

When recorded, please return to:
CITY OF MESA
REAL ESTATE SERVICES
P.O. Box 1466
Mesa, AZ 85211-1466

- DEVELOPMENT AGREEMENT -

This Development Agreement ("Agreement") is made and entered into this ____ day of _____, 20__ by and between the City of Mesa, a Municipal Corporation, hereinafter referred to as Mesa, and *Smith's Food & Drug Centers, Inc., an Ohio corporation*, hereinafter referred to as Developer.

RECITALS:

Whereas, Developer intends to develop certain real property known as *Mulberry Marketplace* located at *10720 E. Guadalupe Road*, Mesa, Arizona, as a *commercial development*, and as more particularly described on Exhibit "A" attached hereto (the "Property"), and

Whereas, Developer is the owner of the Property, and

Whereas, Developer, subject to the regulations contained in the Mesa City Code, shall be required by Mesa to cause, in conjunction with the development of the Property, the design, installation and/or construction of certain specific offsite improvements ("Public Improvements") as identified on Mesa approved engineering drawing(s) A182568 through A182627, and

Whereas, said development of the Property creates a fundamental need for Public Improvements from which Developer's Property shall derive specific benefits, and

Whereas, said Public Improvements are also required to promote the public interest and for the purpose of ensuring that Mesa's minimum standards for transportation, utility service, and infrastructure are maintained, and

Whereas, because certain required Public Improvements entail oversizing to meet regional as well as local demands ("Oversize Improvements"), Developer seeks Mesa's proportional financial participation ("City Share") in the additional costs incurred beyond Developer's fair share, and

Whereas, Arizona law mandates that when City Share for a single development is estimated to exceed a specific dollar amount as defined in A.R.S. §34-201(G), (the "Cost Limit"), all Oversize Improvements that qualify for City Share shall be offered through the public bidding process as administered by Mesa, including Developer's execution of a contract with the lowest qualified bidder ("Low Bidder") at unit prices as identified by Mesa, and

Whereas, if Developer declines to offer all Oversize Improvements that qualify for City Share through the public bidding process as administered by Mesa, City Share shall be limited to the Cost Limit, which Developer and Mesa agree to be One Hundred Twelve Thousand dollars (\$112,000) for purposes of this Agreement, and

Whereas, Developer's and Mesa's obligations for Public Improvements, Oversize Improvements and City Share pertaining to this Property are generally described as follows:

DEVELOPER'S PUBLIC IMPROVEMENTS AND OVERSIZE IMPROVEMENTS OBLIGATIONS:

Subject to Mesa's City Share obligations as described in this Agreement and Exhibit "B" attached hereto, Developer shall be responsible for all costs associated with the design, installation and/or construction of all Public Improvements and Oversize Improvements as identified on Mesa approved engineering drawing(s) A182568 through A182627 and specifically assigned to Developer as identified in Exhibit "B" (Developer's Costs).

MESA'S CITY SHARE OBLIGATIONS:

Subject to Developer's Public Improvements and Oversize Improvements obligations as described in this Agreement and Exhibit "B" attached hereto, Mesa shall provide City Share to Developer for specific costs relating to the design, installation and/or construction of Oversize Improvements as identified on Mesa approved engineering drawing(s) A182568 through A182627 and specifically assigned to Mesa as identified in Exhibit "B" (Mesa's Costs).

AGREEMENT:

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises and covenants in this Agreement, it is agreed as follows:

1. The foregoing Recitals are confirmed to be true and accurate and are hereby incorporated by reference into this Agreement.
2. Mesa agrees:
 - 2.1 To accept financial responsibility for City Share in only those costs for items specifically identified as Oversize Improvements in this Development Agreement and assigned to Mesa as identified in Exhibit "B" (Mesa's costs).

2.1.1 If the contract for Oversize Improvements is publicly bid, Mesa's costs shall be limited to only those costs identified in Exhibit "B," with quantities to be verified by Mesa in accordance with progress payment procedures, and to any additional costs approved by an authorized representative of Mesa on an executed change order pursuant to the Developer/Low Bidder Contract. All other costs and liabilities known and unknown shall remain that of Developer.

2.1.2 If the contract for Oversize Improvements is not publicly bid, Mesa's Costs shall be limited to the unit costs incurred for only those items identified in Exhibit "B" as Mesa's Costs. There shall be no cost adjustments, and MESA shall pay for only actual quantities used for Oversize Improvements. In no event shall Mesa's Costs exceed the Cost Limit. All other costs and liabilities known and unknown shall remain that of Developer. Further, paragraphs 2.2 through 2.5 of this Agreement apply only to contracts that publicly bid.

2.2 To financially participate in Developer's costs for Oversize Improvements only as described in this Agreement and identified as Mesa's costs on Exhibit "B", by making monthly progress payments for the Oversize Improvements during the course of the Developer/Low Bidder contract.

2.3 To start the monthly progress payment cycle with the date of the Notice to Proceed issued by Developer in conjunction with the Developer/Low Bidder contract.

2.4 To coordinate preparation of progress payments with Mesa's Construction Inspector and the Low Bidder based on a list of the quantities for each item of Oversize Improvements completed during the monthly progress payment period.

2.5 To process progress payments through the office of Mesa's Development and Sustainability Department's Development Planning Specialist within fourteen (14) days (except final City Share payment) of Mesa approval in the form of a two-party check made out to both Developer and the Low Bidder.

2.6 To remit final City Share payment to Developer within ninety (90) days of Mesa's approval and acceptance of all Oversize Improvements and receipt of Developer's invoices, lien releases, and proof-of-payment(s). The approval and acceptance date ("Acceptance") occurs upon Mesa's final inspection and approval of the site. If final invoices, lien releases, and proof-of-payment(s) are not received within one year of Acceptance by Mesa, the Developer waives all rights to any remaining payment.

2.7 To assume ownership of all Public and Oversize Improvements and to control and maintain same as a part of Mesa facilities, after completion and Acceptance.

3. Developer agrees:

3.1 To offer all Oversize Improvements that qualify for City Share through the public bidding process as administered by Mesa, or private bidding process administered by Developer (in which case City Share shall be limited to the Cost Limit). If the contract for Oversize Improvements is not publicly bid, Sections 3.2 through 3.6 of this Agreement do not apply.

3.2 To execute a contract with Low Bidder (utilizing Mesa's contract documents as contained in the public bid package) for the exact unit costs related to said Oversize Improvements as identified in Low Bidder's proposal received during the public bidding process.

3.3 To provide Mesa with copies of said contract with Low Bidder, clearly identifying the unit costs of said Oversize Improvements, prior to issuance of the first Rights-of-Way permit to be issued in conjunction with the installation or construction of the Oversize Improvements.

3.4 To comply with all aspects of Mesa's policy and procedures for City Share in said Oversize Improvements as prescribed in this Agreement by making formal written progress payment requests to the office of the Development Sustainability Department's Development Planning Specialist on or before the monthly payment cycle date.

3.5 To remit Developer's monthly progress payment for Public Improvements to Low Bidder prior to or concurrently with Mesa's monthly progress payment for Oversize Improvements to Developer/Low Bidder.

3.6 To provide Mesa with proof-of-payment to Low Bidder by Developer for Public Improvements and Oversize Improvements for the previous month as a part of each subsequent monthly progress payment request.

3.7 To provide Mesa with copies of all invoices, lien releases, and proof-of-payment(s) with the formal written request for final City Share payment, as described more fully in Section 2.6 of this Agreement.

3.8 To accept financial responsibility for all Public Improvements and Oversize Improvements, and liabilities known and unknown, other than City Share in Oversize Improvements costs specifically assigned to Mesa as identified in this Agreement and Exhibit "B" (Mesa Costs).

3.9 To bear all risk of loss, damage, or failure to the Public Improvements and Oversize Improvements until Acceptance.

3.10 To assign to Mesa, at Mesa's request, all of Developer's rights and privileges respecting warranty and maintenance of the Public Improvements and Oversize Improvements, following Mesa's Acceptance of the Public Improvements and Oversize Improvements.

3.11 To defend, indemnify, and hold harmless Mesa from any and all claims, demands, costs, expenses, damages, losses, obligations, judgments, or lawsuits that arise from or relate in any way to any act or omission by Developer or its contractors or agents undertaken in fulfillment of Developer's obligations under this Agreement.

3.12 To the extent applicable under A.R.S. § 41-4401 and 23-214, Developer represents and warrants compliance with all federal immigration laws and regulations that relate to their employees and their compliance with the E-verify requirements of A.R.S. 23-214(A). Breach of the above-mentioned warranty shall be deemed a material breach of the Agreement and may result in the termination of the Agreement by City. The City retains the legal right to randomly inspect the papers and records of any employee who works under this Agreement to ensure compliance with the above-mentioned laws.

3.13 To acknowledge and agree that it is in compliance with ARS 35-391 and ARS 35-391 as it applies to doing business with or having a material interest in a company that does business with Sudan and Iran, respectively. If the City determines that Developer has submitted a false certification or representation, the City reserves the right to impose any and all remedies provided by law, in its sole discretion, including immediate termination of this Agreement.

4. Miscellaneous:

4.1 This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona.

4.2 Time is of the essence with respect to the performance of each of the obligations, covenants and agreements contained in this Agreement.

4.3 This Agreement shall automatically terminate when the first of the following three events occurs:

4.3.1 Satisfaction of each parties responsibilities as set forth in the Agreement.

4.3.2 One year after all construction required under this Agreement is

accepted by City.

- 4.3.3 Five years after the date this Agreement is entered into, if neither party has materially performed under this agreement nor taken any actions to their detriment in reliance on this Agreement.

4.4 In the event that either party defaults in the performance of its obligations contained in this Agreement, the non-defaulting party shall have all remedies available at law and at equity, according to the laws of the State of Arizona.

- 4.4.1 Default. Failure or unreasonable delay by either party to perform or otherwise act in accordance with any term or provision hereof shall constitute a breach of this Agreement. The non-breaching party shall notify the breaching party in writing of the breach, specify the nature of the alleged breach and the manner in which said breach may be satisfactorily cured, if possible. If the breach can be, but is not, cured within thirty (30) days after written notice thereof (the "Cure Period"), the breach shall constitute a default under this Agreement.

- 4.4.2 Nothing contained in Section 4.3.1 is intended to limit Mesa's right to declare a default or terminate this Agreement immediately in the event any act or omission by Developer or its contractor in connection with this Agreement poses an unreasonable risk of harm or liability to Mesa or the public.

4.5 This Agreement shall run with the Property and shall be binding upon the parties hereto and their respective successors and assigns. Developer may not assign its interests hereunder to any successor-in-interest of all or any portion of the Property without the prior written consent of Mesa, which consent shall not be unreasonably withheld. Any such assignment shall, at a minimum, include a written agreement of the assignee to perform Developer's obligations as set forth in this Agreement.

4.6 The individuals executing this Agreement on behalf of the parties hereto represent that they have authority to execute this Agreement on behalf of such parties, and upon execution by the last party, this Agreement shall be binding. No later than ten (10) days after Mesa and Developer have executed this Agreement it shall be recorded in its entirety in the official records of Maricopa County, Arizona.

4.7 Nothing in this Agreement shall be deemed as creating a joint venture, partnership, or any other cooperative or joint arrangement between Developer and Mesa. Until Mesa accepts ownership of the Public Improvements and

Oversize Improvements, Mesa's sole responsibility shall be to assist in funding the construction cost of the Oversize Improvements pursuant to this Agreement.

4.7.1 Developer and Mesa agree that the benefits of this contract are solely intended for Mesa and Developer. No contractor, Low Bidder or otherwise, nor anyone working for or supplying to such contractor, is intended to be a third party beneficiary of this Agreement.

4.8 Developer acknowledges that changes requested by Mesa shall only be done by formal written approval through the Development and Sustainability Department Director. Developer further acknowledges that any changes requested either by Developer or Mesa may require Developer to put all Oversize Improvements through the public bidding process.

4.9 Attorneys' Fees. In the event it becomes necessary for Mesa or Developer to employ legal counsel or to bring any action or proceeding to enforce any provisions hereof, the prevailing party shall be entitled to recover its costs and expenses incurred, including reasonable attorneys' fees.

4.10 Notices. All notices provided for herein shall be delivered personally or sent by certified United States Mail, postage pre-paid, return receipt requested to:

The City: City of Mesa
P.O. Box 1466
Mesa, AZ 85211-1466
Attn: Development and Sustainability
Department Director

With a copy to: City of Mesa
P.O. Box 1466
Mesa, AZ 85211-1466
Attn: City Attorney

Developer: Smith's Food & Drug Centers, Inc.
Dba Fry's Food & Drug Stores
500 S. 99th Avenue
Tolleson, Arizona 85353
Attn: Gabe Torres

Or to such other address or addresses as may hereafter be specified by notice given by any of the above for itself to the others. Any notice or other communication directed to a party to this Agreement shall become effective upon

the earliest of the following: (a) actual receipt by that party; (b) personal delivery to the address of the party, addressed to the party; or (c) if given by certified or registered U.S. Mail, return receipt requested, 36 hours after deposit with the United States Postal Service, addressed to the party.

4.11 Good Standing; Authority. Each of the parties represents and warrants to the other (a) that it is duly formed and validly existing under the laws of Arizona; (b) that it is authorized to conduct business in Arizona with respect to the Developer; and (c) that the individuals executing this Agreement on behalf of their respective parties are authorized and empowered to bind the party on whose behalf each such individual is signing.

4.12 Severability. If any provision of this Agreement is declared void or unenforceable by a court of competent jurisdiction, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect if the remaining provisions permit the parties to obtain the practical benefits of this Agreement. Otherwise, either party may terminate this Agreement.

4.13 Any dispute with respect to this Agreement and the rights and duties created by this Agreement shall be litigated in Superior Court of Maricopa County in the State of Arizona. The Parties shall not raise, and hereby waive, any defenses based on venue, inconvenience of forum, or lack of personal jurisdiction in any action or suit brought in accordance with this Section. **The Parties acknowledge that they have read and understand this clause and agree voluntarily to its terms.**

4.14 Pursuant to ARS § 38-511, City may cancel this agreement at any time within three years after its execution without further obligation if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of City is or becomes at any time while the Agreement is in effect an employee of or consultant to any other party to this Agreement. The cancellation shall be effective upon receipt of written notice of the cancellation unless the notice specifies another time.

4.15 Pursuant to ARS § 42-17106, the City is a governmental agency which relies upon the appropriation of funds by its governing body to satisfy its obligations. City represents that it intends to pay all monies due under this Agreement if such funds have been legally appropriated. City agrees to actively request funding for future fiscal periods in order to satisfy the terms of this Agreement. However, in the event that an appropriation is not granted and operating funds are not otherwise legally available to pay the monies due or to become due under this Agreement, City shall have the right to terminate the Agreement without penalty on the last day of the fiscal period for which funds were legally available. In the event of such termination, City agrees to provide a minimum of thirty (30) calendar days' advance written notice of its intent to

terminate.

4.16 All exhibits attached to this Agreement are incorporated into and made an integral part of this Agreement for all purposes by this reference.

SIGNATURES ON THE NEXT PAGE

In Witness Whereof, the parties have caused these presents to be executed the day and year written herein below,

Developer:

By: _____

Its: _____

Date: _____

STATE OF ARIZONA)
)SS
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2015, by _____, as _____ of on behalf of the corporation.

Notary Public

My Commission Expires:

City: City of Mesa, a Municipal Corporation

By: _____
Development Services Department Director

Date: _____

STATE OF ARIZONA)
)SS
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 20____, by _____, as Development Services Department Director of City of Mesa, a Municipal Corporation, on behalf of the corporation.

Notary Public

My Commission Expires:

Approved as to Form:

Jim Smith, City Attorney

EXHIBIT A

LEGAL DESCRIPTION

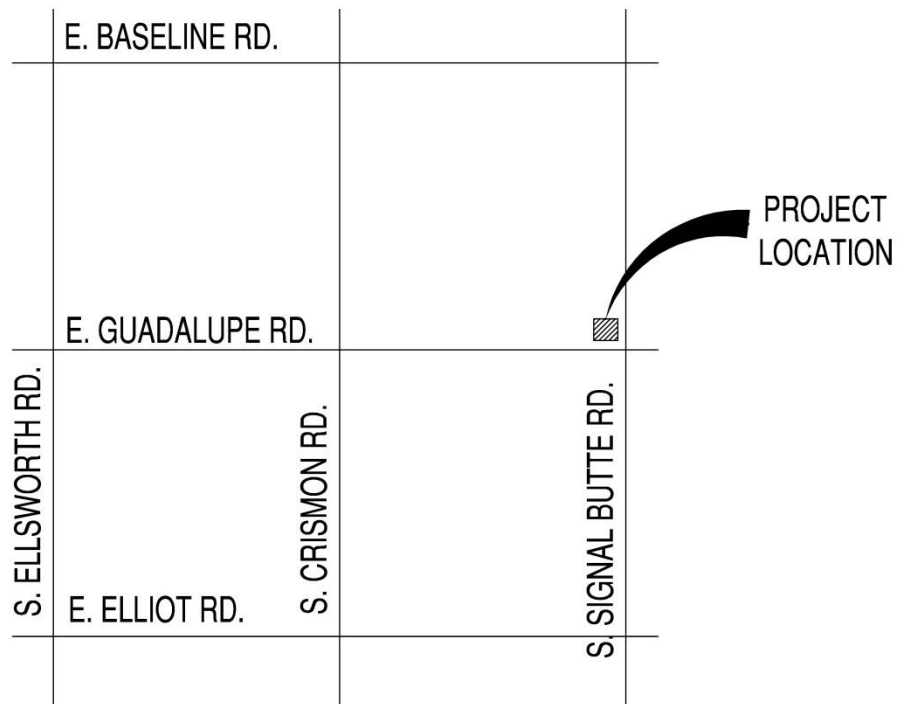
A PORTION OF THE SOUTH HALF OF SECTION 2, TOWNSHIP 1 SOUTH, RANGE 7 EAST OF THE GILA AND SALT RIVER MERIDIAN, MARICOPA COUNTY, ARIZONA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A BRASS CAP IN A HAND HOLE AT THE SOUTHEAST CORNER OF SAID SECTION 2, FROM WHICH A BRASS CAP IN A HAND HOLE AT THE SOUTH QUARTER CORNER OF SAID SECTION 2 BEARS NORTH 89 DEGREES 51 MINUTES 16 SECONDS WEST, (AN ASSUMED BEARING) 2656.20 FEET; THENCE NORTH 89 DEGREES 51 MINUTES 16 SECONDS WEST, ALONG THE SOUTH LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 2, 1060.89 FEET; THENCE NORTH, 688.30 FEET TO THE BEGINNING OF A CURVE, CONCAVE, SOUTHEAST, HAVING A RADIUS OF 170.00 FEET; THENCE NORTHEASTERLY 267.04 FEET ALONG THE ARC OF SAID CURVE THROUGH A CENTRAL ANGLE OF 90 DEGREES 00 MINUTES 00 SECONDS TO A POINT OF TANGENCY; THENCE EAST, 865.38 FEET TO A POINT ON THE EAST LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 2; THENCE SOUTH 01 DEGREES 41 MINUTES 48 SECONDS EAST, ALONG SAID EAST LINE, 861.38 FEET TO THE POINT OF BEGINNING.

VICINITY MAP



"LEED®ing and Developing Smart Projects"



SE 1/4 OF SEC 2, T1S, R7E

VICINITY MAP

SCALE: NTS

SUSTAINABILITY ENGINEERING GROUP
8280 E. GELDING DR., SUITE 101
SCOTTSDALE, AZ 85260

EXHIBIT B

CITY SHARE ESTIMATE - REIMBURSEMENT - EXHIBIT "B"										
CITY OF MESA - DEVELOPMENT AND SUSTAINABILITY DEPARTMENT										
	DEVELOPER: Smith's Food & Drug Centers, Inc.									
	Attn.: Gabe Torres									
	Address: 500 S. 99th Avenue									
	City, State, Zip: Tolleson, Arizona 85353									
	Phone No.: 623-907-1983									
	CITY SHARE PROJECT TITLE: Mulberry Marketplace									
STREET LIGHTING		QUANTITY	UNIT PRICE	ENGINEER ESTIMATE	DEVELOPER QUANTITIES	DEVELOPER'S COSTS	CITY QUANTITIES	MESA'S COSTS		
SIGNAL BUTTE ROAD										
1	310W HPS Luminair	1	EA \$3,700.00	\$3,700.00	0	\$0.00	1	\$3,700.00		
2	250W HPS Luminair	2	EA \$3,650.00	\$7,300.00	0	\$0.00	2	\$7,300.00		
3	200W HPS Luminair	1	EA \$3,600.00	\$3,600.00	0	\$0.00	1	\$3,600.00		
4	#5 Pull Box	3	EA \$275.00	\$825.00	0	\$0.00	3	\$825.00		
5	Conduit per Plan	700	LF \$2.41	\$1,687.00	0	\$0.00	700	\$1,687.00		
6	Light Control Cabinet	1	EA \$3,500.00	\$3,500.00	0	\$0.00	1	\$3,500.00		
7	Trench and Backfill	700	LF \$3.00	\$2,100.00	0	\$0.00	700	\$2,100.00		
GUADALUPE ROAD										
8	310W HPS Luminair on 40' Pole	3	EA \$3,825.00	\$11,475.00	0	\$0.00	3	\$11,475.00		
9	250W HPS Luminair on 40' Pole	1	EA \$3,700.00	\$3,700.00	0	\$0.00	1	\$3,700.00		
10	#5 Pull Box	6	EA \$275.00	\$1,650.00	0	\$0.00	6	\$1,650.00		
11	Conduit per Plan	1,000	LF \$2.41	\$2,410.00	0	\$0.00	1000	\$2,410.00		
12	Light Control Cabinet	1	EA \$3,500.00	\$3,500.00	0	\$0.00	1	\$3,500.00		
13	#9 Pull Box	2	EA \$1,350.00	\$2,700.00	0	\$0.00	2	\$2,700.00		
14	Trench and Backfill	1,000	LF \$3.00	\$3,000.00	0	\$0.00	1000	\$3,000.00		
15	Less Developers Share of Street Lights	1,700	LF \$27.00			\$45,900.00		(\$45,900.00)		
			SUBTOTAL STREET LIGHTING:	\$51,147.00				\$5,247.00		
STREETS IMPROVEMENTS		QUANTITY	UNIT PRICE	ENGINEER ESTIMATE	DEVELOPER QUANTITIES	DEVELOPER'S COSTS	CITY QUANTITIES	MESA'S COSTS		
SIGNAL BUTTE ROAD										
1	2" AC/ 3.5" AC/ 10" ABC	3,100	SY \$27.00	\$83,700.00	0	\$0.00	3,100	\$83,700.00		
GUADALUPE ROAD										
2	2" AC/ 3.5" AC/ 10" ABC	4,850	SY \$27.00	\$130,950.00	0	\$0.00	4,850	\$130,950.00		
			SUBTOTAL STREETS:	\$214,650.00		\$0.00		\$214,650.00		
			TOTAL COSTS:	\$285,797.00	DEVELOPERS COSTS:	\$0.00	CITY COSTS:	\$219,897.00		
							LESS OVER	\$112,000		
							CITY SHARE COST:	(\$107,897.00)		
								\$112,000.00		