000 to \$450,000 will continue to fund each year:

- 7 lane-miles of street pavement preservation
- plus • 2-3 Police Officers or Firefighters  
or 15% of the Library's annual budget

# **An Entrepreneurial Investment**

**Beneficial Return but not a Municipal Precedent**



- The City will receive a 6% to 8% return on its investment, current state pool rate is 0.13%.
- Sales tax is a principal revenue required for Arizona municipalities to operate; Prescott's General Fund is likewise dependent on sales tax and this project will increase that revenue.
- Once bought out, the City will continue to have the ongoing benefit of the sales tax generated from this development.
- The City has done similar entrepreneurial projects in the past
  - Emerson Electric (Sturm Ruger)
  - ERAU Flight Line
  - Monarch Aviation
  - Rittaire
- Strategic investments by other Arizona municipalities
  - Avondale purchase/leaseback (15 ac./\$3.1 mil.) Carlos O'Brien's Restaurant, 2011
  - Phoenix sale (9 acres/\$2.1 million) to Charles Schwab, 2010
  - Mesa distribution plant (23 acres) Crescent Crown conveys to City/leases back, 2011



### **III. Site Plan and Project Details**



**PRESCOTT GATEWAY**  
 SWC Highway 69 and Lee Boulevard  
 Prescott, Arizona







## **IV. Development Agreement and other Documents**



## Three (3) Agreements for the Project

- Development Agreement
- Property Purchase Agreement
- Ground Lease Agreement

# Development Agreement

Parties: City and ERH Acquisitions, LLC  
 Term: 20 years (Developer can assign)



City Activities and Responsibilities	ERH (Developer) Activities and Responsibilities
Purchase 7.1 acre parcel from owner via assignment to ERH; lease to ERH	Lease property from City (interrelated agreement)
Assure site zoning in place; approve site plan and sign package	Design all improvements to the site; apply for building permit and pay standard fees
Provide water and sewer service to site	Pay all water, sewer, other impact and service fees and charges per City Code
Process permits to enable 4/1/11 start of construction; authorize unrestricted work days/hours	Break ground within 6 months of lease agreement; complete construction 12 months thereafter (current schedule is 4/1/11 construction start)
Construct modified SR 69 entry	Construct all on-site improvements 12 months after groundbreaking including 12,000 SF shell space subleased to Trader Joe's (current schedule is 10/31/11 completion); local labor construction opportunities

# Property Purchase Agreement



Parties: City from VHC 228, LLC  
 (via assignment from ERH Acquisitions, LLC)

<b>City as Buyer Activities and Responsibilities</b>	<b>VHC 228 as Seller (via assignment from ERH) Activities and Responsibilities</b>
Purchase property for \$2,000,000 Deposit \$25,000 earnest money Pay one-half of closing costs	Pay one-half of closing costs/prorated taxes
Development of site as a Trader Joe's anchored retail center material to this Purchase Agreement	Development of site as a Trader Joe's anchored retail center material to this Purchase Agreement
Approval of Development Agreement and ground lease material to this Purchase Agreement	Approval of Development Agreement and ground lease material to this Purchase Agreement
30 day review of any title issues, survey	30 day period to cure title policy issues, if any
	Warrants no environmental or code issues
Closing by 6/30/11 or can terminate	Closing by 6/30/11 or can terminate
	Warranty deed free of liens/encumbrances

# Ground Lease Agreement

Parties: City and ERH Acquisitions, LLC

Term: 45 years (max.)



City as Lessor Activities and Responsibilities	ERH as Lessee Activities and Responsibilities
Development Agreement and Property Purchase Agreement interrelated with Ground Lease Agreement	Development Agreement and Property Purchase Agreement interrelated with Ground Lease Agreement
<i>Total Municipal Cost (TMC)</i> = costs to purchase property + modify SR 69 driveway	
After purchase of property lease to ERH (lease structured to encourage buyout of City's property and leasehold interests by ERH or other party)	<u>Lease Cost (payable monthly)</u> Years 1-5 TMC x 6% Years 6-10 TMC x 7% Years 11-45 TMC x 8% + CPI
	Pay real property taxes and personal property taxes (through sub-leases)
	Option to purchase land/site improvements in whole or part (pads) Years 1-5 TMC Years 6-10 TMC + 4% Years 11-45 (TMC + 4%) + 4% per year added



## V. Summary and Schedule Forward

## Summary of Key Points



- Direct benefit to City General Fund - sales tax revenue to preserve levels of core services (public safety) during challenging economic times
- Trader Joe's only N. Arizona store will be a regional draw at Prescott's regional mall and recapture expenditures now made in Phoenix metro
- No sales tax rebate or expensive infrastructure obligations
- City investment is secured by ownership of the land
- Lease revenue provides return on land investment; structure of lease agreement encourages buy-out of City
- A real development project which can be open in November 2011

# Schedule Forward



- 2/9/11**     **Draft agreements available (agenda packet)**
- 2/15/11**   **Council consideration of approvals**
- 4/1/11**     **Building permit issuance**
- 11/11**      **Trader Joe's open**



**RESOLUTION NO. 4065-1135**

**A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT, YAVAPAI COUNTY, ARIZONA, AUTHORIZING THE CITY OF PRESCOTT TO ENTER INTO A DEVELOPMENT AGREEMENT WITH ERH ACQUISITIONS, LLC., FOR THE DEVELOPMENT OF A COMMERCIAL RETAIL CENTER LOCATED AT THE SOUTHWEST CORNER OF HIGHWAY 69 AND LEE BOULEVARD, AND AUTHORIZING THE MAYOR AND STAFF TO TAKE ANY AND ALL STEPS NECESSARY TO ACCOMPLISH THE ABOVE**

**RECITALS:**

WHEREAS, the developer, ERH Acquisitions, LLC., (hereinafter ERH), has entered into contracts with Trader Joe's, Inc., for the construction and lease of a commercial building; and

WHEREAS, ERH desires and intends to construct additional buildings in furtherance of a commercial retail center development; and

WHEREAS, the City of Prescott intends to purchase certain real property in the City limits from the fee owner, VHC 228, LLC & Prescott Eat, LLC., which property is legally described on Exhibit "A" attached and wishes to lease said property to ERH under certain terms and conditions and whereas the parties have negotiated and wish to enter into a Development Agreement pursuant to ARS Section 9-500.05 relating to the development of that property; and

WHEREAS, the City of Prescott has determined that the proposed development is consistent with the City of Prescott's General Plan and further finds that this agreement is in the public interest.

**ENACTMENTS:**

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PRESCOTT AS FOLLOWS:

Section 1. THAT the City of Prescott hereby approves the Development Agreement with ERH Acquisitions, LLC, attached hereto as Exhibit "A".

Section 2. THAT the Mayor and staff are hereby authorized to execute the attached Development Agreement and to take any and all steps deemed necessary to accomplish the above.

PASSED AND ADOPTED by the Mayor and Council of the City of Prescott this 15<sup>th</sup> day of February, 2011.

\_\_\_\_\_  
MARLIN D. KUYKENDALL, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
ELIZABETH A. BURKE, City Clerk

\_\_\_\_\_  
GARY D. KIDD, City Attorney

=====

**DEVELOPMENT AGREEMENT**  
**by and between**  
**The City of Prescott, Arizona, and**  
**ERH ACQUISITIONS, LLC**

=====

THIS AGREEMENT ("Agreement"), is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by and between the **CITY OF PRESCOTT**, an Arizona municipal corporation (hereinafter "the City") and **ERH ACQUISITIONS, LLC**, an Arizona limited liability company) or its duly nominated Assignee, (hereinafter "Developer").

**RECITALS**

A. Developer has the contractual right to purchase approximately 7.1 acres of real property located within the limits of the City (hereinafter referred to as the "Property"). The Property is legally described in Exhibit A attached hereto.

B. Developer wishes to construct and manage a retail shopping center on the Property which includes a "Trader Joe's" specialty grocery store.

C. Development of the Property will enhance and increase employment opportunities within the City of Prescott; will generate sales and construction tax benefits to the City; will provide a stimulus for the economic corridor adjacent to Highway 69; and will serve as a catalyst for future development in that area and will benefit the City generally.

D. The proposed development upon Property is consistent with the approved zoning for the Property, and is additionally in compliance with the City's adopted and approved general plan.

E. Arizona Revised Statutes § 9-500.05 authorizes the City to enter into a development agreement with a landowner or any other person having an interest in real property located within the City to facilitate development of the property.

F. In approving this Agreement, the City Council additionally finds that all activities relating to the development of the property by Developer are economic development activities within the meaning of Arizona Revised Statutes § 9-500.11, that all expenditures by the City pursuant to the Agreement constitute the appropriation and expenditure of public monies for and in connection with economic development activities and that it is appropriate to provide Developer with the benefits in this Agreement as an inducement to Developer to construct, lease and operate the shopping center within the City.

G. The City Council further finds that development of the Property by Developer will substantially increase economic development activity in the City by:

1. Significantly increasing sales tax revenue within the City. The City has projected that the specialty grocery store will generate sales tax revenue for the City, and that additional stores within the Project will increase such revenue to the City;

2. Creating much needed jobs within the City. The City has projected that the specialty grocery store will create new jobs for the City's residents, and that additional stores within the Project will provide additional employment opportunities.

3. Encouraging the development of other property in the vicinity of the Property; and

4. Redirecting the public's retail expenditures to businesses located within the City limits and providing for accelerated development of this economic corridor and gateway into the City of Prescott.

H. The City Council further finds that the economy of the City is in need of economic stimulation, and that the City will receive good and adequate consideration for its performance of the provisions of this Agreement and that the City's expenditures are found and determined to be for fair market value and fair compensation.

NOW THEREFORE, in consideration of the promises and premises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

### **AGREEMENTS**

1. Accuracy of the Recitals. The parties hereby acknowledge the accuracy of the Recitals, which are incorporated herein by this reference.

2. Definitions. As used in this Development Agreement, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this section.

(a) "Adopting Ordinance" means the Ordinance which approves this Agreement.

(b) "Certificate of Occupancy" means either a certificate issued after inspections by the City authorizing a person(s) in possession of property to dwell or otherwise use a specified building or dwelling unit, or the final inspection if a formal certificate is not issued.

(c) "City" means the City of Prescott, Arizona.

(d) "City Council" means the duly elected legislative body governing the City of Prescott.

(e) “Developer” means ERH Acquisitions, LLC, including their successors and assigns.

(f) “Effective Date” means the effective date of the Adopting Ordinance.

(g) “Existing Land Use Regulations” means the ordinances adopted by the City of Prescott in effect on the Effective Date, including the adopting ordinances that govern the permitted uses of land, the density and intensity of use, and the design, improvement, construction standards and specifications applicable to the development of the Property, including, but not limited to the General Plan, the City’s Official Zoning Map and development standards, the public works standards, and all other ordinances, codes, rules and regulations of the City establishing subdivision standards, park regulations, and building standards. Existing Land Use Regulation does not include non-land use regulations, which includes taxes and impact fees.

(h) “Initial Project Improvements” means the construction of an approximately 12,000 s.f. building and related improvements to be subleased from Developer to Trader Joe’s. The Initial Project Improvements do not include the tenant (or interior) improvements required to be constructed by Trader Joes pursuant to the terms of its sublease with Developer.

(i) “Lease” means the Lease described in Section 9.

(j) “Project” means a retail specialty shopping center and appurtenant landscaping, drives and parking to be constructed by Developer (except for Site Improvements to be provided by the City) on the Property, and to be known, at least initially, as *The Shops at Prescott Gateway*.

(k) “Project Improvements” means the improvements constituting the Project to be constructed on the Property by Developer, and not the Property or Site Improvements. The Project Improvements include the Initial Project Improvements and such other improvements to be constructed by Developer upon the Property.

(l) “Site Improvements” means the improvements to the Property to be undertaken, performed or constructed by the City, as outlined in Section 8.

3. Exhibits. Exhibits to this Agreement are as follows:

- (a) Exhibit A -- Legal Description of Property
- (b) Exhibit B -- [Reserved]
- (c) Exhibit C -- Real Estate Purchase Agreement
- (d) Exhibit D -- Site Improvements
- (e) Exhibit E -- Initial Project Improvements
- (f) Exhibit F -- Lease

4. Parties to Development Agreement. The parties to this Agreement are:

(a) The "City" is the City of Prescott, 221 S. Cortez, Prescott, Arizona 86302.

(b) The "Developer" or owner is a private enterprise which currently owns (or has the right to acquire) the Property in fee, and whose principal office is located at One East Washington Street, Suite 300, Phoenix Arizona, 85004. Upon purchase of the property and construction of the Site Improvements by the City, Developer shall be the private enterprise who shall at its sole cost and expense, lease the Property (as improved by the Site Improvements) and construct the Project Improvements upon the Property specified in this Agreement.

5. Term of Agreement. This Agreement shall commence upon the effective date of the Adopting Ordinance approving this Agreement, and shall continue in force for a period of twenty (20) years unless extended or terminated as provided herein. Following the expiration of the term or extension thereof, or if sooner terminated, this Agreement shall have no force and effect, subject however, to post-termination obligations of the Developer.

6. Restrictions on Development and Operation. The development and operation of the Property will be governed by the City's Land Development Code dated January 11, 2005, as amended September 8, 2009 (the "Development Code") as it exists on the Effective Date. All construction will comply with then-current applicable City standards and City codes, including any code provisions dealing with police powers of the city establishing safety, health, or public welfare standards.

(a) Subject to any reasonable restrictions needed by the City to protect the health and safety of persons using the Property, and applicable City building, fire and similar Code provisions, Developer shall be entitled to construct the Initial Project Improvements as depicted in Exhibit E.

(b) At the request of Developer, from time to time the City will accept applications for and process in compliance with the City's standard practices and procedures as modified by the Development Code and this Agreement, any discretionary and non-discretionary approvals or permits which Developer may require from time to time with regard to the development or operation of the Property, including without limitation any construction permits, inspections, variances, special use permits, and certificates of occupancy. The City will use its best efforts to promptly issue plan approval and each construction permit necessary for the development and operation of the Property, provided, however, it is mutually understood that permits and/or approvals from state and/or other agencies over which the City has no control may be required for implementation of the project, and Developer shall be solely responsible for obtaining such permits and/or approvals.

(c) Notwithstanding the foregoing, it is agreed by and between the parties that development of the Property is subject to any applicable discretionary approvals that may be required by applicable City codes.

(d) The City hereby authorizes its City Manager (or the City Manager's designee) to process, execute and deliver all further approvals, documents and instruments required or contemplated by this Agreement, without the need to seek further approval from the City Council.

7. Acquisition of Property. The City will acquire the Property from the existing owner by way of assignment by Developer of its rights arising in and under a purchase contract between the existing owner and Developer, utilizing the form of "Assignment of Purchase Agreement" attached to this Agreement as Exhibit C (the "Assignment"). The acquisition of the Property is a condition precedent to the effectiveness of this Agreement and to the obligations of the parties pursuant to and under this Agreement; and accordingly, although the City Council shall have approved the execution and delivery of this Agreement on behalf of the City prior to the City's acquisition of the Property, this Agreement shall not be "entered into" for the purposes of A.R.S. § 9-500.05 and thereafter recorded until such time as the City owns the Property.

8. Site Improvements; City Obligations. Promptly after acquiring the Property, the City will construct, or cause to be constructed, the following improvements to the Property, at the City's sole cost and expense (collectively, the "Site Improvements"):

(a) An entrance roadway in accordance with the specifications more fully set forth and described in Exhibit D.

(b) Such other work as is reasonably required in connection with the foregoing.

(c) All permit, application and inspection fees; all insurance and bond costs; and all other professional fees required in connection with the Site Improvements.

(d) The Site Improvements shall not include any design or engineering costs in connection with the Site Improvements; or any work, cost or expense required in connection with the construction of the Project Improvements, all of which shall be borne solely and exclusively by Developer.

(e) The Site Improvements shall be completed (with all applicable inspections and approvals, to permit Developer immediately to commence construction of the Initial Project Improvements) no later than sixty (60) days following the City's acquisition of the Property.

(f) In addition to the foregoing, the City (in accordance with all of the standard and uniformly-applied procedures, requirements, rates and fees set forth in its City Code) will provide water and sewer service to the Property from and after the date of this Agreement.

(g) The City will not assess the Property under or in connection with any existing improvement district (with no assessment currently applicable or owing) and will not include the Property (or permit the Property to be included) in any future improvement district or

comparable taxing district without the prior written consent of Developer (or its successor or assign) which may be granted or withheld in its sole discretion.

(h) Concurrently with its approval of this Agreement, and as a condition precedent to the obligations of Developer under this Agreement, the City Council shall approve Developer's final site plan for the construction of the Project Improvements on the Property.

9. Lease. Promptly after acquiring the Property, and subject to compliance with all applicable municipal procedures and requirements, the City will lease the Property to Developer pursuant to the lease attached hereto as Exhibit F (the "Lease").

10. Developer Obligations.

(a) Developer shall make all payments in a timely manner as required under the Lease.

(b) Developer shall maintain the Property and Site Improvements at Developer's sole cost and expense.

(c) Developer shall design and construct the Initial Project Improvements in accordance with the specifications more fully set forth and described in Exhibit E.

(d) Developer shall break ground for the Initial Project Improvements within six (6) months following Developer's execution of this Lease.

(e) Developer shall construct the Initial Project Improvements on the Property at Developer's sole cost and expense in accordance with the terms of the sublease with Trader Joes, and will deliver the shell space to Trader Joes pursuant to the sublease no later than twelve (12) months after breaking ground.

(f) Developer will use commercially reasonable efforts to cause Trader Joes timely to complete its interior improvements in accordance with the terms of the sublease.

11. Construction.

(a) Developer shall give consideration and shall utilize its reasonable efforts to make any and all contract opportunities including construction employment, material supply and other opportunities afforded by the project available to local citizens and will endeavor to contact contractors within the City of Prescott and shall utilize all reasonable efforts to provide contracts and job opportunities to residents of Prescott in order to further the local economy.

(b) Developer shall construct the Project Improvements in accordance with the plans and specifications approved by the City.

(c) Developer may construct (or permit such construction to occur) the Project Improvements at any time during the day or night, and on any day of the week, and shall not be

limited to construction during "daylight" hours only.

(d) Force Majeure. Whether stated or not, all periods of time in this Agreement are subject to this Section 11(d). Neither the City nor the Developer, as the case may be, shall be considered in default of its obligations under this Agreement in the event of an enforced delay due to causes beyond its control and without its fault, without its failure to comply with Existing Land Use Regulations, or without its negligence (an "Enforced Delay"), including but not limited to: (1) acts of God, acts of public enemy, acts of the federal, state or local government, and acts of Third Parties, including the Developer's contractors, subcontractors, suppliers, and persons or entities with whom or which the Developer has a contractual relationship, if the act or omission of such Third Party resulting in the delay was beyond the reasonable control of the Developer; (2) litigation concerning the validity and enforceability of this Agreement or relating to transactions contemplated by this Agreement (including the effect of petitions for initiative or referendum), fires, floods, epidemics, quarantine, restrictions, strikes, embargoes, labor disputes, and unusually severe weather or the delays of subcontractors or materialmen due to such causes); and (3) without limiting the foregoing, any action or inaction of the City, its officers, agents, agencies, departments, committees, Council members, board members or commissioners which is negligent or contrary to Existing Land Use Regulations and which (without the Developer's fault, negligence or failure to comply with Existing Land Use Regulations) delays, directly or indirectly, the Developer's ability to comply with the Schedule of Performance or any other construction schedule or requirement imposed by this Agreement. In no event will Enforced Delay include any delay resulting from general economic or market conditions, unavailability for any reason of particular tenants or purchasers of portions of the Project, nor from the unavailability for any reason of particular contractors, subcontractors, vendors, investors or lenders desired by the Developer in connection with the Project, it being agreed that the Developer will bear all risks of delay which are not Enforced Delay. In the event of the occurrence of any Enforced Delay, the time or times for performance of the obligations of the Party claiming Enforced Delay shall be extended for the period of the Enforced Delay; provided that the Party seeking the benefit of the provisions of this Section 11(d) shall, within thirty (30) days after such Party knows or reasonably could have known of any such Enforced Delay, first notify the other Party of the specific delay in writing and claim the right to an extension for the period of the Enforced Delay.

12. City Representations and Warranties. The City acknowledges that Developer is entering into this Agreement, and expending considerable sums in consideration of the design and engineering fees associated with the Project. The City represents, warrants and covenants to developer that all of the City's representations, findings, warranties and covenants set forth in this Agreement are believed by the City to be true in all material respects as of the date of this Agreement. The City further represents, warrants and covenants to Developer as follows:

(a) The property is located within the municipal limits of the City. The Property is currently zoned Business Regional ("BR"), which permits the construction and operation of the Project.

(b) The City is a duly organized, validly existing municipal corporation in the

State of Arizona. The transactions contemplated by this Agreement, the execution of this Agreement and the City's performance hereunder have been duly authorized by all requisite action of the City and no other approval or consent is required for this Agreement to be binding upon the City. The individuals executing this Agreement have all necessary authority to enter into this Agreement and to bind the City. The execution of this Agreement and the consummation of the transactions contemplated hereby will not result in any violation of, or default under, any term or provision of any applicable agreement, instrument, law, rule, regulation or official policy to which the City is a party or by which the City is bound.

(c) The City has no knowledge of any default or breach by any third-party under any existing agreement or instrument applicable to the Property.

(d) There is no litigation, referendum, investigation, initiative or proceeding pending or, to the knowledge of the City, contemplated or threatened against the City, the Property, this Agreement, the zoning of the Property (collectively, "actions," and each individually an "action") which would impair or adversely affect the City's ability to perform its respective obligations under this Agreement or under any instrument or document related hereto.

(e) This Agreement (and each undertaking of the City contained herein), constitutes a valid, binding and enforceable obligation of the City, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditors' rights and by equitable principles, whether considered at law or in equity. The severability and reformation provisions of Section 36 shall apply in the event of any successful challenge to this Agreement or to any provision hereof.

13. Developer's Representations and Warranties. Developer represents, warrants and covenants to the City that all of Developer's representations, warranties and covenants set forth in this Agreement are true in all material respects as of the date of this Agreement. Developer represents, warrants and covenants to the City as follows:

(a) Developer is a duly organized, validly existing limited liability company organized under the laws of the state of Arizona.

(b) The transactions contemplated by this Agreement, the execution of this Agreement and Developer's performance hereunder have been duly authorized by all requisite action of Developer's manager and no other approval or consent is required for this Agreement to be binding upon Developer.

(c) The execution of this Agreement and the consummation of the transactions contemplated hereby will not result in any violation of, or default under, any term or provision of any applicable agreement, instrument, law, rule, or regulation to which Developer is a party or by which Developer is bound.

(d) This Agreement (and each undertaking of Developer contained herein) constitutes a valid, binding and enforceable obligation of Developer, enforceable according to its

terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditors' rights and by equitable principles, whether considered at law or in equity. Developer will defend the validity and enforceability of this Agreement in the event of any proceeding or litigation arising from its terms that names Developer as a party or which challenges the authority of Developer to enter into or perform any of its obligations hereunder and will cooperate with the City in connection with any other action by a third party in which the City is a party and the benefits of this Agreement to the City are challenged. The severability and reformation provisions of Section 38 shall apply in the event of any successful challenge to this Agreement.

14. Permitted Uses and Development Standards. The permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, provisions for reservation and dedication of land or payment of fees in lieu of dedication for public purposes, the construction, installation and extension of public improvements, development guidelines and standards for development of the Property shall be those set forth in this Agreement, the permits and approvals identified herein, and all exhibits incorporated herein. It is understood and agreed the City may enact development standards and technical specifications relating to development of the Property that do not result in a change or modification of vested zoning designations, or densities set forth in this Agreement or any subsequently approved and permitted zoning uses or densities. Further, it is agreed that City building, fire, and other land use codes applicable to the property shall remain in full force and effect.

15. Further Discretionary Actions. Developer acknowledges that the Existing Land Use Regulations contemplate the exercise of further discretionary powers by the City. These powers include, but are not limited to, review of additional permit applications. Nothing in this Agreement shall be construed to limit the authority or the obligation of the City to hold legally required public hearings, or to limit the discretion of the City and any of its officers or officials in complying with or applying Existing Land Use Regulations.

16. Existing Land Use Fees and Development Fees. Land use fees and impact fees (that is, those fees normally assessed by the City for platting, planning and zoning) adopted by the City by ordinance as of the Effective Date of this Agreement ("Existing Development Fees") may be modified by the City from time to time, however Developer shall not be required to pay any amounts in excess of the Existing Development Fees in connection with the development of the Project except such development and impact fees as may be applicable to new development or similarly situated developments at the time.

17. Default.

(a) Subject to extensions of time by mutual consent in writing, failure or delay by either party or any party not released from this Agreement, to perform any term or provision of this Agreement shall constitute a default. In the event of alleged default or breach of any terms or conditions of this Agreement, the party alleging such default or breach shall give the other party not less than thirty (30) days notice in writing specifying the nature of the alleged default and the manner in which said default may be cured. During this thirty (30) day period,

the party charged shall not be considered in default for purposes of termination or institution of legal proceedings.

(b) After notice and expiration of the thirty (30) day period, if such default has not been cured or is not being diligently cured in the manner set forth in the notice, the non-defaulting party to this Agreement may, at its option, institute legal proceedings pursuant to this Agreement. In addition, the City may decide to file an action to enforce the City's Codes, and to obtain penalties and costs as provided in the Prescott Municipal Code for violations of the Code. Subject in any event to Section 33 of this Agreement, Developer may seek special action or other similar relief (whether characterized as mandamus, injunction or otherwise), requiring the City to undertake and to fully and timely perform its obligations under this Agreement.

18. Termination. This Agreement shall terminate as provided in Section 5 or by mutual agreement of City and Developer. Upon termination of this Agreement, the City and Developer shall record a notice of such termination in a form satisfactory to the City Attorney that this Agreement has been terminated.

19. Effect of Termination on Developer Obligations. Termination of this Agreement as to the Developer of the Property or any portion thereof shall not affect any of the Developer's obligations to comply with the City General Plan and the terms and conditions or any applicable zoning code(s) or subdivision map or other land use entitlements approved with respect to the Property, any other conditions of any other development specified in the Agreement to continue after the termination of this Agreement or obligations to pay assessments, liens, fees or taxes.

20. Effect of Termination on City. Upon any termination of this Agreement as to the Developer of the Property, or any portion thereof, the entitlements, conditions of development, limitations on fees and all other terms and conditions of this Agreement shall no longer be vested hereby with respect to the property affected by such termination (provided that vesting of such entitlements, conditions or fees may then be established for such property pursuant to then existing planning and zoning laws).

21. Assignment and Assumption. The Developer shall have the right to sell, assign or transfer this Agreement with all its rights, title and interests therein to any person, firm or corporation at any time during the term of this Agreement. Developer shall provide the City with written notice of any assignment or transfer all or a portion of the Property, at least thirty (30) days following such action and provide City with a copy of any assignment of this Agreement.

22. Covenants Running With the Land. The conditions and covenants set forth in this Agreement and incorporated herein by the Exhibits shall run with the land and the benefits and burdens shall bind and inure to the benefit of the parties. The Developer and every purchaser, assignee or transferee of an interest in the Property, or any portion thereof, shall be obligated and bound by the terms and conditions of this Agreement, and shall be the beneficiary thereof and a party thereto, but only with respect to the Property, or such portion thereof, sold, assigned or transferred to it. Any such purchaser, assignee or transferee shall observe and fully perform all

of the duties and obligations of a Developer contained in this Agreement, as such duties and obligations pertain to the portion of the Property sold, assigned or transferred to it.

23. Amendment to Agreement; Effect of Agreement on Future Actions. This Agreement may be amended at any time by written amendment executed by and between the City and the owner of the portion of the Property which is the subject of any such amendment. The balance of the owners need not execute any such amendment for any such amendment to be effective, so long as such amendment does not materially and adversely affect the portion of the Property owned by others. All amendments to this Agreement must be recorded in the official records of Yavapai County, Arizona, within ten (10) days following execution, as required by A.R.S. § 9-500.05(D). The City shall not make any amendment to its General Plan, Development Code, Official Zoning Map or development regulations affecting the Property during the next five years, except as the City may deem necessary to the extent required by a serious threat to public health and safety. Nothing in this Agreement shall prevent the City from making any amendments of any type to the General Plan, Development Code, Official Zoning Map or development regulations relating to the Property after five years from the anniversary date of the Effective Date of this Agreement.

24. Releases. Upon the sale, assignment or transfer of the Property, Developer shall be released from any further obligations relating to the sold, assigned, or transferred portion of the Property, provided that the buyer, assignee or transferee expressly assumes the obligations under this Agreement as provided herein.

25. Reimbursement for Agreement Expenses of the City. Any reimbursement by Developer to the City for actual expenses incurred shall be set forth in the Lease or Purchase Agreement.

26. Cooperation and Expedited City Decisions.

(a) Appointment of Representatives. To further the commitment of the parties to cooperate in the implementation of this Agreement, the City and Developer each shall designate and appoint a representative to act as a liaison between the City and its various departments and Developer. The initial representative for the City shall be its Community Development Director or his designee; and the initial representative for Developer shall be Brett Heron. The representatives shall be available at all reasonable times to discuss and review the performance of the parties' respective obligations under this Agreement.

(b) Expedited City Decisions. The City and Developer agree and acknowledge that Developer wishes to proceed expeditiously with the construction of the Project Improvements and that, accordingly, the City will make reasonable efforts to provide an expedited City review process. The City shall publish, post and give all required notices relating to the same in a diligent and expeditious manner. The City will use its best efforts to inspect the Project Improvements and provide any notice of defect in a diligent and expeditious manner.

(c) Submittal Requirements. The Developer shall use commercially

reasonable efforts to ensure quality and completeness of all submittals, in accordance with applicable City codes and submittal requirements, and shall exercise good faith and reasonable efforts to ensure that all resubmittals address City review comments and requirements, at the time of each resubmittal. Developer acknowledges that the lack of quality and completeness of their plans at the time of submittal and resubmittal may adversely impact any schedules set forth in this Agreement or agreed to between the staff members of the parties. The parties agree to work together to accomplish an expedited schedule and further agree to work in good faith and to use all reasonable efforts to expedite plan submittals and plan reviews to meet the scheduling agreed upon by the parties and further agree that failure to achieve the specified schedule, for any reason, shall not be deemed a material breach of the agreement.

(d) Expedited Scheduling. In the event that any issue arises as to expedited scheduling that cannot be resolved expeditiously between the parties, then if the issue on which an impasse has been reached (including any payment application) is an issue where a final decision can be reached by the City representative, the City Manager shall give Developer a final decision within fourteen (14) days after a request for an expedited decision is made. If the issue on which an impasse has been reached is one where a final decision requires action by the City Council, the City Manager shall be responsible for scheduling a City Council hearing on the issue at the next regularly scheduled City Council meeting after the request for an expedited decision is made; provided however, that if the issue is appropriate for review by the City's Planning and Zoning Commission, the matter shall be submitted to the Planning and Zoning Commission first, and then to the City Council. Both parties agree to continue to use reasonable good faith efforts to resolve any impasse pending any such expedited decision.

27. Notices and Filings.

(a) Manner of Serving. All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered or served if in writing and (i) delivered personally; (ii) delivered by recognized overnight courier service for next business day delivery; or (iii) sent by registered or certified United States Mail, postage prepaid, to:

The City

City of Prescott  
Attn: City Manager  
201 S. Cortez  
Prescott, Arizona 86303

With copy to:

City of Prescott  
Attn: City Attorney  
221 S. Cortez  
Prescott, Arizona 86303

Developer:

ERH Acquisitions, LLC  
c/o RED Realty Advisors, LLC

One East Washington, Suite 300  
Phoenix, Arizona 85004  
Attn: Brett Heron

With copy to:

Mariscal, Weeks, McIntyre & Friedlander, P.A.  
2901 North Central Avenue, Suite 200  
Phoenix, Arizona 85012  
Attn: Gary L. Birnbaum, Esq.

Or to such other addresses as either party hereto may from time to time designate in writing and deliver in a like manner.

(b) Mailing Effective. Notices, filings, consents, approvals and communication given by mail shall be deemed delivered upon receipt or refusal.

28. Further Documents and Acts. The parties to this Agreement shall execute and deliver all such documents and perform all such acts as are reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.

29. City's Statutory Right of Cancellation. Pursuant to A.R.S. § 38-511, the City may cancel this Agreement, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the City is, at any time while the Agreement or any extension of the Agreement is in effect, an employee or agent of any other party the Agreement in any capacity or a consultant to any other party of the Agreement with respect to the subject matter of the Agreement. In the event of the foregoing, the City further elects to recoup any fee or commission paid or due to any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the City from any other party to the Agreement arising as a result of this Agreement.

30. Non-liability of City Officials, Etc. No City Council member, City official, representative, agent, attorney or employee shall be personally liable to any of the other parties hereto, or to any successor in interest to any of the other parties, in the event of any default or breach by City or for any amount which may become due to any of the other parties or their successors, or with respect to any obligation of City under the terms of this Agreement.

31. Indemnification Developer hereby agrees to indemnify and hold harmless the City, its departments and divisions, its employees and agents, from any and all claims, liabilities, appeals, expenses or lawsuits, including the costs of defense of any and all claims, lawsuits or appeals as a result of the development, construction and operation of the Project Improvements.

32. Waiver of Right to Trial by Jury. The parties hereto expressly covenant and agree that in the event of a dispute arising from this Agreement, each of the parties hereto waives any right to a trial by jury. In the event of litigation, the parties hereby agree to submit any such litigation to the court and that the parties agree that this contract shall be deemed to have been created in Yavapai County, Arizona and to be subject to the jurisdiction of the Yavapai County

Superior Court, and that any claims to alternative jurisdiction based on diversity of citizenship, corporate location, etc. are waived by the parties pursuant to this Agreement.

33. No Damage Remedy; No Award of Attorneys' Fees. The parties hereto expressly covenant and agree that in the event of litigation arising from this Agreement, neither party shall be entitled to an award of attorneys' fees, either pursuant to this Agreement, pursuant to ARS §§ 12-341.01(A) and (B), or pursuant to any other state or federal statute. The parties further agree that there shall be no damage remedy for breach of any provisions of this Agreement and that the sole remedy for any breach shall be specific performance and or declaratory judgment.

34. Preliminary Arbitration. The parties agree to meet and attempt to resolve any dispute in good faith prior to initiating any legal process, to participate in accelerated arbitration with each party bearing an equal share in the cost of the arbitrator and to make good faith efforts to expeditiously resolve any dispute during such process, in order to promptly and expeditiously resolve any disputes. Further, in the event of an appeal from such arbitration process, the parties agree to utilize all good faith efforts to ensure expeditious resolution of any litigation, including participation in expeditious provisional remedies if available. In the event that litigation arises relating solely to the issue of non-payment by the City or Developer of all or a portion of the City's or Developer's financial obligations, the court shall have the discretion to order specific performance of such portions of the non-prevailing party's financial obligation as it may determined due and payable, and may, in the court's discretion award prejudgment interest which shall be calculated at the Municipal Market Data General Obligation "AAA" 20 year rate and shall pertain solely to the judicially determined amount of such unpaid financial obligations, from the date the court determines such funds were to be paid to the date of the court's decision. No damages or attorneys fees or costs or expenses whatsoever shall be awardable except for such interest sum directed to be paid pursuant to an order for specific performance.

35. Joint Defense. Developer covenants to jointly defend, with the City, any and all claims, lawsuits, and appeals challenging this Agreement, its cost of such joint defense to be at its sole cost and expense, including but not limited to attorneys fees, and costs. The City covenants to jointly defend, with Developer, any and all claims, lawsuits and appeals challenging this Agreement its cost of such joint defense to be at its sole cost and expense, including but not limited to attorneys fees, and costs.

36. Ambiguities in Agreement. This Agreement is the result of negotiations by and between the parties. Any ambiguity in this Agreement is not be construed against either party.

37. Strict Performance. Time is of the essence in this Agreement. The failure of either party to require the strict performance by the other of any provision of this Agreement shall not be deemed a waiver of the right of said party thereafter to require strict performance of that or any other provision of this Agreement in accordance with the terms hereof and without notice.

38. Limited Severability. The City and Developer each believes that the execution,

delivery and performance of this Agreement are in compliance with all applicable laws. However, in the unlikely event that any provision of this Agreement is declared void or unenforceable (or is construed as requiring the City to do any act in violation of any applicable laws, constitutional provision, law, regulation, City code or City charter), such provision shall be deemed severed from this Agreement and this Agreement shall otherwise remain in full force and effect; provided that this Agreement shall retroactively be deemed reformed to the extent reasonably possible in such a manner so that the reformed agreement (and any related agreements effective as of the same date) provide essentially the same rights and benefits (economic and otherwise) to the parties as if such severance and reformation were not required. The parties further agree, in such circumstances, to do all acts and to execute all amendments, instruments and consents necessary to accomplish and to give effect to the purposes of this Agreement, as reformed.

39. This Agreement shall be binding upon the parties hereto, their administrators, heirs, successors or assigns and can be changed only by written agreement signed by all parties.

40. Rights of Lenders. The City is aware that financing for improvements to be constructed on the Parcel may be provided, in whole or in part, from time to time, by one or more Third Parties (individually a "Lender", and collectively the "Lenders"). In the event of an Event of Default by the Developer, the City shall provide notice of such Event of Default, at the same time notice is provided to the Developer, to such Lenders as previously designated by the Developer to receive such notice (the "Designated Lenders") whose names and addresses were provided by written notice to the City in accordance with Section 27. The City shall give the Developer copies of any such notice provided to such Designated Lenders and, unless the Developer notifies the City that the Designated Lenders names or addresses are incorrect (and provides the City with the correct information) within three (3) business days after the Developer receives its copies of such notice from the City, the City will be deemed to have given such notice to the Designated Lenders even if their names or addresses are incorrect. The Developer may provide notices to other Lenders. If a Lender is permitted, under the terms of its nondisturbance agreement with the City to cure the Event of Default and/or to assume the Developer's position with respect to this Agreement, the City agrees to recognize such rights of the Lender and to otherwise permit the Lender to assume all of the rights and obligations of the Developer under this Agreement. The City shall, at any time upon reasonable request by the Developer, provide to any Lender an estoppel certificate or other document evidencing that this Agreement is in full force and effect and that no Event of Default by the Developer exists (or, if appropriate, specifying the nature and duration of any existing Event of Default). Upon request by a Lender, the City will enter into a separate nondisturbance agreement with such Lender, consistent with the provisions of this Section 40.

[Signatures are on the following page.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first written above.

**ERH ACQUISITIONS, LLC**, an Arizona limited liability company

By: ERH HOLDINGS, LLC, an Arizona limited liability company

By: \_\_\_\_\_  
Name:  
Title:

**CITY OF PRESCOTT**, an Arizona municipal corporation

By \_\_\_\_\_  
Marlin D. Kuykendall, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
ELIZABETH A. BURKE  
City Clerk

\_\_\_\_\_  
GARY D. KIDD  
City Attorney



**EXHIBIT A**  
Legal Description of Property

All that portion of the West half of Section 31, Township 14 North, Range 1 West, Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at the West One-quarter corner of said Section 31, from whence the Northwest corner of said Section 31 bears North  $01^{\circ}07'54''$  East (the basis of bearings for this description);

Thence, North  $01^{\circ}07'54''$  East along the West line of said Section 31, a distance of 362.31 feet to a point on the South right-of-way of Arizona State Route 69;

Thence, along said right-of-way, South  $89^{\circ}23'53''$  East, 323.63 feet;

Thence, along said right-of-way, South  $83^{\circ}15'54''$  East, 308.54 feet;

Thence, along said right-of-way, South  $63^{\circ}52'52''$  East, 328.02 feet;

Thence, along said right-of-way, South  $73^{\circ}41'52''$  East, 228.90 feet;

Thence, along said right-of-way, South  $51^{\circ}05'45''$  East, 123.23 feet;

Thence, along said right-of-way, South  $54^{\circ}32'46''$  East, 401.52 feet;

Thence, along said right-of-way, South  $64^{\circ}53'44''$  East, 308.71 feet to a point on a non-tangent curve, concave Northeasterly, with a radius of 2989.79 feet and a radial bearing of North  $33^{\circ}19'21''$  East;

Thence, Southeasterly along said curve and right-of-way, through a central angle of  $03^{\circ}37'06''$ , a length of 188.81 feet to the POINT OF BEGINNING;

Thence, continuing along said curve and right-of-way, concave Northeasterly, with a radius of 2989.79 feet, through a central angle of  $07^{\circ}17'16''$ , a length of 380.29 feet;

Thence, along said right-of-way, South  $74^{\circ}59'16''$  East, 49.73 feet;

Thence, leaving said right-of-way, South  $25^{\circ}53'24''$  East, 212.42 feet, to a point on the West right-of-way of Lee Boulevard, as recorded in Book 26 of Maps and Plats, Pages 27-31, on file in the office of the Yavapai County Recorder;

Thence, along the right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder, South  $74^{\circ}45'33''$  East, 4.60 feet, to a point on a non-tangent curve, concave Easterly, with a radius of 650.00 feet and a radial bearing of South  $81^{\circ}29'04''$  East (said point being on the West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder);

Thence Southerly along said West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of  $05^{\circ}26'56''$ , a length of 61.82 feet to a point of tangency;

**EXHIBIT B**  
[Reserved]

**EXHIBIT C**  
Assignment of Purchase Agreement

**DRAFT**

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**ASSIGNMENT AND ASSUMPTION OF PURCHASE AGREEMENT**

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THIS ASSIGNMENT AND ASSUMPTION (this "Assignment") is made and entered into as of the \_\_\_ day of February 2011 by and between ERH Acquisitions, LLC, , an Arizona limited liability company (hereinafter called "Assignor"), and The City of Prescott, an Arizona municipal corporation (hereinafter called "Assignee").

**RECITALS**

A. Assignor, as Buyer, and VHC 228, LLC, a Delaware limited liability company, as Seller (hereinafter called "Seller"), entered into that Purchase Agreement dated October 26, 2010 (the "Agreement"), under which Seller has agreed to convey certain real property located in Yavapai County, Arizona, more particularly described in the Agreement. Assignor has certain rights and obligations under the Agreement. A true, correct and complete copy of the Agreement is attached to this Assignment as Exhibit A, and is incorporated herein for all purposes.

B. Assignor desires to transfer and assign to Assignee all of its right, title and interest in and to, and arising under, the Agreement, Assignee desires to assume all of the obligations of Assignor under the Agreement and to be bound by all of the terms, conditions and provisions thereof in place of Assignor, and Seller desires to give its consent to such assignment to Assignee.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**AGREEMENT**

1. Assignment and Assumption.

1.1 For the consideration of Twenty-Five Thousand and no/100 Dollars (\$25,000.00) paid by Assignee to Assignor, representing the amount of the Deposit (as defined in the Agreement) previously paid by Assignor to Title Company (as defined in the Agreement), Assignor does hereby irrevocably grant, sell, convey, assign, transfer, set over and deliver unto Assignee all of Assignor's right, title and interest in and to, and arising under, the Agreement. This amount shall be paid by Assignee to Assignor at the time of the Closing (as defined in the Agreement).

1.2 Assignee hereby assumes and agrees to perform all of the duties, obligations and promises of Assignor as set forth in or arising under the Agreement, to be bound by all of the terms, conditions and provisions of the Agreement and to do any and all acts and things required under the Agreement to be done by Assignor.

1.3 Pursuant to Section 25 of the Agreement, Assignor may freely assign its rights under the Agreement without the consent of Seller.

1.4 From and after the date of its execution of this Assignment by Assignee, Assignor shall have no further rights or obligations under the Agreement; provided, however, that as between Assignor and Assignee, Assignor shall remain responsible for the obligations of Buyer arising under Section 16(c) of the Agreement, and Assignor shall indemnify and defend Assignee for and from

any and all actual loss arising out of or in connection with the failure of the contingency described in Section 16(c) of the Agreement to be satisfied; and further provided, however, that in the event that the contingency in Section 16(c) of the Agreement is not met or satisfied, Assignee shall re-assign the Agreement to Assignor so that Assignor may receive the return of the Deposit, and Assignee shall have no further payment obligations to Assignor pursuant to Section 1.1 of this Assignment.

2. Miscellaneous.

2.1 The parties shall execute such additional documents and do such other acts as may be reasonably necessary to fully implement the intent of this Assignment.

2.2 This Assignment shall be governed by and construed according to the laws of the State of Arizona.

2.3 This Assignment shall be binding upon, and shall inure to the benefit of, the parties hereto and their heirs, personal representatives, successors and assigns.

2.4 This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed an original, but all counterparts shall constitute but one agreement. Facsimile signatures shall be permitted and when transmitted shall be deemed an original for all purposes.

2.5 This Agreement may be executed in any number of counterparts, each of which counterparts shall be deemed an original and all of which counterparts shall constitute one and the same instrument. Facsimile signatures shall be permitted and when transmitted shall be deemed an original for all purposes.

The parties have executed this Assignment as of the date indicated above.

**ASSIGNOR:**

ERH Acquisitions, an Arizona limited liability company

By: ERH Holdings, LLC, an Arizona limited liability company, its Manager

By: \_\_\_\_\_  
Brett Heron, Manager

**ASSIGNEE:**

The City of Prescott, an Arizona municipal corporation

By: \_\_\_\_\_  
Marlin D. Kuykendall, Mayor

**ATTEST:**

\_\_\_\_\_  
Elizabeth A. Burke, City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Gary D. Kidd, City Attorney

**EXHIBIT D**  
Site Improvements

# Exhibit "D" to Development Agreement

## Depiction of Site Improvements

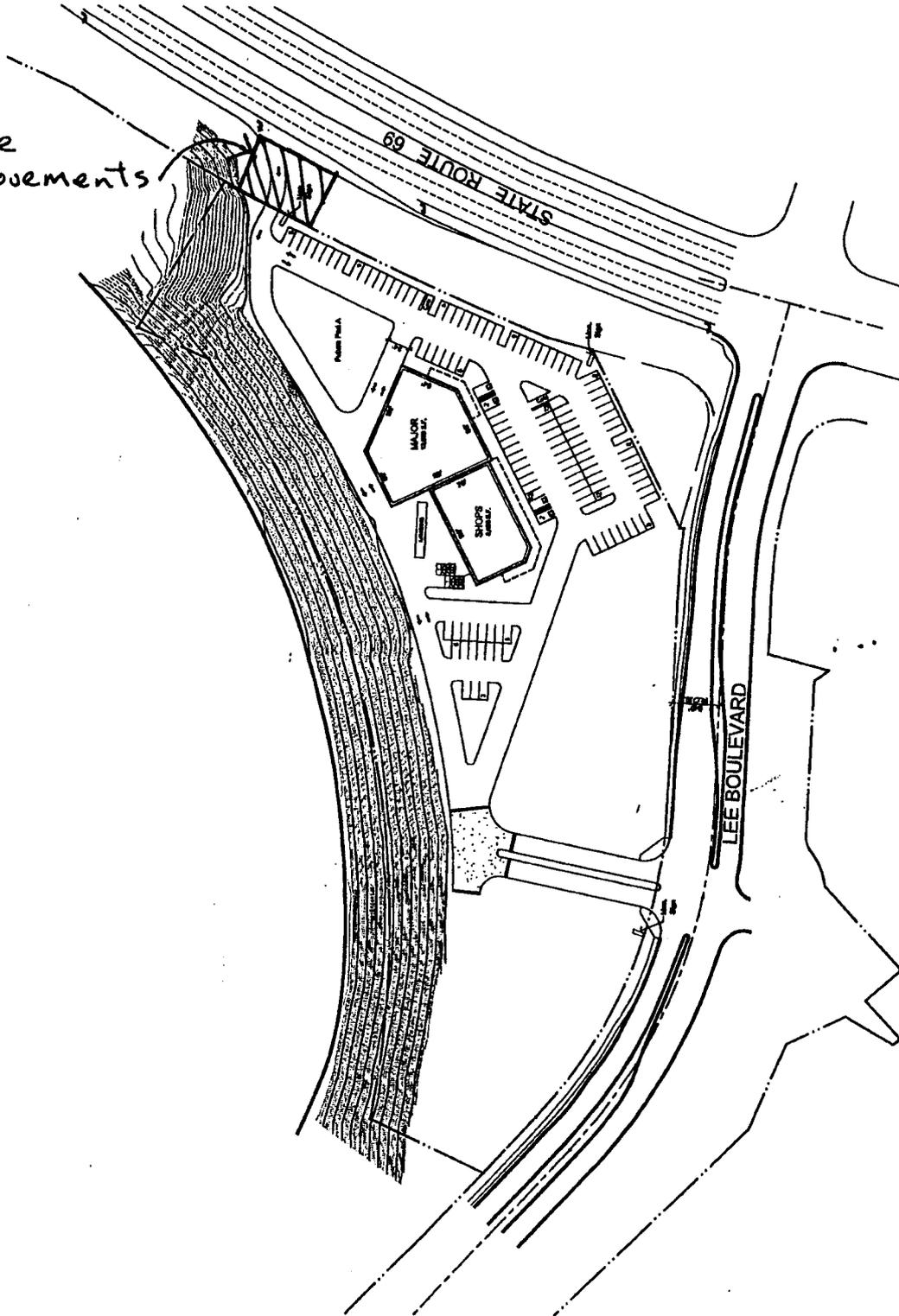
01-04-18  
10:48:57 AM



Site Data	
Green Site Area:	210,165 sq ft
Building Area:	20,000 sq ft
Tenant's Primary Parking Field:	108 Spaces
Future Pod A Parking:	17 Spaces
Total Parking:	125 Spaces



Site  
Improvements



### PRESCOTT GATEWAY

SWC Highway 69 and Lee Boulevard  
Prescott, Arizona

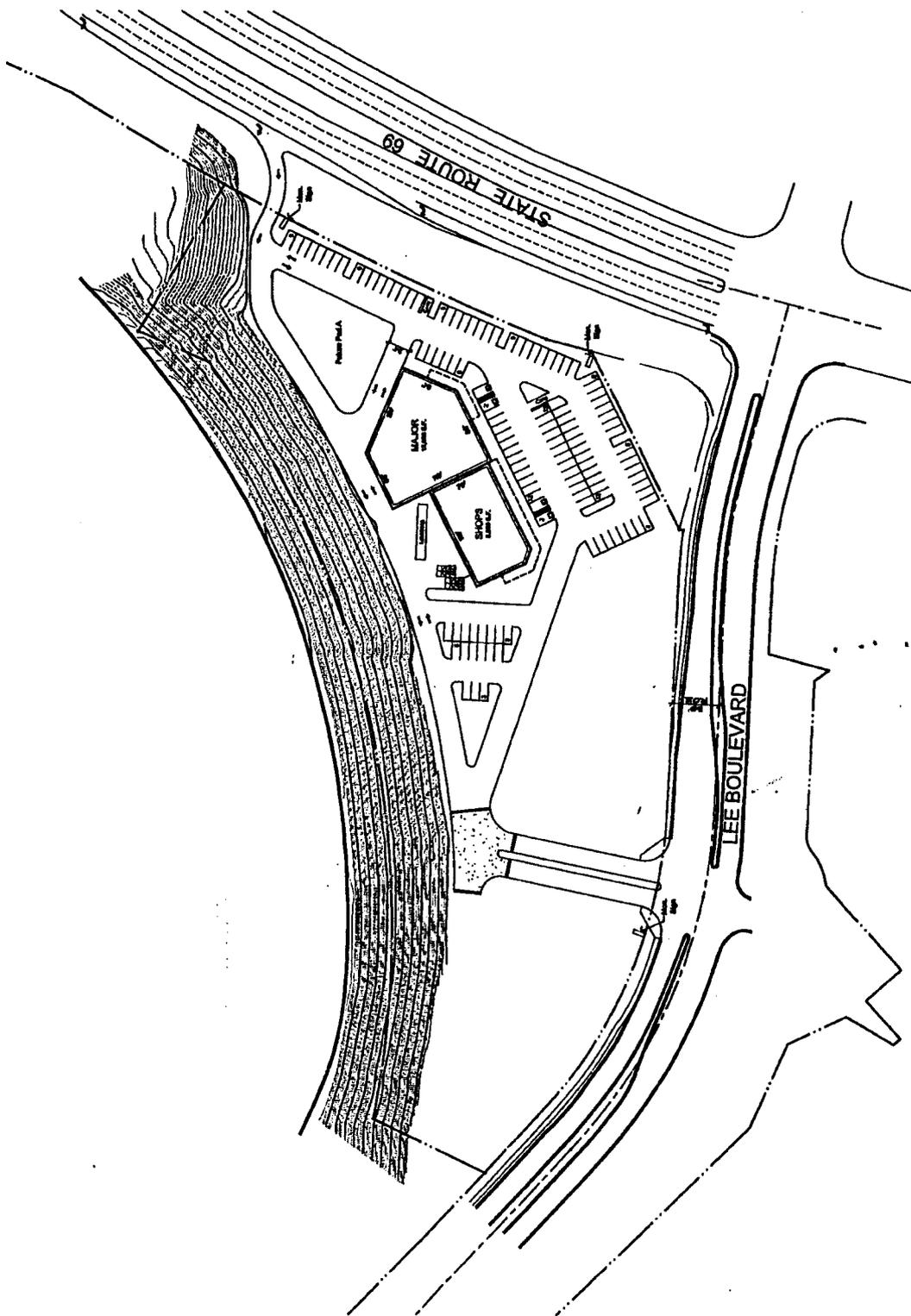
**EXHIBIT E**  
Project Improvements

# Exhibit "E" to Development Agreement

## Depiction of Initial Project Improvements



Site Data	310,000 sq ft
Green Site Area	24,000 sq ft
Building Area	20,000 sq ft
Tennis's Primary Parking Field	105 Spaces
Future (Part A) Parking	17 Spaces
Total Parking	122 Spaces



### PRESCOTT GATEWAY

SWC Highway 69 and Lee Boulevard  
Prescott, Arizona

**EXHIBIT F**  
Lease

**EXHIBIT A**  
**LEGAL DESCRIPTION**

All that portion of the West half of Section 31, Township 14 North, Range 1 West, Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at the West One-quarter corner of said Section 31, from whence the Northwest corner of said Section 31 bears North 01°07'54" East (the basis of bearings for this description);

Thence, North 01°07'54" East along the West line of said Section 31, a distance of 362.31 feet to a point on the South right-of-way of Arizona State Route 69;

Thence, along said right-of-way, South 89°23'53" East, 323.63 feet;

Thence, along said right-of-way, South 83°15'54" East, 308.54 feet;

Thence, along said right-of-way, South 63°52'52" East, 328.02 feet;

Thence, along said right-of-way, South 73°41'52" East, 228.90 feet;

Thence, along said right-of-way, South 51°05'45" East, 123.23 feet;

Thence, along said right-of-way, South 54°32'46" East, 401.52 feet;

Thence, along said right-of-way, South 64°53'44" East, 308.71 feet to a point on a non-tangent curve, concave Northeasterly, with a radius of 2989.79 feet and a radial bearing of North 33°19'21" East;

Thence, Southeasterly along said curve and right-of-way, through a central angle of 03°37'06", a length of 188.81 feet to the POINT OF BEGINNING;

Thence, continuing along said curve and right-of-way, concave Northeasterly, with a radius of 2989.79 feet, through a central angle of 07°17'16", a length of 380.29 feet;

Thence, along said right-of-way, South 74°59'16" East, 49.73 feet;

Thence, leaving said right-of-way, South 25°53'24" East, 212.42 feet, to a point on the West right-of-way of Lee Boulevard, as recorded in Book 26 of Maps and Plats, Pages 27-31, on file in the office of the Yavapai County Recorder;

Thence, along the right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder, South 74°45'33" East, 4.60 feet, to a point on a non-tangent curve, concave Easterly, with a radius of 650.00 feet and a radial bearing of South 81°29'04" East (said point being on the West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder);

Thence Southerly along said West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of 05°26'56", a length of 61.82 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South 03°04'00" West, 242.18 feet to the beginning of a tangent curve, concave Northwesterly, with a radius of 522.96 feet;

Thence, Southerly along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of 40°05'27", a length of 365.92 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South 43°09'27" West, 81.32 feet;

Thence, leaving said right-of-way, North 64°43'53" West, 132.97 feet to a point on a non-tangent curve, concave Southwesterly, with a radius of 1055.07 feet and a radial bearing of North 78°21'18" West;

Thence, Northerly along said curve through a central angle of 46°33'24", a length of 857.32 feet;

Thence, North 65°54'17" West, 81.39 feet;

Thence, North 30°09'03" East, 182.41 feet to the POINT OF BEGINNING.

EXCEPT all coal and other minerals as reserved in Patent from United States of America.

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## ASSIGNMENT AND ASSUMPTION OF PURCHASE AGREEMENT

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THIS ASSIGNMENT AND ASSUMPTION (this "Assignment") is made and entered into as of the \_\_\_ day of February 2011 by and between ERH Acquisitions, LLC, , an Arizona limited liability company (hereinafter called "Assignor"), and The City of Prescott, an Arizona municipal corporation (hereinafter called "Assignee").

### RECITALS

A. Assignor, as Buyer, and VHC 228, LLC, a Delaware limited liability company, as Seller (hereinafter called "Seller"), entered into that Purchase Agreement dated October 26, 2010 (the "Agreement"), under which Seller has agreed to convey certain real property located in Yavapai County, Arizona, more particularly described in the Agreement. Assignor has certain rights and obligations under the Agreement. A true, correct and complete copy of the Agreement is attached to this Assignment as Exhibit A, and is incorporated herein for all purposes.

B. Assignor desires to transfer and assign to Assignee all of its right, title and interest in and to, and arising under, the Agreement, Assignee desires to assume all of the obligations of Assignor under the Agreement and to be bound by all of the terms, conditions and provisions thereof in place of Assignor, and Seller desires to give its consent to such assignment to Assignee.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

### AGREEMENT

1. Assignment and Assumption.

1.1 For the consideration of Twenty-Five Thousand and no/100 Dollars (\$25,000.00) paid by Assignee to Assignor, representing the amount of the Deposit (as defined in the Agreement) previously paid by Assignor to Title Company (as defined in the Agreement), Assignor does hereby irrevocably grant, sell, convey, assign, transfer, set over and deliver unto Assignee all of Assignor's right, title and interest in and to, and arising under, the Agreement. This amount shall be paid by Assignee to Assignor at the time of the Closing (as defined in the Agreement).

1.2 Assignee hereby assumes and agrees to perform all of the duties, obligations and promises of Assignor as set forth in or arising under the Agreement, to be bound by all of the terms, conditions and provisions of the Agreement and to do any and all acts and things required under the Agreement to be done by Assignor.

1.3 Pursuant to Section 25 of the Agreement, Assignor may freely assign its rights under the Agreement without the consent of Seller.

1.4 From and after the date of its execution of this Assignment by Assignee, Assignor shall have no further rights or obligations under the Agreement; provided, however, that as between Assignor and Assignee, Assignor shall remain responsible for the obligations of Buyer arising under Section 16(c) of the Agreement, and Assignor shall indemnify and defend Assignee for and from

any and all actual loss arising out of or in connection with the failure of the contingency described in Section 16(c) of the Agreement to be satisfied; and further provided, however, that in the event that the contingency in Section 16(c) of the Agreement is not met or satisfied, Assignee shall re-assign the Agreement to Assignor so that Assignor may receive the return of the Deposit, and Assignee shall have no further payment obligations to Assignor pursuant to Section 1.1 of this Assignment.

2. Miscellaneous.

2.1 The parties shall execute such additional documents and do such other acts as may be reasonably necessary to fully implement the intent of this Assignment.

2.2 This Assignment shall be governed by and construed according to the laws of the State of Arizona.

2.3 This Assignment shall be binding upon, and shall inure to the benefit of, the parties hereto and their heirs, personal representatives, successors and assigns.

2.4 This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed an original, but all counterparts shall constitute but one agreement. Facsimile signatures shall be permitted and when transmitted shall be deemed an original for all purposes.

2.5 This Agreement may be executed in any number of counterparts, each of which counterparts shall be deemed an original and all of which counterparts shall constitute one and the same instrument. Facsimile signatures shall be permitted and when transmitted shall be deemed an original for all purposes.

The parties have executed this Assignment as of the date indicated above.

**ASSIGNOR:**

ERH Acquisitions, an Arizona limited liability company

By: ERH Holdings, LLC, an Arizona limited liability company, its Manager

By: \_\_\_\_\_  
Brett Heron, Manager

**ASSIGNEE:**

The City of Prescott, an Arizona municipal corporation

By: \_\_\_\_\_  
Marlin D. Kuykendall, Mayor

**ATTEST:**

\_\_\_\_\_  
Elizabeth A. Burke, City Clerk

**APPROVED AS TO FORM:**

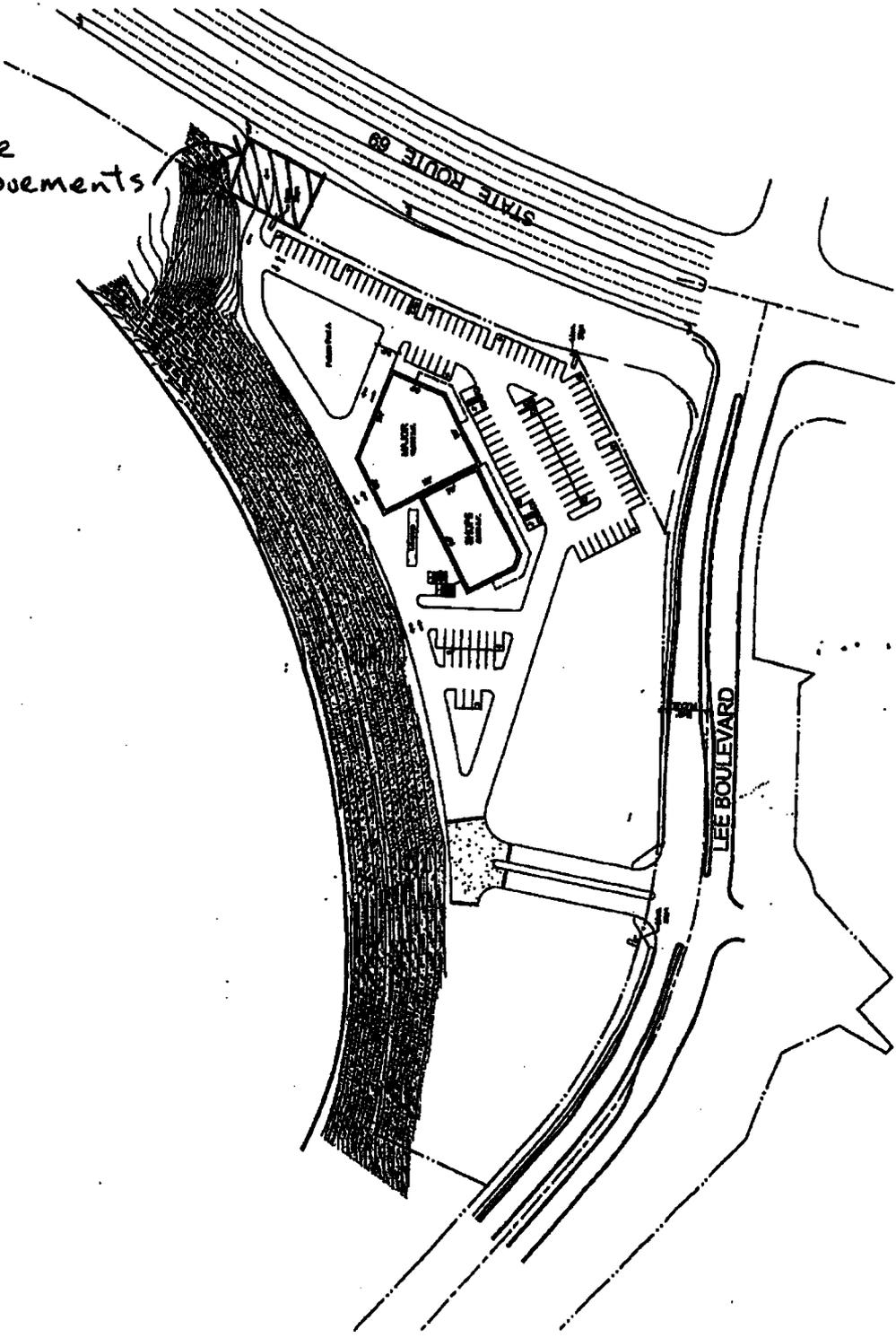
\_\_\_\_\_  
Gary D. Kidd, City Attorney

Exhibit "D" to  
Development Agreement  
Depiction of Site Improvements



Site Area:	279,100 sq. ft.
Ground Area:	279,100 sq. ft.
Building Area:	20,000 sq. ft.
Travels (Primary Parking):	100 Spaces
Primary (Per A. Parking):	17 Spaces
Total Parking:	117 Spaces

Site Improvements



**PRESCOTT GATEWAY**  
SWC Highway 69 and Lee Boulevard  
Prescott, Arizona

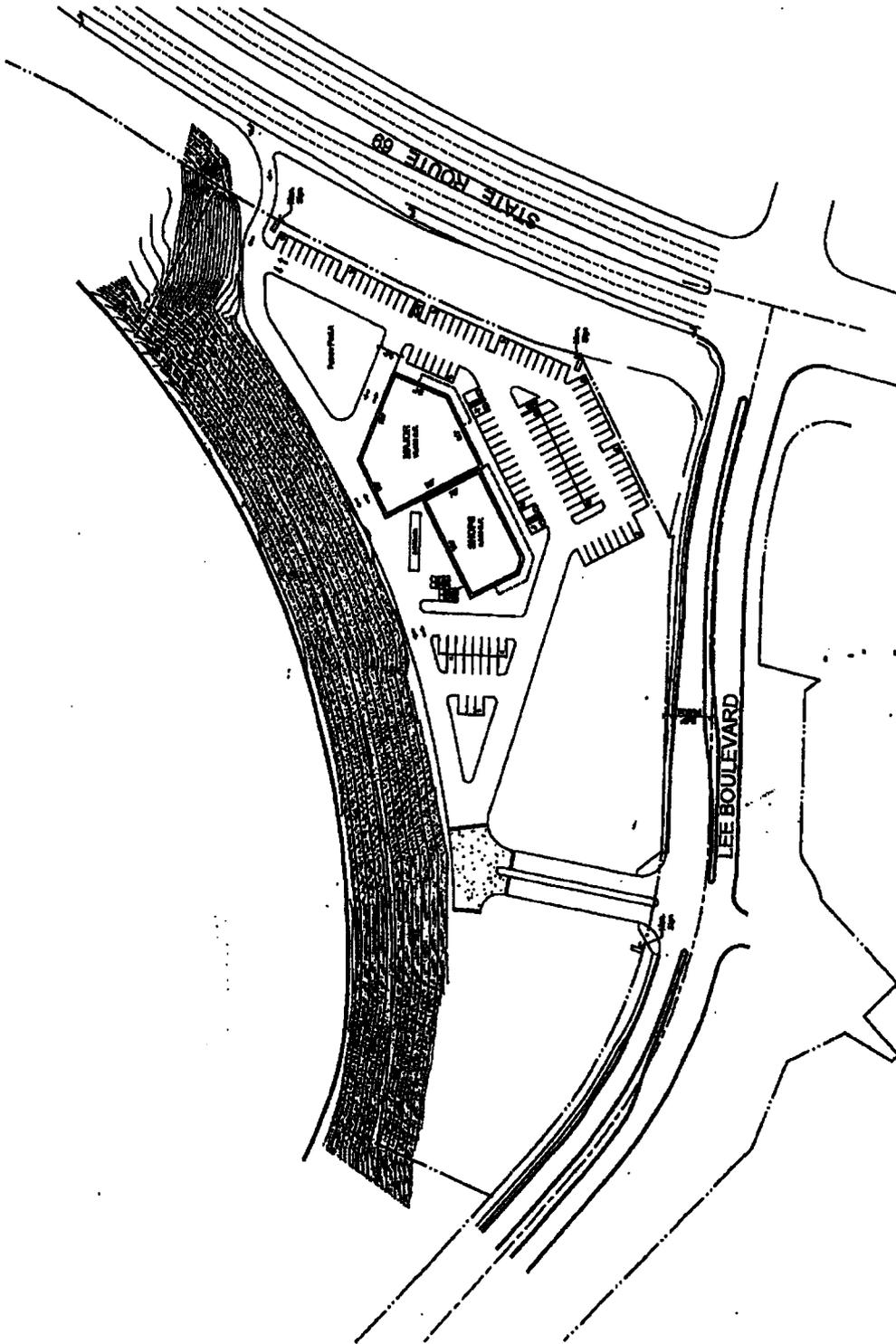
# Exhibit "E" to Development Agreement



## Depiction of Initial Project Improvements



Site Total:	274,000 sq. ft.
Green Site Area:	20,000 sq. ft.
Building Area:	20,000 sq. ft.
Truck/Heavy Parking (Total):	100 Spaces
Phone Mail/A Parking:	17 Spaces
Total Parking:	117 Spaces



**PRESCOTT GATEWAY**  
 SWC Highway 69 and Lee Boulevard  
 Prescott, Arizona

**ORDINANCE NO. 4779-1130**

**AN ORDINANCE OF THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT, YAVAPAI COUNTY, ARIZONA, AUTHORIZING THE PURCHASE OF REAL PROPERTY LOCATED AT THE SOUTHWEST CORNER OF HIGHWAY 69 AND LEE BOULEVARD; AND AUTHORIZING THE MAYOR AND STAFF TO EXECUTE ANY AND ALL DOCUMENTS TO EFFECTUATE SAID PURCHASE**

**RECITALS:**

WHEREAS, the City Council desires to purchase approximately 7.1 acres of real property commonly located at the Southwest corner of highway 69 and Lee Boulevard; and

WHEREAS, the real property is unique in nature; and

WHEREAS, the proposed purchase of the property more particularly described in Exhibit "A" attached hereto is fair and equitable and in the public interest.

**ENACTMENTS:**

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PRESCOTT AS FOLLOWS:

SECTION 1. THAT the City Council hereby authorizes a purchase agreement to be completed for that certain real property located at the southwest corner of Highway 69 and Lee Blvd., more particularly described in Exhibit "A," attached hereto pursuant to an assignment and assumption of rights.

SECTION 2. THAT the Mayor and staff are hereby authorized and directed to execute any and all documents necessary in order to effectuate said purchase agreement and assignment agreement, including acceptance of said property by the City, subject to satisfactory completion of escrow and transfer to the City of clear title by warranty deed.

PASSED and ADOPTED by the Mayor and Council of the City of Prescott, Arizona, on this 15<sup>th</sup> day of February, 2011.

\_\_\_\_\_  
MARLIN D. KUYKENDALL, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
ELIZABETH A. BURKE, City Clerk

\_\_\_\_\_  
GARY D. KIDD, City Attorney

# DRAFT

## PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (this "Agreement") is made and entered into by and between VHC 228, LLC, a Delaware limited liability company ("Seller") and ERH ACQUISITIONS, LLC, an Arizona limited liability company ("Buyer"). The "Effective Date" of this Agreement is the date on which this Agreement is fully executed by all parties hereto, as indicated by the latest date on the signature pages of this Agreement.

1. **Sale and Purchase.** Pursuant to this Agreement, Seller shall sell and Buyer shall purchase the tract of land, all easements, water rights, mineral rights and other rights appurtenant thereto and all of Seller's right, title, and interest in any public rights-of-way adjoining the property, together with any and all licenses, permits and other consents or approvals from governmental authorities or private parties, all development fees, impact fees, water, sewer or other utility tap, connection, meter or service fees or amounts which have been paid to any governmental authority in connection with any previous development of the property, together with all plans, specifications, drawings, reports, studies, books, records and other documents pertaining to said land (collectively, the "Property") described in Exhibit A hereto.
2. **Purchase Price/Reimbursement.** The purchase price for the Property (the "Purchase Price") is \$2,000,000.00. Buyer will deposit \$25,000.00 (the "Deposit") with Magnus Title Agency ("Title Company") (Attn: Vicki Etherton) with interest accruing to the Buyer. The Deposit shall be applicable to the Purchase Price. The balance of the Purchase Price after application of the Deposit will be paid through the Escrow upon closing of this sale ("Closing") by certified check or Federal wire transfer.
3. **Escrow.** This Agreement will be delivered as escrow instructions to establish an escrow (the "Escrow") with Title Company as escrowholder ("Escrow Agent") at the following address: 2525 E. Camelback Road, Suite 136, Phoenix, AZ 85016. Escrow fees are to be split equally between Buyer and Seller. Not less than three (3) business days prior to Closing, Seller shall execute the deed for the Property and deliver it to Title Company to hold until Closing. If there is any inconsistency between any escrow instructions and this Agreement, this Agreement shall control.
4. **Survey.** Buyer, at Buyer's cost, may obtain a survey of the Property (the "Survey") suitable to Buyer and Title Company. The Survey will show each Schedule B exception contained in the Commitment and its effect on the Property. If Seller has an existing ALTA survey, Seller shall authorize the consultant that prepared the existing ALTA survey to certify it to Buyer at Buyer's expense.
5. **Title Review.** The Title Company shall provide Buyer with a commitment for an ALTA owner's title policy on the Property and legible copies of all instruments shown therein as exceptions (the "Commitment"). At Closing Seller shall cause to be released any mortgages, deeds of trust or other non-governmental liens on the Property. Buyer shall have 30 days after receipt of the Commitment and Survey (the "Review Period"), to review the Commitment and Survey. If Buyer objects to any matters in the Commitment or Survey, Buyer shall notify Seller in writing. If Buyer fails to object to any matters, Buyer shall be deemed to have approved the matters then shown on the Commitment and Survey. Within 30 days of receipt of notice, Seller shall notify Buyer whether Seller is able and willing to cure Buyer's objections. If Seller agrees to cure Buyer's objections, Seller shall cure same prior to Closing. If Seller does not agree to cure Buyer's objections, Buyer shall have 30 days following receipt of Seller's notice to either cancel this Agreement in which event the Deposit shall be returned to Buyer or rescind Buyer's

objection to the matters Seller is unable or unwilling to cure. Except for matters to which Buyer objects, exceptions contained in the Commitment are the "Permitted Exceptions". If the Commitment is amended or supplemented after Buyer has submitted its objections to Seller, the same time periods, procedures and notices for objections and clearance of title shall apply to matters disclosed thereby.

6. Title Insurance and Conveyance Instruments. At Closing, Seller shall convey marketable fee simple title to the Property to Buyer, by special warranty deed in a form acceptable to Buyer, subject only to the Permitted Exceptions. Buyer shall obtain at Closing a standard form ALTA Owner's Title Insurance Policy (the "Policy") issued by the Title Company, insuring marketable fee simple title to Buyer in the full amount of the Purchase Price and containing no exceptions or conditions other than the Permitted Exceptions. Seller shall pay for the cost of standard coverage and buyer shall pay the cost to obtain extended coverage and any endorsements requested by Buyer.
7. Risk of Loss and Condemnation. Until Closing, Seller has the risk of loss or damage to the Property. If any loss or damage occurs prior to Closing, Buyer may, at its option, either (i) cancel this Agreement and receive a refund of the Deposit, or (ii) accept the Property. If all or any part of the Property is condemned or any condemnation action or proceeding is commenced prior to Closing, Buyer may, at its option, either (a) cancel this Agreement, or (b) complete the purchase, with all condemnation proceeds and claims being assigned to Buyer.
8. Credits and Prorations. The following provisions shall govern the apportionment of income and expenses with respect to the Property between Seller and Buyer:
  - (a) Real estate taxes and personal property taxes shall be prorated between Seller and Buyer at Closing.
  - (b) All other prorations shall be made in accordance with Escrow Agent's prevailing custom in the county in which the Property is located.
  - (c) The prorations described in this Section 8 shall be made as of 12:01 a.m. on the day of Closing, as if Buyer were vested with title to the Property during the entire day upon which Closing occurs. All prorations described in this Section 8 shall be effected by increasing or decreasing, as the case may be, the amount of cash to be paid by Buyer to Seller at Closing. Seller and Buyer agree to adjust between themselves after Closing any errors or omissions in the prorations made at Closing; provided, however, that such prorations shall be deemed final and not subject to further post Closing adjustments if no such adjustments have been requested within one (1) year after the Closing.
9. Notice of Default. In the event either party is in default of any provision hereof, including pursuant to Section 19, the non-defaulting party, as a condition precedent to its remedies, must give the defaulting party written notice of the default in strict accordance with the notice requirements of Section 18. The defaulting party shall have 10 business days from receipt of such notice to cure the default. If the default is timely cured, this Agreement shall continue in full force and effect. If the default is not timely cured, the non-defaulting party may pursue its applicable remedies set forth in Sections 10 or 11.
10. Remedies of Seller. If Buyer defaults under this Agreement, Seller's sole and exclusive remedy shall be to retain the Deposit as liquidated damages, and cancel this Agreement with Buyer responsible for the payment of any escrow cancellation fees. The parties acknowledge that: (i) it would be impracticable to fix the actual damages suffered by

Seller as a result of such default; and (ii) the amount of the liquidated damages represents a fair and reasonable compensation to Seller for such default.

11. Remedies of Buyer. If Seller defaults under this Agreement, Buyer may, at its option, (a) cancel this Agreement in which case the Title Company is irrevocably instructed to return the Deposit to Buyer, and Seller shall be responsible for any escrow cancellation fees, or (b) proceed with this Agreement and purchase the Property pursuant to this Agreement, or (c) pursue a suit for specific performance; provided, however, that if Seller shall have taken any action to convey the Property or otherwise prevent Buyer's ability to obtain specific performance, then Buyer may pursue any other legal or equitable remedy.
12. Right of Entry and Inspection. At any time prior to Closing, at Buyer's sole expense, Buyer or its authorized agents may enter upon the Property for any lawful purpose, including making inspections and erecting signs Buyer deems necessary. Buyer may select qualified professionals to make inspections (including tests, borings, surveys, studies, inspections, investigations and interviews of persons familiar with the Property) concerning the Property, including but not limited to tests of structures, wells, septic tanks, underground storage tanks, soils, geologic hazards, utility lines and systems and environmental hazards. Buyer shall keep the Property free of any liens, and repair any material physical damages to the Property arising from the inspections. If any inspections disclose matters unsatisfactory to Buyer, which Seller is unable or unwilling to correct at Seller's expense, Buyer may cancel this Agreement prior to the expiration of the Feasibility Period (defined below).
13. Brokerage Fees. At Closing Seller shall pay a commission in the amount of six percent (6%) of the purchase price to RED Realty Advisors, LLC. Both parties represent that no other broker is involved in this Agreement (other than SRS Real Estate Partners, whose commission will be paid from a portion of the amount due RED Realty Advisors, LLC hereunder) and each party indemnifies the other against any other brokerage or commission claims arising out of the indemnifying party's actions.
14. Seller's Warranties and Covenants.

14.1 Seller's Warranties. Seller makes the following representations and warranties which are true and accurate as of the Effective Date and as of Closing:

- (a) Seller has no actual knowledge of any violations of city, county, state, federal, building, land use, fire, health, safety, environmental, hazardous materials or other governmental or public agency codes, ordinances, regulations, or orders with respect to the Property.
- (b) No litigation is pending, or to Seller's actual knowledge threatened with respect to the Property or Seller's interest therein.
- (c) The individual signing this Agreement on behalf of Seller has the authority to bind the Seller to the agreements set forth herein.
- (d) Except as disclosed to Buyer in writing, there are no unrecorded leases, arrangements, agreements, understandings, options, contracts, or rights of first refusal affecting or relating to the Property in any way.

14.2 Seller Covenants. Seller covenants with Buyer as follows:

- (a) Seller shall not enter into any lease or contract (or an extension or modification of same) with respect to the Property which will survive the Closing or otherwise affect the use, operation or enjoyment of the Property after the Closing, without first obtaining Buyer's prior written consent thereof, which consent shall not be unreasonably withheld.
- (b) After the Effective Date and prior to Closing, no part of the Property, nor any interest therein, will be alienated, encumbered or otherwise transferred.
- (c) Seller shall deliver the Property at Closing in substantially the same condition as it was in on the Effective Date, reasonable wear and tear excepted.
- (d) Seller has paid or will pay in full, prior to Closing, all bills and invoices for labor, goods, materials and services of any kind with respect to the Property and utility charges relating to the period prior to Closing.
- (e) Seller shall promptly notify Buyer of any change in any condition with respect to the Property or of any event or circumstance which makes any representation or warranty of Seller to Buyer under this Agreement untrue or misleading, or any covenant of Seller under this Agreement incapable or less likely of being performed, it being understood that Seller's obligation to provide notice to Buyer under this Section 14.2 shall in no way relieve Seller of any liability for a breach by Seller of any of its representations, warranties or covenants in this Agreement.

15. Intentionally Omitted.

16. Contingencies.

- (a) Feasibility Period. Buyer shall have a 45 day period from the Effective Date (the "Feasibility Period") to determine the feasibility of Buyer's planned development of the Property. At any time prior to the end of the Feasibility Period, the Buyer may, for any reason in its sole and absolute discretion, cancel this Agreement and receive a refund of the Deposit. From and after the expiration of the Feasibility Period, and except as otherwise provided in Sections 5, 11, 16(b) and 16(c), the Deposit shall be non-refundable.
- (b) The Governmental Agreements. Notwithstanding anything to the contrary contained in this Agreement, Buyer's obligations under this Agreement are expressly conditioned upon the City of Prescott, agreeing to each of the following pursuant to agreements in form and substance satisfactory to the Buyer in the Buyer's sole discretion (collectively the "City Agreements"):
  - (i) The approval of all discretionary approvals required to develop the site as a Trader Joe's anchored retail center.
  - (ii) The approval of a Development Agreement and ground lease upon such terms and conditions as may be acceptable to Buyer.

As used herein, "Final Approval" means the date when (i) all of the City Agreements have been reviewed and finally approved by the appropriate governmental agencies, (ii) any ordinances with respect thereto have taken effect, (iii) the time has passed for appeal of all City Agreements, (iv) no notice of referendum or initiative with respect to any City Agreement has been published

or publicized and (v) any appeals or litigation with respect to (iii) or (iv) above have been prosecuted and resolved in a manner which is satisfactory to Buyer and is not subject to remand to lower courts or governmental agencies. In the event that the Buyer is unable to obtain Final Approval of the City Agreements or in the event that the terms of the City Agreements are not acceptable to the Buyer, then in either such event, Buyer shall have the right to terminate this Agreement in which event the Deposit shall be returned to Buyer and the parties shall have no further obligations hereunder.

(c) Trader Joe's Lease. Notwithstanding anything to the contrary contained in this Agreement, Buyer's obligations under this Agreement are expressly conditioned upon negotiating a lease with Trader Joes to occupy a portion of the property and the removal of all contingencies involving discretionary city approvals. In the event that Buyer is unable to negotiate a lease with Trader Joes upon terms acceptable to Buyer and secure the removal of the contingencies related to discretionary approvals contained therein, then in either such event, Buyer shall have the right to terminate this Agreement in which event the Deposit shall be returned to Buyer and the parties shall have no further obligations hereunder.

17. Information. After the Effective Date, Seller shall provide Buyer with full access during normal business hours to all of the following located at Seller's office: (i) all surveys, site plans, studies, engineering reports, environmental studies, agreement pertaining to any water rights or supply, matters similar to the results of inspections and other materials prepared for Seller, (ii) all licenses, permits, certificates of occupancy and other consents or approvals from governmental authorities or private parties, and (iii) all plans, specifications, drawings, reports, studies, books, records and other documents pertaining to the Property. Buyer, at Buyer's cost, shall have the right to copy any of the foregoing documents. In addition to the foregoing, Seller shall disclose in writing any other material reports concerning the Property of which Seller is aware. The foregoing requirements are not intended to impose upon Seller a duty to independently investigate the existence and location of materials or information relating to the Property of which Seller has no knowledge. If this Agreement is canceled, the information provided will be returned to Seller; otherwise, Buyer may retain the information. Seller shall disclose any material changes with respect to any information contained in this Agreement which occur prior to Closing.

18. Notices. All notices and communications required or permitted to be given hereunder shall be in writing and hand delivered or mailed by certified or registered mail, postage prepaid, or by Federal Express, Airborne Express, or similar overnight delivery service, addressed as follows:

If to Seller:  
VHC 228, LLC  
c/o Vertical Holdings Company, LLC  
7377 E. Doubletree Ranch Road  
Suite A-270  
Scottsdale, AZ 85258  
Attention: Mark Villalpando

If to Buyer:  
ERH Acquisitions, LLC  
One East Washington Street, Suite 300  
Phoenix, AZ 85004  
Attention: Brett Heron

Notice shall be deemed to have been given upon receipt or refusal.

19. **Closing.** Closing shall occur at a place and time mutually agreed upon by the parties, within 30 days following the later to occur of the Final Approval of the City Agreements and when all conditions and contingencies set forth in this Agreement are satisfied; provided, however, if the Closing has not occurred by June 30, 2011, then at any time thereafter, either party may terminate this Agreement by providing written notice to the other party and Title Company. Seller shall deliver to Buyer and Title Company all information and documents required of it for Closing at least three days prior to Closing. If Seller fails to do so, Buyer may, at its option, delay Closing until three days after all information and documents are delivered. Each party authorizes the Title Company to prepare the settlement statements for the Closing on HUD forms, show both the Buyer and Seller columns on a single settlement statement and disclose to the other party both the Buyer's and the Seller's half of any settlement statement, pre-audit or similar closing statement. Seller shall deliver possession of the Property to Buyer at Closing.
20. **Closing Costs.** Notwithstanding anything to the contrary contained herein, Closing costs shall be paid as follows:
- By Seller (Seller hereby authorizing Title Company to deduct the following expenses from the Seller's proceeds due at Closing):
- (a) Expenses of placing title in proper condition.
  - (b) Preparation of Special Warranty Deed, the Bill of Sale and Assignment, the Assignment and Assumption of Contracts, affidavits and any other documents required to convey title.
  - (c) Brokerage or finder's fee or commission, if any.
  - (d) Seller's share of the escrow and title fees.
  - (e) Revenue stamps, transfer tax, documentary stamps or excise tax.
- By Buyer:
- (a) Recording fees.
  - (b) Buyer's share of the escrow and title fees.
21. **Time of Essence.** Time is of the essence of this Agreement.
22. **Entire Agreement.** This Agreement contains the entire agreement between Seller and Buyer, and there are no other terms, conditions, promises, undertakings, statements or representations, either written or oral or express or implied, concerning the sale contemplated by this Agreement.
23. **Headings.** The Section headings are for convenience of reference only and do not modify or restrict any provisions hereof and shall not be used to construe any provisions.
24. **Modifications and Waiver.** This Agreement may be amended only by an instrument in writing signed by both Seller and Buyer. This Agreement may be terminated only in accordance with the terms of this Agreement or by an instrument in writing signed by both Seller and Buyer. No waiver of any of the provisions of this Agreement shall constitute a waiver of any other provision, nor shall any waiver be a continuing waiver. Except as expressly provided in this Agreement, no waiver shall be binding unless executed in writing by the party making the waiver.
25. **Successors.** This Agreement shall inure to the benefit of and bind the parties hereto and their respective executors, heirs, administrators, successors and assigns. Seller may

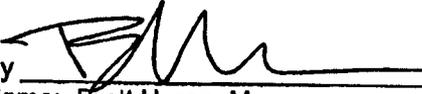
not assign this Agreement without the prior written consent of Buyer. Buyer may freely assign this Agreement without consent by Seller.

26. Internal Revenue Code. Seller agrees to comply with Section 1445 of the Internal Revenue Code and will complete and submit to Buyer a non-foreign affidavit.
27. Attorney's Fees; Court Costs. In any action or proceeding arising out of this Agreement, each party shall bear its own attorney's fees, and the prevailing party shall be entitled to recover only court costs from the non-prevailing party incurred by such party in enforcing its rights hereunder. In the event of a legal dispute, the laws of the State where the Property is located shall prevail.
28. Survival. All warranties, indemnities, representations and covenants herein and the provisions of Section 8 shall survive Closing.
29. Dates of Performance. If any date for performance of any obligation hereunder falls on a Saturday, Sunday or nationally established holiday, the time for performance of such obligation shall be extended until the next business day following such date.
30. Enforceability. If any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable. This Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof.
31. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which, together, shall constitute one and the same instrument.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the Effective Date.

**ERH ACQUISITIONS, LLC**, an Arizona limited liability company

By: ERH Holdings, LLC, an Arizona limited liability company  
Its: Manager

By   
Name: Brett Heron, Manager  
Date 10/26/10

**VHC 228, LLC, LLC**, a Delaware limited liability company

By: Vertical Holdings Company, an Arizona limited liability company  
Its: Manager

By   
Name: Mark Villalpando  
Its: Member  
Date: 10/25/10

**EXHIBIT A TO PURCHASE AGREEMENT**

(Legal Description of the Property--To be attached by Escrow Agent)

**EXHIBIT A TO PURCHASE AGREEMENT**

**EXHIBIT A**  
**LEGAL DESCRIPTION**

All that portion of the West half of Section 31, Township 14 North, Range 1 West, Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at the West One-quarter corner of said Section 31, from whence the Northwest corner of said Section 31 bears North 01°07'54" East (the basis of bearings for this description);

Thence, North 01°07'54" East along the West line of said Section 31, a distance of 362.31 feet to a point on the South right-of-way of Arizona State Route 69;

Thence, along said right-of-way, South 89°23'53" East, 323.63 feet;

Thence, along said right-of-way, South 83°15'54" East, 308.54 feet;

Thence, along said right-of-way, South 63°52'52" East, 328.02 feet;

Thence, along said right-of-way, South 73°41'52" East, 228.90 feet;

Thence, along said right-of-way, South 51°05'45" East, 123.23 feet;

Thence, along said right-of-way, South 54°32'46" East, 401.52 feet;

Thence, along said right-of-way, South 64°53'44" East, 308.71 feet to a point on a non-tangent curve, concave Northeasterly, with a radius of 2989.79 feet and a radial bearing of North 33°19'21" East;

Thence, Southeasterly along said curve and right-of-way, through a central angle of 03°37'06", a length of 188.81 feet to the POINT OF BEGINNING;

Thence, continuing along said curve and right-of-way, concave Northeasterly, with a radius of 2989.79 feet, through a central angle of 07°17'16", a length of 380.29 feet;

Thence, along said right-of-way, South 74°59'16" East, 49.73 feet;

Thence, leaving said right-of-way, South 25°53'24" East, 212.42 feet, to a point on the West right-of-way of Lee Boulevard, as recorded in Book 26 of Maps and Plats, Pages 27-31, on file in the office of the Yavapai County Recorder;

Thence, along the right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder, South 74°45'33" East, 4.60 feet, to a point on a non-tangent curve, concave Easterly, with a radius of 650.00 feet and a radial bearing of South 81°29'04" East (said point being on the West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder);

Thence Southerly along said West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of 05°26'56", a length of 61.82 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South  $03^{\circ}04'00''$  West, 242.18 feet to the beginning of a tangent curve, concave Northwesterly, with a radius of 522.96 feet;

Thence, Southerly along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of  $40^{\circ}05'27''$ , a length of 365.92 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South  $43^{\circ}09'27''$  West, 81.32 feet;

Thence, leaving said right-of-way, North  $64^{\circ}43'53''$  West, 132.97 feet to a point on a non-tangent curve, concave Southwesterly, with a radius of 1055.07 feet and a radial bearing of North  $78^{\circ}21'18''$  West;

Thence, Northerly along said curve through a central angle of  $46^{\circ}33'24''$ , a length of 857.32 feet;

Thence, North  $65^{\circ}54'17''$  West, 81.39 feet;

Thence, North  $30^{\circ}09'03''$  East, 182.41 feet to the POINT OF BEGINNING.

EXCEPT all coal and other minerals as reserved in Patent from United States of America.

#1-C

**ORDINANCE NO. 4780-1131**

**AN ORDINANCE OF THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT, YAVAPAI COUNTY, ARIZONA, AUTHORIZING THE LEASING OF REAL PROPERTY LOCATED AT THE SOUTHWEST CORNER OF HIGHWAY 69 AND LEE BOULEVARD AND AUTHORIZING POTENTIAL SALE OF SUCH PROPERTY IN CONJUNCTION WITH A LEASE PURCHASE OPTION AND AUTHORIZING THE MAYOR AND STAFF TO EXECUTE ANY AND ALL DOCUMENTS TO EFFECTUATE SAID PURCHASE**

**RECITALS:**

WHEREAS, the City Council desires to purchase approximately 7.1 acres of real property commonly located at the Southwest corner of Highway 69 and Lee Boulevard and upon completion of the purchase, wishes to enter into a lease agreement with a option to buy; and

WHEREAS, the real property is unique in nature; and

WHEREAS, the proposed lease of the property more particularly described in Exhibit "A" attached hereto is fair and equitable and in the public interest and said proposal is deemed acceptable, and is however, subject to compliance with all City Code and Charter requirements.

**ENACTMENTS:**

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PRESCOTT AS FOLLOWS:

SECTION 1. THAT the City Council hereby authorizes a lease purchase agreement to be completed, subject to compliance with all City Charter and Code requirements.

SECTION 2. THAT the Mayor and staff are hereby authorized and directed to execute any and all documents in order to effectuate a lease agreement with a purchase option, which option shall provide for and allow the sale of all or part of said property under terms and conditions that provide for a reasonable return of the City's investments. Said lease agreement and purchase option shall be contingent and conditioned upon prior compliance with City Charter and City Code provisions and shall not be effective until such compliance and successful completion of the purchase of the property by the City.

PASSED and ADOPTED by the Mayor and Council of the City of Prescott, Arizona, on this 15<sup>th</sup> day of February, 2011.

\_\_\_\_\_  
MARLIN D. KUYKENDALL, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
ELIZABETH A. BURKE, City Clerk

\_\_\_\_\_  
GARY D. KIDD, City Attorney

**DRAFT**

City Contract # \_\_\_\_\_

**LEASE AGREEMENT**  
**between the**  
**CITY OF PRESCOTT**  
**AND**  
**ERH ACQUISITIONS, LLC**

**EFFECTIVE DATE**

\_\_\_\_\_, 2011

## GROUND LEASE BETWEEN THE CITY OF PRESCOTT AND ERH ACQUISITIONS, LLC

This ground lease (the "Lease") is made between the CITY OF PRESCOTT, a municipal corporation of the State of Arizona, hereinafter referred to as "City" or "Lessor," and ERH ACQUISITIONS, LLC, an Arizona limited liability company, hereinafter referred to as "Lessee." In consideration of the premises and the mutual covenants contained in this Lease, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party to the other, the parties agree as follows:

### RECITALS

Lessor has agreed to lease approximately 7.1 acres of land at the southwest corner of Highway 69 and Lee Boulevard to the Lessee, for the purpose of constructing, and thereafter leasing or subleasing, certain Improvements. Should Improvements be constructed by the Lessee to the Premises, Lessee will retain ownership of the Improvements during the term of this Lease unless the Lease is earlier terminated as provided herein.

### ARTICLE I. DEFINITIONS AND EXHIBITS

A. Definitions. The following words as used in this Lease shall have the following meanings unless the context clearly indicates otherwise:

Affiliate means Lessee (including all entities which have an ownership interest in Lessee), any person or legal entity that is controlled by Lessee, that controls Lessee or that is under common control with Lessee, whether direct or indirect, and whether through ownership of voting securities, by control or otherwise. For purposes of this definition, "control" shall be conclusively presumed in the case of direct or indirect ownership of fifty percent (50%) or more of outstanding interests in terms of value or voting power of Lessee.

City means the City of Prescott, Arizona.

City Council or Council means the City Council of the City.

City Manager means the City Manager for the City.

Community Development Director means the Community Development Director for the City.

Development Agreement means that certain "Development Agreement" between the City and Lessee (as the Developer named therein), dated February \_\_\_\_, 2011.

Encumbrance means:

- (1) any pledge, mortgage, contract lien, assignment, or transfer, of all or part of Lessee's interest in the Premises; or
- (2) any transfer of fifty percent (50%) or more of Lessee's total ownership interest in Lessee's business.

Effective Date means the date following which the City has purchased the Premises, complied with all City Code provisions relating or applicable to leasing the Premises to Lessee (as authorized by the Development Agreement), and the parties have executed this Lease, which date shall be inserted on the cover page of this Lease.

Improvement or Improvements means any building, structure or fixture constructed, erected, placed, expanded, altered, or modified by Lessee, including any parking lot, driveway, walkway, landscaping feature, water well, water supply system, septic system, utility line, or outdoor sign.

Initial Improvements mean the Improvements to be constructed in the first phase of development as more specifically described on Exhibit C.

Lease means this agreement.

Mortgagee means the beneficial holder of a mortgage on any Improvement and Lessee's interest under this Lease.

Premises means the real property subject to this Lease as legally described in Exhibit A.

Site Improvements means the site improvements required to be constructed by the City pursuant to the terms of the Development Agreement.

Store Competition Date means the date on which the store to be constructed for Trader Joe's Company, a California corporation, has been substantially completed, and the City has issued a final certificate of occupancy for such store.

Total Municipal Cost means the sum of the amounts paid by the City for the acquisition of its fee interest in the Premises, and all costs incurred in connection with the construction of the Site Improvements.

B. Exhibits. This Lease includes the following exhibits, attached to and incorporated into this Lease by reference. Any amendment of any Exhibit to this Lease approved by the City Council shall be attached to this Lease as a modification of this Lease. The amendment to any Exhibit shall be effective when Lessor and Lessee execute a written instrument accepting such amendment.

Exhibit A is the legal description of the Premises.

Exhibit B is the allowed uses for the Premises.

Exhibit C is a description of the Initial Improvements.

## **ARTICLE II. LEASE OF PREMISES**

Lessor hereby leases to Lessee and Lessee leases from Lessor the Premises described in Exhibit A on the terms and conditions set forth in this Lease.

## **ARTICLE III. TERM**

The term of this Lease ("Term") shall commence on the Effective Date and shall be forty-five (45) years from the Store Completion Date.

## **ARTICLE IV. RENTALS AND PAYMENTS**

Lessee shall pay rent ("Rent") to Lessor in equal monthly installments, on the 1st business day of each month during the term hereof, as follows:

A. Prior to Store Completion Date. From and after the Effective Date of this Lease, but prior to the Store Completion Date, no Rent shall be owing from Lessee to Lessor. Lessee shall use commercially

reasonable efforts to cause Trader Joe's to achieve a store Completion Date no later than \_\_\_\_\_ (subject to force majeure).

**B. Subsequent to Store Completion Date.**

1. From and after the Store Completion Date, and until the expiration of the sixtieth (60th) full calendar month thereafter, Lessee shall pay monthly Rent in advance equal to one-twelfth of the Total Municipal Cost, multiplied by six percent (6%).

2. If the Store Completion Date occurs on a day that is not the first day of a calendar month, then the first payment of Rent from Lessee to Lessor shall be a prorated amount for the partial month, and the full monthly amount for the next full calendar month thereafter.

3. For the sixty-first (61st) through the one hundred twentieth (120th) calendar month following the Store Completion Date, Lessee shall pay monthly Rent in advance equal to one-twelfth of the Total Municipal Cost, multiplied by seven percent (7%).

4. From and after the One Hundred Twenty First (121st) calendar month following the Store Completion Date, Lessee shall pay monthly Rent in advance equal to one-twelfth of the Total Municipal Cost, multiplied by eight percent (8%).

5. Notwithstanding the foregoing, effective on the One Hundred Thirty Third (133rd) calendar month following the Store Completion Date, and each twelve (12) month anniversary thereafter, the monthly Rent as calculated in Section 4(B)(4) above, shall be adjusted by the percentage increase, if any, in the Consumer Price Index (CPI) for the immediately preceding twelve calendar month period. The CPI shall mean the Consumer Price Index for the U.S. City Averages for All Urban Customers. All items of the United States Department of Labor, Bureau of Labor Statistics. If the CPI is discontinued, then the Lessor shall substitute therefor a comparable index based upon the cost of living or the purchasing power of the consumer dollar published by any other governmental agency, or if no such index is available, a comparable index published by a major financial institution or a university.

**C. Due Date and Place of Payment.** Each monthly rental payment is due on the first City business day of each month without notice or billing from Lessor and shall be delivered to the City's Finance Department, P.O. Box 2059, Prescott, Arizona, or personally to the department at 201 S. Cortez Street, Prescott, Arizona, unless another address as specified by Lessor in writing.

**D. Penalties for Delinquency.** Any monthly rental payment not paid by the fifteenth (15) day of the month due is delinquent and shall include an additional monetary amount, as a penalty, equal to ten percent (10%) of the monthly rental due for that month. Additionally, all rental payments which are past due more than thirty (30) days shall accrue interest at the rate of one and one-half percent (1.5%) per month on the overdue amount.

**ARTICLE V. USE OF PREMISES**

Lessee shall use the Premises solely for the purpose of conducting those lease activities approved by the City as set forth in Exhibit B, attached hereto and made a part hereof. Lessee shall operate and manage the Premises according to federal, state, and local codes, laws and ordinances as they may exist or be amended from time to time. Lessee shall also comply with any future amendments to the City code that are not in direct conflict with this Lease. Lessee must comply with all applicable federal, state and local regulations, including but not limited to the Storm Water Pollution Prevention Plan.

## ARTICLE VI. IMPROVEMENTS TO PREMISES

A. Site Improvements. Promptly following its execution of this Lease, City shall commence the construction of the Site Improvements in accordance with the terms and conditions of the Development Agreement, which obligations are fully incorporated into this Lease and made a part hereof. Lessee consents to the presence of Lessor (and its contractors) on the Premises for the purpose of timely constructing the Site Improvements.

B. Approval of Initial Improvements.

1. By approving this Lease, the City Council has approved the Initial Improvements on the Premises, as described in Exhibit C subject to compliance with this Lease and any and all applicable codes, ordinances, rules, regulations, and laws. Any Improvements in addition to the Initial Improvements shall be deemed approved by Lessor once approved by the City through its normal review processes.

2. The plans for the Improvements shall be kept on file with the City Manager or his/her designee.

3. The City's ordinances and codes applicable to the construction of buildings and structures within the City shall apply to any Improvements made by Lessee on the Premises, including the requirements to apply for permits, pay fees, and receive permits prior to beginning construction of any Improvement. All Improvements shall be constructed in strict compliance with the plans for the Improvements as approved by the City and the provisions of this Lease. Lessee shall file with the City, a complete set of as-built drawings, within thirty (30) days of completion of any Improvement. The drawings must be submitted both in hard copy and in an electronic format as established by the Community Development Director.

C. Initial Improvements by Lessee.

1. Lessee shall make proper application for construction permits for the Initial Improvements to the City's building official within sixty (60) days of the City Council's approval of the site plan for the Premises. Lessee or Lessee's contractor shall commence construction of the Initial Improvements promptly following the issuance of the construction permits and shall diligently pursue construction to completion.

2. If for any reason, Lessee fails to complete construction of the Initial Improvements within 18 months following the Effective Date, either party may terminate this Lease by giving the other party written notice of termination thirty (30) days in advance of the termination date.

D. Connection to Parking Improvements. Lessee agrees to install and maintain any connections between the City's adjacent roadways and the Premises as needed by Lessee for the enjoyment or use of the Premises. Lessee shall construct these connections in accordance with the requirements of this Lease applicable to the approval of Improvements.

## ARTICLE VII. MAINTENANCE

A. Lessee's Maintenance Obligations. Lessee shall keep and maintain the Premises and all Improvements on the Premises in good condition and repair and in a safe, clean and sanitary condition. Lessee shall provide containers on the Premises for trash, garbage and waste. The City Manager may issue and Lessee shall comply with any written directive regarding the type, location, and screening of trash

containers maintained by Lessee outside any building, provided that such directive is applicable to all comparable retail centers in the City. Lessee shall utilize City sanitation services on the property so long as they are available for the Premises.

B. Lessor Self Help. If Lessee fails to make repairs to any Improvement, correct any unsafe or unsanitary condition, or remove any litter or waste as required by this Article, Lessor may give Lessee written notice of the defect. If Lessee fails to correct the condition within thirty (30) days of Lessor's written notice, Lessor may enter upon the Premises and correct the condition and Lessee shall pay the cost thereof, (including, the cost of labor, material, and equipment) within ten (10) days of receipt of statement from Lessor.

## ARTICLE VIII. INSURANCE

A. Minimum Lessee Insurance Requirements. Lessee shall obtain and maintain during this Lease, at Lessee's expense, the following minimum insurance. The insurance requirements herein are minimum requirements for this Lease and in no way limit the indemnity covenants contained in this Lease. All insurance policies cited herein shall not contain any restrictions of coverage with regard to operations on or near City premises. All insurance policies cited herein shall contain a waiver of subrogation rights endorsement with respect to Lessor. Insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.

1. Commercial General Liability Insurance against claims for bodily injury, death, and property damage occurring on, in or about the Premises, related to or arising out of Lessee's activities, in an amount not less than \$2,000,000 aggregate. The policy must be written on an "occurrence basis". The policy shall be endorsed to include the following additional insured language: "Lessor shall be named as an additional insured with respect to liability arising out of the activities on Lessee's premises, using form CG2010 (10/01) or equivalent.

2. Fire and Extended Coverage to protect against loss or damage to any Improvements located on the Premises resulting from fire, lightning, vandalism, malicious mischief and such perils ordinarily defined as "extended coverage". The insurance shall be maintained in an amount of not less than the full replacement value of all Improvements constructed on the Premises, subject to a deductible clause not to exceed twenty-five thousand dollars (\$25,000.00). The proceeds paid to Lessee from any loss under this policy(s) shall be used to replace or repair any loss or damage to the Premises. Lessor shall be named as a loss payee on property coverage.

B. Annual Delivery of Certificates. Lessee shall furnish to Lessor prior to occupancy of the Premises and annually during the term of this Lease, certificates of insurance showing that the insurance requirements of this Lease have been met and that Lessor is named as an additional insured under the required Commercial General Liability and other policies. New certificates of insurance shall be resubmitted to Lessor whenever changes or revisions occur. Lessee shall use commercially reasonable efforts to insure that each policy of insurance contains the following clause:

It is agreed that this policy shall not be canceled nor the coverage reduced until thirty (30) days after Lessor has received written notice of the cancellation or reduction.

C. Modification Of Coverage Requirements. Lessor shall have the right from time-to-time to require Lessee to obtain increases in insurance coverage if Lessor determines that increases are necessary to provide adequate protection to Lessor as a result of the passage of time and changes in economic conditions.

D. Self Help By Lessor. Should Lessee fail to obtain or keep the required insurance in effect during this Lease, Lessor, subject to the provisions of Article XIII, may purchase the required insurance and Lessee shall reimburse Lessor for the cost thereof within ten (10) days of Lessor sending an itemized statement showing the cost incurred. In the event that Lessee fails to do so, Lessor may maintain a direct action seeking reimbursement for such sums, and/or may elect to proceed with termination of this Lease as provided herein for breaches of the Lease.

## **ARTICLE IX. TAXES, ASSESSMENTS AND FEES**

Lessee shall pay, before they become delinquent, all taxes, assessments and fees assessed or levied upon Lessee, Lessee's property or the Premises by any government entity or political subdivision, including, without limitation, the following:

A. Sales & Privilege Taxes. Lessee shall pay any taxes measured by the gross rental receipts (rental taxes) which Lessor is required to collect or pay by reason of the amounts paid by Lessee to Lessor under this lease, as determined by any taxes imposed by the City of Prescott, County of Yavapai, or the State of Arizona. Lessee shall make reasonable efforts to include in all subleases, provisions requiring the subtenants to comply with all applicable laws.

B. Real Property Taxes. Lessee, in addition to the rent provided for herein, shall pay or reimburse Lessor for all ad valorem real property taxes and assessments upon the Premises and the Improvements, which are assessed during the Term.

C. Personal Property Taxes. Lessee shall pay prior to delinquency all taxes assessed against and levied upon trade fixtures, furnishings, equipment, and all other personal property of Lessee contained in the Premises or elsewhere, and when possible, Lessee shall cause such property to be assessed and billed separately from the real property of Lessor.

Notwithstanding the above, Lessee shall not be responsible for, or have any personal liability to the Lessor for the payment (or a tenant's non-payment) of (1) taxes and assessments levied upon the personal property or fixtures of any tenant within the Premises, (2) the payment of any related fees or charges assessed against any tenant in the Premises with respect to such tenant's use of the property, and (3) commercial use/sales tax fees assessed by the City, which the City hereby agrees shall be assessed directly against tenants on the Premises and not Lessee or Lessor.

## **ARTICLE X. UTILITIES**

Lessee shall pay for and maintain all telephone, electric, cable television, gas and other utilities necessary to its use and enjoyment of the Premises. Lessee shall install and maintain water supply systems and sanitary sewer facilities to serve the Premises as approved by the City in accordance with this Lease.

## **ARTICLE XI. DAMAGE TO OR DESTRUCTION OF IMPROVEMENTS**

A. General Obligation to Repair or Rebuild. The damage or destruction of Improvements on the Premises shall not terminate this Lease. Within one hundred and eighty (180) days of the damage or destruction, Lessee shall commence (which shall include the application for required permits and retaining design professionals, if required) and diligently pursue to complete the repair, replacement, or reconstruction of Improvements necessary to permit full use and occupancy of the Premises for the purposes permitted by this Lease. Notwithstanding the foregoing, upon any material damage to or destruction of the Improvements (effectively rendering the Improvements untenable) occurring within the last 48 months of the Term of this Lease, Lessee may elect not to reconstruct the Improvements but rather may (1) assign to Lessor the rights to

all insurance proceeds available to reconstruct the improvements to City and (2) thereupon vacate and surrender the Premises to lessor whereupon this Lease will be deemed terminated.

B. Lessor Approval of New Plans. If Lessee wishes to repair or reconstruct the damaged or destroyed Improvements so that the repaired or rebuilt Improvements would not comply with the plans previously approved by the City for the Improvements, Lessee shall submit the revised plans to Lessor for its approval and shall comply with the requirements of this Lease that apply to the approval of plans for new Improvements.

## ARTICLE XII. ASSIGNING, SUBLETTING AND ENCUMBERING

A. Space Leases. Lessee may enter into a sublease with a subtenant for a portion of the Premises for activities allowed under this Lease ("Space Lease"):

1. Each Space Lease shall be subject and subordinate to this Lease and the rights of Lessor hereunder, and the rights of a Permitted Encumbrance as provided for in this Lease;

2. Any act or omission by a tenant which constitutes a violation of any term of this Lease shall be deemed a violation of such provision by Lessee, it being the intention and meaning of the parties that Lessee shall assume and be liable to Lessor for any and all acts and omissions of any and all tenants that constitute violations of this Lease.

3. Lessee will provide to Lessor a copy of each Space Lease following execution of the same.

B. Permitted Encumbrance for Financing Improvements. An Encumbrance to finance construction of Improvements (including construction loans and permanent loans, and refinancings of such loans), including the Initial Improvements, shall be permitted subject to the following terms and conditions ("Permitted Encumbrance"):

1. Conditions of Permitted Encumbrances. Lessee from time to time during the term of this Lease may make one or more Permitted Encumbrances, provided that:

(a) Each Permitted Encumbrance shall cover no interest in any real property other than Lessee's interest in the Premises, the Improvements and the Space Leases;

(b) The holder of such Permitted Encumbrance ("Mortgagee") shall promptly deliver to Lessor in the manner herein provided for the giving of notice to Lessor, a true copy of the Permitted Encumbrance(s) and of any assignment thereof, and shall notify Lessor of the address of the Mortgagee(s) to which notices may be sent;

2. Effect of Permitted Encumbrances. For the purpose of this Section the making of a Permitted Encumbrance shall not be deemed to constitute an assignment or transfer of this Lease, nor shall any Mortgagee, as such, be deemed an assignee or transferee of this Lease or of the leasehold estate hereby created so as to require such Mortgagee, as such, to assume the performance of any of the terms, covenants, or conditions on the part of Lessee to be performed hereunder; but the purchaser at any sale of this Lease in any proceedings for the foreclosure of any Permitted Encumbrance, or the assignee or transferee of this Lease under any instrument of assignment or transfer in lieu of the foreclosure of any Permitted Encumbrance, shall be deemed to be an assignee or transferee within the meaning of this Section and shall be deemed to have assumed the performance of all of the terms, covenants, and conditions on the part of Lessee to be performed hereunder from and after the date of such purchase and assignment.

3. Notice to Mortgagees. So long as any Permitted Encumbrance shall remain a lien on Lessee's leasehold estate hereunder, Lessor agrees, simultaneously with the giving of any notice to Lessee (i) of default, or (ii) of a termination hereof, or (iii) of a matter on which a default may be predicated or claimed, or (iv) of a condition which if continued may lead to a termination hereof, to give duplicate copies thereof or of any process in any action or proceeding brought to terminate or otherwise in any way affect this Lease, to Mortgagee, and no such notice to Lessee or process shall be effective unless a copy of such notice is given Mortgagee in the manner herein provided for. Lessee shall timely provide documentation and shall provide current information to Lessor of any and all Permitted Encumbrances and the addresses to which any notices to the Mortgagee are to be sent by Lessor. Mortgagee will have the same period after receipt of the notice aforesaid to it for remedying the default or causing the same to be remedied as is given Lessee after notice to it plus twenty (20) days thereafter, and Lessor agrees to accept such performance, on the part of the Mortgagee as though the same had been done or performed by Lessee.

4. Mortgagee Cures. Lessor will take no action to effect a termination of this Lease by reason of any default without first giving to Mortgagee reasonable time within which either (i) to obtain possession of the Premises (including possession by a receiver) and thereafter to cure such default if the default be one which can be cured with the exercise of reasonable diligence by Mortgagee, or (ii) to institute foreclosure proceedings and to complete such foreclosure, or otherwise to acquire Lessee's interest under this Lease with diligence and without unreasonable delay in the case of a default which cannot be cured with the exercise of reasonable diligence by the Mortgagee. In either such case, the default of which notice shall have been given shall be deemed cured. The Mortgagee shall not be required to continue such foreclosure proceedings if the default shall be cured by Lessee; provided, further, that nothing herein shall preclude Lessor from exercising any rights or remedies under this Lease with respect to any other default by Lessee during any period of such forbearance.

5. Conditions of Cure. The provisions of the preceding paragraph and this paragraph are conditioned on the following: The Mortgagee shall, within thirty (30) days after notice of such default:

(a) Notify Lessor of its election to proceed with due diligence promptly to acquire possession of the Premises or to foreclose the Permitted Encumbrance or Premises or otherwise to extinguish Lessee's interest in this Lease; and

(b) Deliver to Lessor an instrument in writing duly executed and acknowledged wherein such Mortgagee agrees that:

(1) During the period that Mortgagee shall be in possession of the Premises and so long as it remains in possession and/or during the pendency of any such foreclosure or other proceedings and until the interest of Lessee in this Lease shall terminate or such proceeding shall be discontinued, it will pay or cause to be paid to Lessor all sums from time to time becoming due hereunder for rent; and

(2) If delivery of possession of the Premises shall be made to such Mortgagee, whether voluntarily or pursuant to any foreclosure or other proceedings or otherwise, such Mortgagee shall, promptly following such delivery of possession, perform all the covenants and agreements herein contained on Lessee's part to be performed (including but not limited to payment of net rent) to the extent that Lessee shall have failed to perform the same to the date of delivery of possession, as aforesaid, except such covenants and agreements which cannot with the exercise of due diligence be performed by such Mortgagee. Nothing in this (2) shall be construed to require such Mortgagee to perform any of the Lessee's obligations hereunder accruing after such Mortgagee ceases to be in possession.

6. Mortgagee Consent. This Lease shall not be modified or surrendered to Lessor or cancelled by Lessee, nor shall Lessor accept a surrender of this Lease without the prior written consent of Mortgagee, nor shall any merger result from the acquisition by, or devolution upon, any one entity of the fee and leasehold estates in the Premises.

7. Recognition, Non-Disturbance and Estoppels. The City promptly and upon written request will provide Lessee's subtenants and Mortgagee (or Mortgagees), including successor Mortgagees, with suitable estoppel certificates and recognition and non-disturbance protections as are customary for projects and leases of this nature. The form of "Recognition, Nondisturbance and Attornment Agreement" to be executed by the City in connection with the sublease with Trader Joe's Company, as sublessee of Lessee, is attached to this Lease as Exhibit D, and is fully incorporated herein.

C. Assignment By Lessee. Lessee may assign its rights under this Lease at any time to an Affiliate without the consent of the City, in which event Lessee shall be released from the performance of all the obligations on the part of Lessee arising under this Lease. Prior to substantial completion of the Initial Improvements, Lessee may assign its rights under this Lease to a person or entity that is not an Affiliate, only with the prior written consent of the City, which shall not be unreasonably withheld, conditioned or delayed. Following substantial completion of the Initial Improvements, Lessee may assign its rights under this Lease to a person or entity that is not an Affiliate without the requirement of the City's consent.

D. Assignees Bound. Every assignee, whether as assignee or as successor in interest of any assignee of Lessee herein named or as assignee of the holder of any Permitted Encumbrance, or as successor in interest of any assignee, including any purchaser of under a foreclosure of any Permitted Encumbrance, shall immediately be and become and remain liable for the payment of all rent coming due hereunder, and for the due performance of all the covenants, agreements, terms, and provisions hereof on Lessee's part to be performed to the end of the term hereof, and every provision of this Lease applicable to Lessee shall apply to and bind every such assignee and purchaser with the same force and effect as though such assignee or purchaser were the Lessee named in this Lease. No transfer to such assignee or to such purchaser shall be binding upon Lessor unless such assignee or purchaser shall deliver to the Lessor a recordable instrument which contains a covenant of assumption by said assignee or purchaser to such effect, but the failure or refusal of such assignee or purchaser to deliver such instrument shall not release or discharge such assignee or purchaser from its obligations and liability as above set forth. Subsequent to the completion of the Initial Improvements and the discharge of all obligations in connection therewith, upon any assignment of this Lease, and the delivery of the instruments above referred to, the assignee shall be released from the performance of all of the obligations on the part of Lessee thereafter to be performed hereunder, except any obligation to hold and apply insurance or other monies held by assignor on the date of the assignment and any unperformed obligations which shall have matured prior to such assignment.

### **ARTICLE XIII. DEFAULT BY LESSEE**

A. Lessee Default. Should Lessee default in the performance of this Lease, Lessor shall give written notice to Lessee and any Mortgagee holding an interest under a Permitted Encumbrance, of the default and what must be done to correct the default and the period of time in which Lessor has to cure such default. If the default is monetary in nature, the cure period shall be no less than 10 business days. If the default is non-monetary in nature, the cure period shall be no less than thirty days; provided that if at the end of any applicable cure period, Lessee is diligently pursuing a cure of the default, then such period shall be extended up to an additional 60 days provided that Lessee continues to diligently pursue such cure. If the default as noticed by Lessor is not corrected within the applicable cure period, Lessor may declare this Lease terminated. In the event of any such termination, Lessor and/or its designee shall have the right to re-enter the premises and remove therefrom all persons and personal property of the Lessee and may pursue any other remedy provided for herein or under applicable law, or Lessor may treat this Lease as continuing and take,

have, and recover any damages it may have sustained or continue to sustain by reason of such continuing breach. All rights of Lessee and those who claim under or through Lessee shall expire and be of no further force and effect at time of any such termination; subject, however, to the continuing rights under Article XII, if any, of a Mortgagee holding a Permitted Encumbrance. If any Lessee default noticed by Lessor hereunder relates to any act or omission of a tenant under a Space Lease (including, without limitation, any act or omission described in Article XIX), Lessee's termination of the rights of the defaulting tenant under its Space Lease shall be deemed to be an effective cure of such default under this Lease, so long as such termination results in or is accompanied by a cure of the condition giving rise to the default.

B. Quitclaim Upon Termination. Upon termination of this Lease for any reason, Lessee shall execute, acknowledge and deliver to Lessor within thirty (30) days after receipt of written demand therefore, a good and sufficient document whereby all title and interest of Lessee in the Premises is quitclaimed to Lessor.

#### ARTICLE XIV. DISPOSITION OF IMPROVEMENTS

A. Ownership of Improvements. All Improvements installed by Lessee shall be and remain the property of Lessee during the term of this Lease. Upon the expiration or termination of this Lease, the Improvements shall become the property of Lessor.

B. Disposition of Improvements Upon Termination. Upon termination or expiration of this Lease, Lessee shall not be required to remove from the Premises any Improvements that had been approved by Lessor at the time of their construction or installation.

#### ARTICLE XV. EMINENT DOMAIN

A. General. If all of the Premises is condemned by a public entity in the lawful exercise of the power of eminent domain, this Lease shall terminate upon the date possession is taken by the public entity. If only a part is condemned and the taking of that part does not substantially impair the capacity of the remainder to be used for the purposes allowed by this Lease, Lessee shall continue to be bound by the terms, covenants and conditions of this Lease, except, the monthly rental shall be reduced in proportion to the relationship that the compensation paid by the public entity for the portion of the Premises condemned bears to the value of the whole of the Premises as of the date possession of the part is taken by the public entity. If only a part is condemned and the taking of the part substantially impairs the capacity of the remainder to be used for the purposes allowed by this Lease, Lessee shall have the option to:

1. Terminate this Lease and be absolved of all obligations hereunder which have not accrued at the date possession is taken by the public entity; or

2. Continue to occupy the remainder of the Premises and remain bound by the terms, covenants and conditions of this Lease. If Lessee elects to continue to occupy the remainder, the monthly rental shall be reduced in proportion to the relationship that the compensation paid by the public entity for the portion of the Premises condemned bears to the value of the whole of the Premises as of the date possession of the part is taken by the public entity.

Lessee shall give notice in writing of its choice of remedies hereunder within thirty (30) days of the date possession of the part is taken by the public entity. If Lessor and Lessee cannot agree as to whether a partial taking substantially impairs the capacity of the remainder to be used for the purposes allowed by this Lease, then they shall submit the issue to mediation in accordance with Article XXII.

B. Division of Award. If the order or decree in any condemnation or similar proceeding shall fail separately to state the amount to be awarded to the Lessor and the amount to be awarded to the Lessee

under the provisions of this Article XVII, by way of compensation, damages, rent, the cost of demolition, removal or restoration or otherwise, and if the Lessor and the Lessee cannot agree thereon within thirty (30) days after the final award or awards shall have been fixed and determined, such dispute shall be determined in accordance with Article XXII hereof.

C. Rights of Participation. Each party shall have the right, at its own expense, to appear in any condemnation proceeding and to participate in any and all hearings, trials, and appeals therein. In addition, Lessor agrees to cooperate fully with Lessee to prevent any condemnation or eminent domain proceeding to be instituted or otherwise successfully prosecuted.

D. Notice of Proceeding. In the event Lessor or Lessee shall receive notice of any proposed or pending condemnation proceedings affecting the Premises, the party receiving such notice shall promptly notify the other party of the receipt and contents thereof.

E. Condemnation by City. The City shall not have the right to condemn the Premises or the Lease at any time during the Term.

#### **ARTICLE XVI. RESERVATIONS TO THE CITY**

A. Reservation for Utility Installations. The Premises are accepted by Lessee subject to any and all existing easements and encumbrances on the Premises.

#### **ARTICLE XVII. HAZARDOUS MATERIALS**

A. Definitions.

(1) Hazardous Materials Laws means any federal, state or local law, ordinance, rule, order, regulation or court decision relating to Hazardous Materials.

(2) Hazardous Materials means any substance or other material that:

(a) is defined as a hazardous substance, hazardous material, hazardous waste or toxic substance under any Hazardous Materials Law or is a flammable or explosive material (including gasoline, diesel, aviation fuels, lubricating oils, and solvents), asbestos, radioactive material, nuclear medicine material, drug, vaccine, bacterial, virus, or injurious or potentially injurious matter; or

(b) is controlled or governed by any Hazardous Materials Law.

B. Hazardous Material Handling, Spills, and Cleanup. Lessee shall comply with any Material Hazardous Law in the storage, distribution, processing, handling or disposal of any Hazardous Materials. If during the term of the Lease any Hazardous Material spills, leaks, or is discharged on or from the Premises, Lessee shall immediately make all repairs necessary to prevent further spills, leaks or discharges and shall immediately clean up the spill, remove any contaminated soil and promptly dispose of the spilled Hazardous Material and soil in the manner prescribed by Hazardous Materials Laws. If Lessee fails to immediately clean up the spill or properly dispose of any contaminated soil Lessor may, upon twenty-four (24) hours written notice to Lessee, take whatever action is necessary to clean up the spill and dispose of any contaminated soil. Lessee shall reimburse Lessor for the cost of all such work by Lessor within thirty (30) days from receipt of a bill from Lessor. Notwithstanding the foregoing, as between Lessee and Lessor, Lessee shall not be responsible for the cost of handling, removing and disposal of (a) any Hazardous Material which is determined to have been present on or below the Premises at the inception of this Lease, and (b) any material

(whether or not a Hazardous Material) deposited on the Premises by any person exercising rights under the public right of flight reserved by the City under this Lease.

C. Termination. Upon termination of this Lease, Lessee shall, at Lessee's cost, remove any equipment utilized in connection with any Hazardous Materials and shall clean up, detoxify, repair and otherwise restore the Premises to a condition free of Hazardous Materials, to the extent such condition is caused by Lessee or any assignee or sublessee of Lessee or their respective agents, contractors, employees, licensee or invitees.

D. Default. The release or discharge of any Hazardous Materials or violation of any Hazardous Materials Law by Lessee or any assignee or sublessee of Lessee shall be a material default by Lessee under the Lease, subject to the notice and cure provisions of Article XIII. In addition to or in lieu of the remedies available under the Lease as a result of such default, the City shall have the right, without terminating the Lease, to require Lessee to suspend its operations and activities on the Premises until Lessor is satisfied that appropriate remedial work has been or is being adequately performed. Lessor's election to suspend Lessee's operations shall not constitute a waiver of Lessor's right thereafter to declare a default and pursue other remedies set forth in the Lease.

#### **ARTICLE XVIII. DEFAULT BY LESSOR**

In the event of any breach by Lessor of any of the covenants, agreements, terms, or conditions hereof, Lessee, in addition to any and all other rights, shall be entitled to enjoin such breach and shall have the right to invoke any right and remedy allowed at law or in equity or by statute or otherwise for such breach.

#### **ARTICLE XIX. LESSEE'S PURCHASE OPTION**

A. Lessee has an option (the "Option") to purchase the Premises from the City, as improved with the Site Improvements, from time-to-time, and in one or more releases, as follows:

1. The Option may be exercised by Lessee (or its successors and assigns) at any time after the date of commencement of the Lease.

2. At any time after the commencement of the Lease, and for the first five (5) years following the Store Completion Date, the purchase price to be paid by Lessee for the Premises (and applicable improvements) pursuant to the Option ("Option Price") shall be the Total Municipal Cost. For the sixth through tenth years following the Store Completion Date, the Option Price shall be the Total Municipal Cost plus four percent (4%) of the Total Municipal Cost. After year ten (10), for each year (or partial year) the Option Price shall be the Option Price as of the end of year ten (10), increased thereafter by four percent (4%) annually. For example, if Lessee exercises the Option in the thirteenth year following the Store Completion Date, then the Option Price shall be [Total Municipal Cost + 4% of the Total Municipal Cost] x [4% x 3 years following the end of year ten].

3. Lessee shall have the right to exercise the Option with respect to the entire Premises, or specified subdivided parcels constituting the Premises. If Lessee elects to purchase a portion of the Premises, then the Option shall continue with respect to the remainder of the Premises.

4. The term of the Option shall be co-terminous with the term of this Lease.

5. If Lessee elects to purchase a portion of the Premises (an "Optioned Portion"), then the purchase price for the Optioned Portion shall be the Option Price applicable at the time of exercise, multiplied by a fraction, the numerator of which is the land area included in the Optioned Portion, and the

denominator of which is the total land area included in the Premises, multiplied by 120%: Option Price x [Optioned Portion s.f./Premises s.f.] x 120%

B. In the event that Lessee elects to purchase an Optioned Portion, then the Rent payable by Lessee to Lessor for the balance of the Premises shall be reduced by a fraction, the numerator of which is the purchase price for the Optioned Portion, and the denominator of which is the Option Price for the entirety of the Premises.

C. Lessor shall have the right to sell or assign its lessor's interest in this Lease and/or the Premises from and after the earlier to occur of (i) an assignment by the Lessee of its interest in this Lease or the Improvements, or (ii) the expiration of ten (10) years from the Effective Date of his Lease; provided, however, that any sale, transfer or assignment by the City of all or any portion of its interest in this Lease or the Premises shall be and remain subject in all events to any and all rights granted to Lessee under the Development Agreement and this Lease, including but not limited to the Option. Further, notwithstanding any sale, transfer or assignment by the City of all or any portion of its interest in this Lease or the Premises, Lessee shall not be required to make any payment required to be made under this Lease (whether designated as Rent, or otherwise) to more than a single person or entity as successor to the City.

## **ARTICLE XX. DISPUTE RESOLUTION; MEDIATION**

All claims, disputes and other matters in controversy ("Dispute") arising out of or related to any provision in this Agreement shall be resolved exclusively according to the procedures set forth in this Article XIX. No party to this Agreement shall commence any litigation proceeding against the other unless such party shall first give a written notice (a "Dispute Notice") to the other party setting forth the nature of the dispute. Each party shall designate a senior executive officer to act on its behalf and to attempt in good faith to resolve the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association (AAA) in effect on the date of the Dispute Notice. Notwithstanding the forgoing, the Lessee shall be responsible for any and all costs and fees pertaining to such mediation. If the parties cannot agree on the selection of a mediator within twenty (20) days after delivery of the Dispute Notice, the mediator will be selected by the AAA. If the dispute has not been resolved by mediation as provided above within ninety (90) days after delivery of the Dispute Notice, then either party may thereafter elect to seek resolution of the dispute through legal process (litigation), subject to the provisions of page 19, ¶ S.

## **ARTICLE XXI. MISCELLANEOUS PROVISIONS**

A. Holding Over. In the event Lessee shall hold over after the term herein granted, the holding over shall be deemed to be a tenancy from month-to-month and shall be governed by the provisions of this Lease.

B. Amendments. This Lease sets forth all of the agreements and understandings of the parties and any modification of this Lease must be written and executed by Lessor and Lessee.

C. Force Majeure. If by reason of force majeure, Lessee cannot perform any obligation of this Lease, it shall give notice of the force majeure to the City in writing within ten (10) days of the occurrence relied upon. The obligation of Lessee, to the extent and for the period of time affected by the force majeure, shall be suspended. Lessee and Lessor shall jointly endeavor to remove or overcome the inability with all reasonable effort. For purposes of this provision, "force majeure" shall mean acts of God, landslides, lightning, earthquakes, hurricanes, storms, floods, or other natural occurrences; strikes, lockouts, insurrections, riots, wars, or other civil or industrial disturbances; orders of any kind of the Federal or State government or of any civil or military authority; explosions, fires, breakage or accidents to machinery, lines, or equipment, or the failure of the system or water supply system; or any other cause not reasonably within

the control of Lessee. Force Majeure shall not include financial inability and shall not excuse Lessee from paying any monthly rental or other charge as required by this Lease.

D. Partial Invalidity. If any provision of this Lease is held by a court of competent jurisdiction to be invalid, the remainder of the Lease shall remain in effect.

E. Time. Time is of the essence of this Lease. The failure of either party to require the strict performance by the other of any provision of this Lease shall not be deemed a waiver of the right of said party thereafter to require strict performance of that or any other provision of this Lease in accordance with the terms hereof, and without notice.

F. Americans With Disabilities Act. Lessee warrants that it is in compliance with the Americans with Disabilities Act (Public Law 101-336) and that it will, in carrying out the requirements of this Lease, comply in all respects with the provisions of the Act and its implementing regulations.

G. Unlawful Use. Lessee and its employees and agents shall not use or knowingly allow any other person to use of the Premises in violation of any federal, state, county, or local regulation, order, law, or ordinance applicable to the Premises.

H. Notices. Any notice given under this Lease shall be given in writing by certified mail, by delivery in person or by delivery by recognized overnight courier for next business day delivery, as follows:

To the City:

City Manager  
City of Prescott  
201 S. Cortez St  
Prescott, Arizona 86302

With a copy to:

City Clerk  
City of Prescott  
P. O. Box 2059  
Prescott, Arizona 86302

To Lessee:

ERH Acquisitions, LLC  
c/o RED Realty Advisors, LLC  
One East Washington, Suite 300  
Phoenix, Arizona 85004  
Attn: Brett Heron

With a copy to:

Mariscal, Weeks, McIntyre & Friedlander, P.A.  
2901 North Central Avenue, Suite 200  
Phoenix, Arizona 85012  
Attn: Gary L. Birnbaum

I. Successors in Interest. Unless otherwise provided in this Lease, this Lease shall apply to and bind the successors and assigns of Lessee and Lessor. Lessee shall require assignees to acknowledge assignment of this Lease and assumption of the obligations hereunder.

J. Lessee Indemnity. Lessee shall indemnify and hold harmless Lessor from and against any and all claims arising from Lessee's use of the Premises including any and all claims alleging negligent acts or omissions pertaining in any way to Lessee's use or occupancy of the Premises or arising from or relating to the conduct of Lessee's business or from any activity, work, or things done, permitted, or suffered by Lessee in or about the premises or elsewhere and shall further indemnify and hold harmless Lessor from and against any and all claims arising from any breach or default in the performance of any obligation on Lessee's part to be performed under the terms of the lease or arising from any negligent acts or negligent omissions of the Lessee, or any of the Lessee's agents, contractors, or employees, and from and against all costs, attorney's fees, expenses, and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon; and in case any action or proceeding be brought against Lessor by reason of any such claim.

K. Lessor Indemnity. Lessor shall indemnify and hold harmless Lessee from and against any and all claims arising from any breach or default in the performance of any obligation on Lessor's part to be performed under the terms of the lease or arising from any negligence of the Lessor, or any of the Lessor's agents, contractors, or employees, and from and against all costs, attorney's fees, expenses, and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon; and in case any action or proceeding be brought against Lessee by reason of any such claim.

L. Waiver. The waiver by the Lessor of any breach or breaches by the Lessee of any one or more of the covenants, agreements, conditions, or obligations herein contained or the acceptance of any delinquent payments shall not bar the Lessor's right to declare a forfeiture or to employ any other rights or remedies of the said Lessor in the event of any subsequent breach of any such or other covenants, agreements, conditions, or obligations. Any entry and/or re-entry by the Lessor, whether had or taken under what is generally known as summary proceedings, or otherwise, as provided by the terms of this lease, shall not be deemed to absolve or discharge the Lessee from liability hereunder.

M. Governing Law. The terms and conditions of this Lease shall be construed and governed in accordance with the laws of the State of Arizona.

N. Attorney's Fees. The parties hereto expressly covenant and agree that in the event of litigation arising from this Agreement, the prevailing party shall be entitled to an award of attorney's fees, either pursuant to the Lease, pursuant to ARS Section 12-341.01 (A) and (B), or pursuant to any other state or federal statute.

O. Memorandum. Lessor and Lessee agree that at the request of either, each will execute a short form memorandum of this Lease in form satisfactory for recording in the office of the Yavapai County Recorder.

P. A.R.S. Section 38-511. Pursuant to A.R.S. Section 38-511, the City of Prescott may cancel this agreement, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the agreement on behalf of the City is, at any time while the agreement or any extension of the agreement is in effect, an employee or agent 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. In the foregoing event, the City of Prescott further elects to recoup any fee or commission paid or due to any person significantly involved in initiating, negotiating, securing, drafting or creating this agreement on behalf of the City of Prescott from any other party to the agreement arising as a result of this agreement.

[Signatures are on the following page.]

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

**LESSEE:**

ERH ACQUISITIONS, LLC,  
an Arizona limited liability company

By: ERH Holdings, LLC, an Arizona limited liability company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

PASSED, APPROVED AND ADOPTED by the Mayor and Council of the City of Prescott this \_\_\_\_  
day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Marlin D. Kuykendall, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Elizabeth A. Burke  
City Clerk

\_\_\_\_\_  
Gary D. Kidd  
City Attorney

**EXHIBIT A**  
**LEGAL DESCRIPTION**

All that portion of the West half of Section 31, Township 14 North, Range 1 West, Gila and Salt River Base and Meridian, Yavapai County, Arizona, more particularly described as follows:

Commencing at the West One-quarter corner of said Section 31, from whence the Northwest corner of said Section 31 bears North 01°07'54" East (the basis of bearings for this description);

Thence, North 01°07'54" East along the West line of said Section 31, a distance of 362.31 feet to a point on the South right-of-way of Arizona State Route 69;

Thence, along said right-of-way, South 89°23'53" East, 323.63 feet;

Thence, along said right-of-way, South 83°15'54" East, 308.54 feet;

Thence, along said right-of-way, South 63°52'52" East, 328.02 feet;

Thence, along said right-of-way, South 73°41'52" East, 228.90 feet;

Thence, along said right-of-way, South 51°05'45" East, 123.23 feet;

Thence, along said right-of-way, South 54°32'46" East, 401.52 feet;

Thence, along said right-of-way, South 64°53'44" East, 308.71 feet to a point on a non-tangent curve, concave Northeasterly, with a radius of 2989.79 feet and a radial bearing of North 33°19'21" East;

Thence, Southeasterly along said curve and right-of-way, through a central angle of 03°37'06", a length of 188.81 feet to the POINT OF BEGINNING;

Thence, continuing along said curve and right-of-way, concave Northeasterly, with a radius of 2989.79 feet, through a central angle of 07°17'16", a length of 380.29 feet;

Thence, along said right-of-way, South 74°59'16" East, 49.73 feet;

Thence, leaving said right-of-way, South 25°53'24" East, 212.42 feet, to a point on the West right-of-way of Lee Boulevard, as recorded in Book 26 of Maps and Plats, Pages 27-31, on file in the office of the Yavapai County Recorder;

Thence, along the right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder, South 74°45'33" East, 4.60 feet, to a point on a non-tangent curve, concave Easterly, with a radius of 650.00 feet and a radial bearing of South 81°29'04" East (said point being on the West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, on file in the office of the Yavapai County Recorder);

Thence Southerly along said West right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of 05°26'56", a length of 61.82 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South 03°04'00" West, 242.18 feet to the beginning of a tangent curve, concave Northwesterly, with a radius of 522.96 feet;

Thence, Southerly along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, through a central angle of 40°05'27", a length of 365.92 feet to a point of tangency;

Thence, continuing along said right-of-way of Lee Boulevard, as recorded in Book 40 of Maps and Plats, Page 24, South 43°09'27" West, 81.32 feet;

Thence, leaving said right-of-way, North 64°43'53" West, 132.97 feet to a point on a non-tangent curve, concave Southwesterly, with a radius of 1055.07 feet and a radial bearing of North 78°21'18" West;

Thence, Northerly along said curve through a central angle of 46°33'24", a length of 857.32 feet;

Thence, North 65°54'17" West, 81.39 feet;

Thence, North 30°09'03" East, 182.41 feet to the POINT OF BEGINNING.

EXCEPT all coal and other minerals as reserved in Patent from United States of America.

**EXHIBIT B**  
**PERMITTED USES OF THE PREMISES**

The Premises may be used for any use permitted in the "BR-Business Regional" zoning designation as provided in the City of Prescott Land Development Code except that the following uses are hereby prohibited without the prior consent of the City:

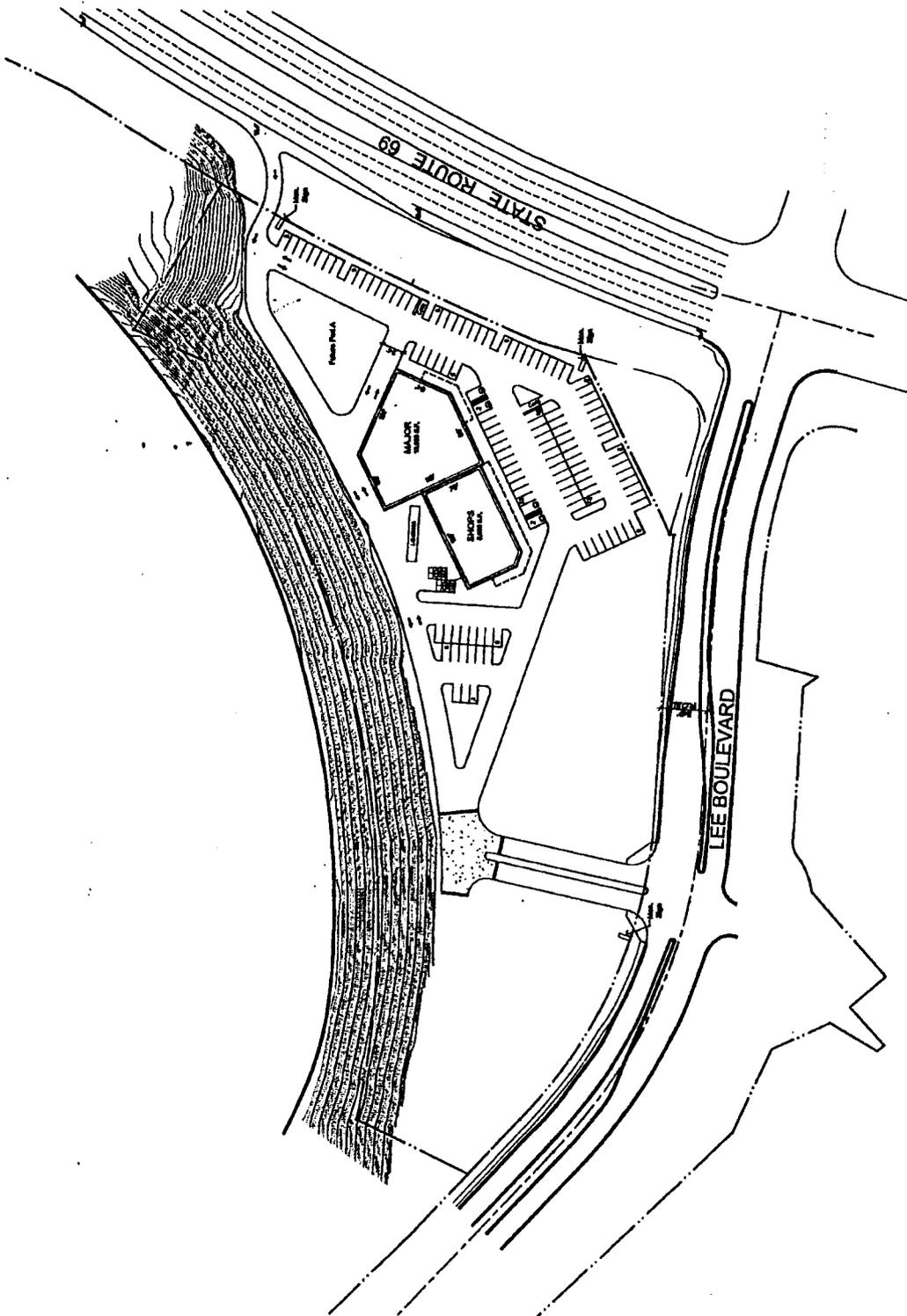
- Adult day care center
- Ambulance service
- Mortuaries
- Newspaper Publishing
- Second-hand Stores
- Light Ice Manufacturing
- Mini-Storage
- Miniature Golf
- Pawn Shops
- Tattoo Parlors
- Taxidermy
- Taxi Service
- Billard/pool Room as a primary use
- Mobile Catering, except as ancillary to a restaurant
- Crematorium
- Feed Stores
- Fender and Body Repair
- Plumbing Shops
- Recreational Vehicle Parks
- RV Storage Yards (10% maximum as an ancillary use)
- Light Machine Shops
- Residential Uses

**EXHIBIT C**  
**INITIAL IMPROVEMENTS**



<b>Site Data</b>	
Overall Area:	310,186 sq ft (7.13 ac)
Building Area:	20,000 sq ft
Tenant's Primary Parking Pkgs:	156 Spaces
Public Prod. A Parking:	17 Spaces
Total Parking:	173 Spaces

Exhibit "C" to Ground Lease  
Depiction of  
Initial Improvements



**PRESCOTT GATEWAY**

SWC Highway 69 and Lee Boulevard

Prescott, Arizona

**EXHIBIT D**  
RECOGNITION, NONDISTURBANCE AND ATTORNMENT AGREEMENT  
FOR TRADER JOE'S COMPANY

# 1-D

**RESOLUTION NO. 4066-1136**

**A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT, YAVAPAI COUNTY, ARIZONA, APPROVING THE TRANSFER OF UNENCUMBERED APPROPRIATIONS FROM THE WATER FUND TO THE CITY MANAGER DEPARTMENT IN THE GENERAL FUND**

**RECITALS:**

WHEREAS, Article VI, Section 10 of the Prescott City Charter allows the City Council to transfer appropriations among various City departments; and

WHEREAS, there are unencumbered appropriations allocated to the Police Department that were not expended during fiscal year 2010-11; and

WHEREAS, the budgeted amount for the City Manager Department will be insufficient to meet the fiscal needs for fiscal year 2010-11.

**ENACTMENTS:**

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PRESCOTT AS FOLLOWS:

SECTION 1. THAT, the Mayor and staff are authorized to transfer from unencumbered funds allocated to the Water Fund for fiscal year 2010-11 to the City Manager Department (\$2,200,000) in the General Fund.

SECTION 2. THAT, the Mayor and staff are hereby authorized and directed to execute any and all documents in order to effectuate the foregoing.

PASSED and ADOPTED by the Mayor and Council of the City of Prescott, Arizona, this 15<sup>th</sup> day of February, 2011.

\_\_\_\_\_  
MARLIN D. KUYKENDALL, Mayor

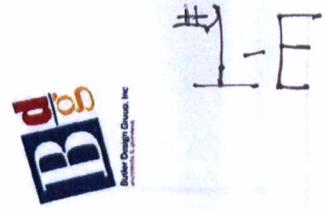
ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
ELIZABETH A. BURKE, City Clerk

\_\_\_\_\_  
GARY D. KIDD, City Attorney





**PRESCOTT GATEWAY**  
 SWC Highway 69 and Lee Boulevard  
 Prescott, Arizona

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## PLANNED AREA DEVELOPMENT

This Planned Area Development ("PAD") document is presented in accordance with Section 9.5 of the City of Prescott Land Development Code (the "Code") in order to establish modified development standards for the Shops at Prescott Gateway located at the southwest corner of Highway 69 & Lee Boulevard (the "Project").

### Development Standards

The Development Standards applicable to the Project shall be those contained in the Code except as specifically modified by this PAD. In the event of a conflict between the Code and this PAD, this PAD shall govern. The section references contained in this PAD refer to the applicable sections of the Code which are being modified by this PAD.

### Parking Design Standards

1. No Passenger Loading spaces shall be required within the Project. (Section 6.2.8)

### Landscaping and Screening

1. All parking lots adjacent to Highway 69 shall be landscaped with a minimum of 8 feet on site (measured from the right of way edge) with plantings as specified in Section 6.5.5 of the Code. All parking lots adjacent to Lee Boulevard shall be landscaped with a minimum of 10 feet on site (measured from right of way edge) with plantings as specified in Section 6.5.5 of the Code. The portion of the parking lot adjacent to HOA owned parcel at the corner of Lee Boulevard and Highway 69 shall be landscaped with a minimum of 4 feet on site (measured from property line) with plantings as specified in Section 6.5.5 of the Code. The minimum landscape strip may be reduced along part of each frontage provided the average applicable landscaped width is maintained along the applicable frontage. (Section 6.5.6A.1.a)
2. If a minimum 3' masonry wall is used to screen the parking area, said wall may be located within the minimum landscape setback area. (Section 6.5.6A.1.b)
3. Perimeter parking and driveway areas which are adjacent to the slope along the perimeter of the Project shall not require additional landscaping or screen wall. (Section 6.5.6A.2)
4. As a clarification, foundation plantings shall not be required on the west building wall of the "Major" nor on the east building wall of Pad A. (Section 6.5.7)
5. The intent of Section 6.5.8G of the Code is met by the location of the loading area at the rear of the "Major" and "Shops" building and no additional screening is required.

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## COMPREHENSIVE SIGN PLAN

This Comprehensive Sign Plan ("CSP") document is presented in accordance with Section 6.12.6 of the City of Prescott Land Development Code (the "Code") in order to establish modified signage standards for the Shops at Prescott Gateway located at the southwest corner of Highway 69 & Lee Boulevard (the "Project").

### **Comprehensive Sign Plan Standards**

The standards applicable to the Project shall be those contained in the Code for "Commercial or Industrial Centers (3 or more businesses)" except as specifically modified by this CSP. In the event of a conflict between the Code and this CSP, this CSP shall govern. The section references contained in this CSP refer to the applicable sections of the Code which are being modified by this CSP.

#### **Free Standing Sign Standards**

Commercial or Industrial Centers (3 or more businesses)

1. **Number Permitted.** Three (3) freestanding signs shall be permitted for the Project. These three (3) signs shall be in addition to the mall sign located at the western edge of the Project (which is located in an easement for the benefit of the mall and is not a part of this CSP).
2. **Height.** Sign Type "A" shall have a maximum permitted height of twenty feet (20'). Sign Type "B" shall have a maximum permitted height of twelve feet (12').
3. **Setback.** No setback shall be required from adjacent property lines or right-of-way.
4. **Area.** Sign Type "A" shall have a maximum of 230 s.f. of sign area per side. Sign Type "B" shall have a maximum of 80 s.f. per side.

#### **Canopy or Wall Sign Standards**

Commercial Center (3 or more businesses)

1. **Permitted Locations.** Wall signs are permitted on any building elevation which is oriented towards the street, an interior parking area or drive aisle.

#### **Sign Calculations**

Sign Area B

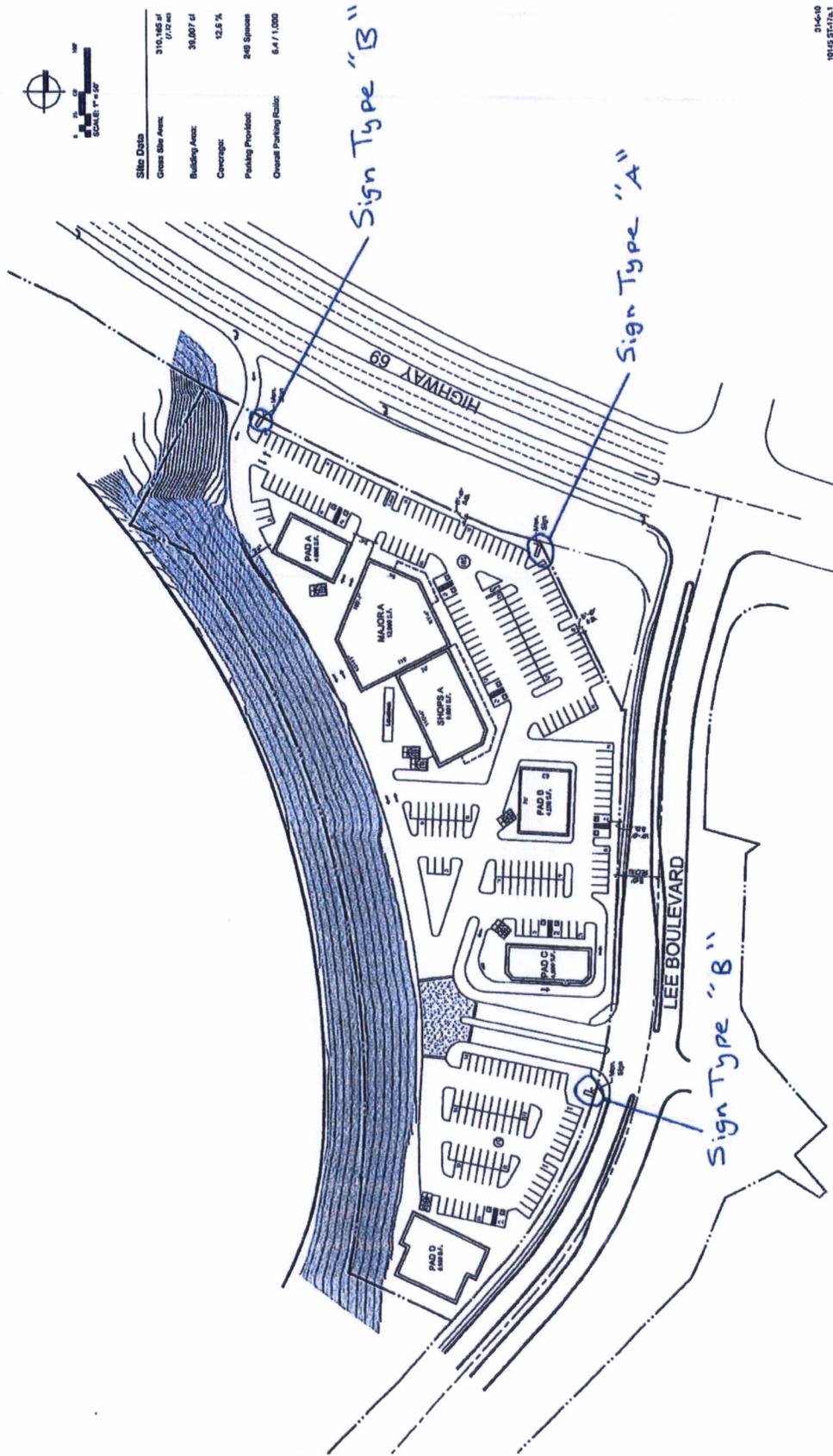
1. **Area.** One and one half (1 1/2) square feet of sign area for each linear foot of building frontage up to 300 square feet per wall of building frontage. Notwithstanding the foregoing, each business shall be allowed a minimum of 40 s.f. of sign area per building frontage.

#### **Administrative Adjustments**

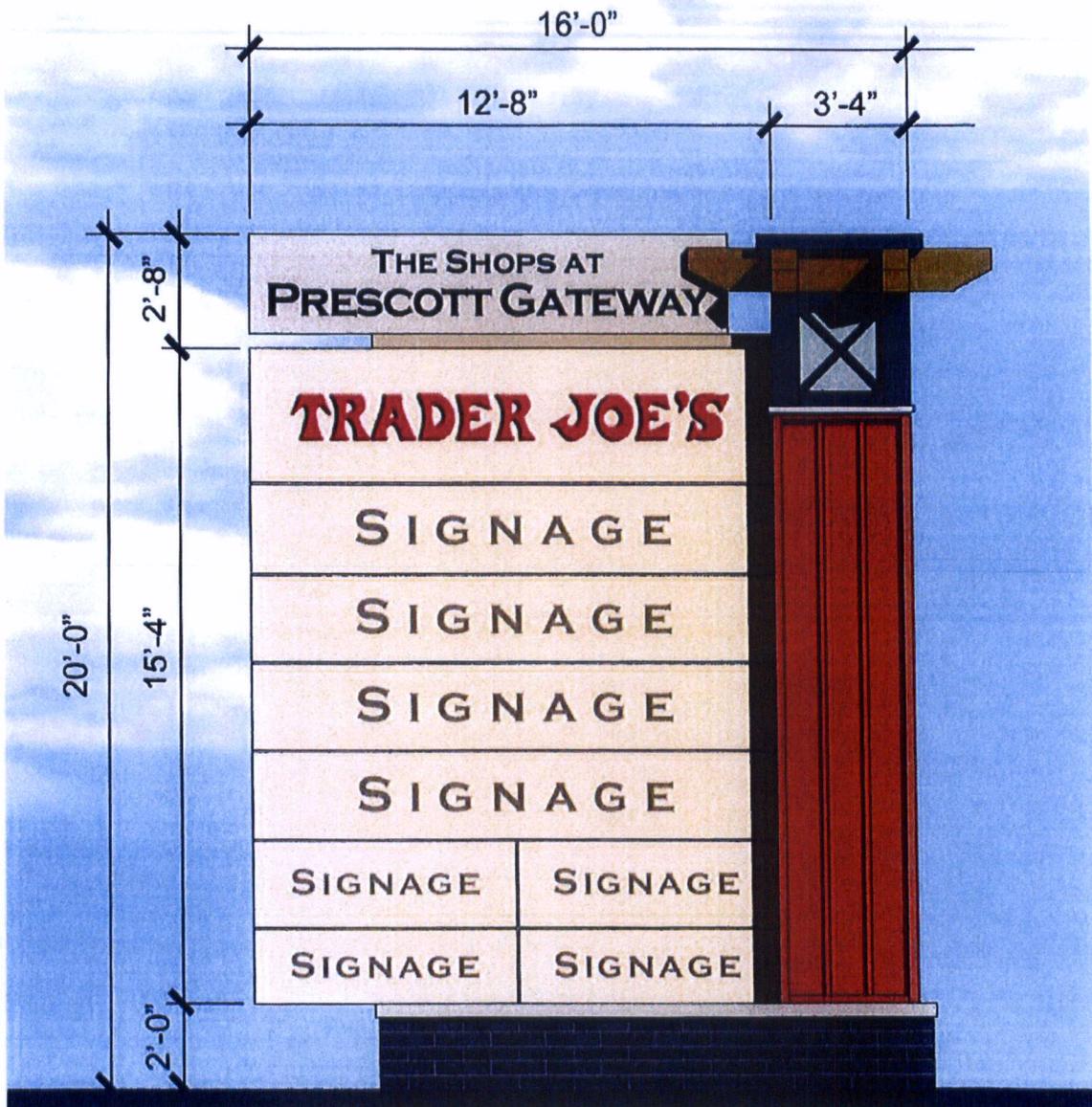
1. Adjustments to the sign standards contained in this CSP may be approved in accordance with the provisions of Section 9.16, Administrative Adjustments of the Code. (Section 6.12.4)



Site Data	
Overall Site Area:	310,346 sf (7.12 ac)
Building Area:	39,007 sf
Coverage:	12.6 %
Parking Provision:	240 Spaces
Overall Parking Ratio:	6.4 / 1,000



**THE SHOPS AT PRESCOTT GATEWAY**  
 SWC Highway 69 and Lee Boulevard  
 Prescott, Arizona



## Sign - A

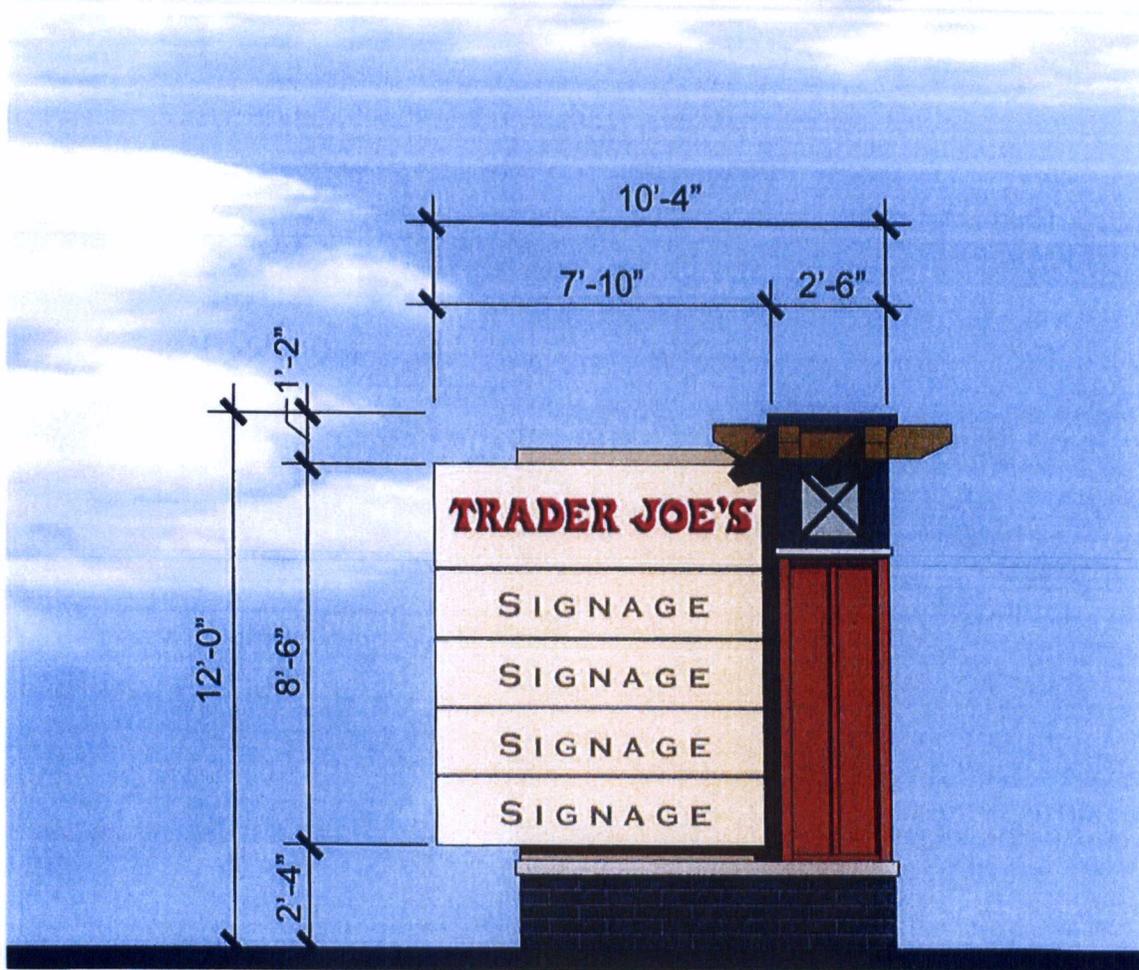
Scale: 1/4" = 1'-0"

# PRESCOTT GATEWAY

SWC Highway 69 and Lee Boulevard  
Prescott, Arizona

10145  
02.02.11





## Sign - B

Scale: 1/4" = 1'-0"

# PRESCOTT GATEWAY

SWC Highway 69 and Lee Boulevard  
Prescott, Arizona

10145  
02.02.11

