

Staff Summary Report



Council Meeting Date: 4/23/09

Agenda Item Number: _____

SUBJECT: Request approval of a resolution authorizing completion of the purchase of the property and building at 1425 S. Clark Drive, Tempe, for use as a Fire Department Support Services Facility pursuant to a Purchase and Sale Agreement (C2009-65) executed by the City Manager.

DOCUMENT NAME: 29989423fdjg01 **REAL PROPERTY ACQUISITION (0902-21-02)**
RESOLUTION NO. 2009.31

COMMENTS: The purchase price of the building is \$3,080,000.00

PREPARED BY: Jim Gaintner, Assistant Fire Chief

REVIEWED BY: Cliff Jones, Fire Chief (858-7201)

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney (858-2187)

FISCAL NOTE: The purchase price is \$3,080,000.00, and the City will pay certain closing costs. Sufficient funds have been appropriated in the Capital Improvements Fund #5604009.

RECOMMENDATION: Adopt resolution as submitted.

ADDITIONAL INFO: The Fire Department is moving forward with all due diligence so that the project will be "shovel ready" should it be approved for Federal Stimulus Funding.

This acquisition of a Fire Department Support Services Facility will achieve a Fire Department goal of improving facilities and conditions for preventive maintenance and repair of fire apparatus, storage of reserve fire apparatus, the ability to conduct maintenance and repair of self-contained breathing apparatus and specialized power tools, and provide adequate space for the storage of fire service equipment and supplies.

RESOLUTION NO. 2009.31

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE ACQUISITION OF CERTAIN REAL PROPERTY LOCATED AT 1425 SOUTH CLARK DRIVE, TEMPE, ARIZONA.

WHEREAS, the City of Tempe conducted an exhaustive search for a suitable location for a Fire Department Support Services Facility (the "Facility"), and has determined that the real property and improvements located at 1425 South Clark Drive (the "Property") in Tempe, Arizona, satisfy the City's requirements for the Facility; and

WHEREAS, the City has executed a Purchase and Sale Agreement dated as of April 10, 2009 with Gorilla Holdings, LLC, a copy of which is attached hereto as Exhibit A (the "Agreement"), pursuant to which the City may acquire the Property; and

WHEREAS, the City desires to approve the terms of and authorize consummation of the acquisition of the Property on the terms and conditions set forth in the Agreement.

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

That the Agreement is hereby ratified and approved in all respects, and the Manager or his designee is authorized and directed to execute such documents and take such actions as are necessary to consummate the acquisition of the Property in accordance with the Agreement, such actions to include without limitation disbursement of the requisite funds.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this ____ day of April, 2009.

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

PURCHASE AND SALE AGREEMENT
(1425 South Clark Drive, Tempe, Arizona)
(Maricopa County Parcel #133-01-444)
~~C2009-65~~

This Agreement is entered into effective as of April 10, 2009, by and between Gorilla Holdings, LLC an Arizona limited liability company ("Seller"), and The City of Tempe, an Arizona municipal corporation ("Buyer"), on the following terms and conditions:

1. Agreement.

(a) Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller that approximately 1.85 acre parcel of real property ("Property") described/depicted on Exhibit A attached hereto on the terms and conditions contained in this Agreement, together with (a) all rights of way, easements, and water rights used in connection with or appurtenant to the real property, if any, (b) any rights of Seller to any adjoining strips or gores of property and any land lying within the bed of any adjoining street, highway or waterway, (c) all minerals thereon and rights thereto, (d) all fixtures, improvements and other property located thereon, and (e) any other rights or privileges appurtenant to such real property or used in connection therewith.

2. Escrow Agent. Seller and Buyer shall open an escrow ("Escrow") with Fidelity Title Insurance Company; ("Escrow Agent") to facilitate the consummation of the sale of the Property. Seller and Buyer shall execute any escrow instructions ("Escrow Instructions") reasonably requested by Escrow Agent in connection with opening the Escrow or otherwise facilitating the consummation of the sale of the Property. In the event of any conflict or inconsistency between the Escrow Instructions and this Agreement, the provisions of this Agreement shall prevail.

3. Purchase Price and Payment Terms. The purchase price ("Purchase Price") to be paid by Buyer for the Property shall be Three Million Eighty Thousand and 00/100 Dollars (\$3,080,000.00), which shall be paid by Buyer into Escrow in cash or other immediately available funds on or prior to the Closing Date.

4. Earnest Money. No earnest money deposit is required.

5. Escrow Opening and Closing. The Escrow Agent shall sign and date this Agreement on the space provided at the end of this Agreement, indicating that Escrow has been opened as of such date ("Opening of Escrow"). The date ("Closing Date") set for conveyance of title to the Property and the performance of all conditions (except those conditions expressly required to be performed earlier pursuant to this Agreement) relating thereto ("Closing" or "Close of Escrow") shall be thirty (30) days following the Feasibility Date, or such earlier date as Buyer may specify by written notice to Seller. Notwithstanding the foregoing, Buyer shall have the right in its unfettered discretion to extend the Closing for an additional thirty (30) days by giving written notice to Seller and Escrow Agent not less than ten (10) days prior to the then-scheduled Closing Date and the delivery to Seller of a non refundable **Extension Fee** in the

amount of Thirty Thousand Dollars (\$30,000.00). Upon Closing, Fifteen Thousand Dollars of the Extension Fee will be credited against the Purchase Price.

6. Owner's Title Policy; Closing Costs.

(a) At Closing, Seller shall cause Escrow Agent to furnish Buyer with an ALTA extended coverage owner's policy of title insurance in the amount of the Purchase Price for the Property insuring Buyer's title to the Property, subject only to the usual printed exceptions contained in such title insurance policies, those matters which appear as exceptions in Schedule B of the Title Commitment described in Section 7(a) herein and which are not objected to or are waived in the manner described in said section, and any other matters approved in writing by Buyer. Buyer shall pay (i) the difference in premium cost between an ALTA extended coverage and a standard owner's policy and (ii) the cost of any endorsements requested by Buyer, and Seller shall pay the cost of a standard owners policy of title insurance and the cost of any endorsements obtained to cure a title objection that Seller has agreed to cure under Section 7(a). Buyer's obligations under this Agreement shall be conditioned on issuance by Escrow Agent of the title policy described in this paragraph; the failure of such condition shall entitle Buyer to terminate this Agreement. Seller shall also provide Escrow Agent at the Close of Escrow with any statements or affidavits reasonably requested by Escrow Agent in connection with issuance of the title policy, including information regarding mechanics, liens and parties in possession.

(b) At Closing, Seller additionally shall pay one half of the recording fees with respect to the Deed and any releases of encumbrances, all then-existing general and special assessments pertaining to the Property, all delinquent property taxes, and one-half of the Escrow fees. Buyer shall pay one-half of the Escrow fees. All real property taxes reflected on the Title Commitment shall be prorated as of Closing based upon the most recent available information and paid by Seller. Buyer is exempt from payment of such taxes, and shall not in any case be chargeable for payment of any such amounts, whether or not adequate funds are retained by Escrow Agent at Closing. Except as provided herein, any other fees or charges shall be paid as is customary in the community.

7. Buyer's Contingencies. Buyer's obligation to consummate the transaction contemplated hereby or fulfill its obligations under this Agreement is subject to satisfaction of the following conditions precedent (which Buyer may elect to waive, in whole or in part, in its sole discretion):

(a) Status of Title. Seller shall cause Escrow Agent, within ten (10) days after Opening of Escrow, to provide Buyer with a current commitment for title insurance (the "Title Commitment") for the Property, disclosing all matters of record and other matters of which Escrow Agent has knowledge which relate to the title to the Property, and a legible copy of each of the instruments and documents referred to in the Title Commitment. The Title Commitment shall include Escrow Agent's requirements for

Closing and issuing its title policies, which requirements (including those to be met by releasing or satisfying monetary encumbrances, but not those to be met solely by Buyer) shall be met by Seller on or before the date set for Closing. Buyer shall have thirty (30) days after receipt of the Title Commitment, Phase I Report (as hereafter defined) and Survey (as hereafter defined) and copies of all instruments and documents referred to in the Title Commitment, or five (5) business days after the receipt of any amendment thereto and copies of all instruments and documents referred to therein, to object in writing to Seller to any matter shown thereon. If Buyer fails to object within said period, the condition of title to the Property shall be deemed approved. If Buyer timely objects to any matter disclosed by the Title Commitment or any amendment thereto, Seller shall use reasonable efforts to cure such objection (which obligation shall not include any obligation to expend funds) within ten (10) days thereafter. If Seller is unsuccessful in its efforts to cure Buyer's objection, Buyer shall have ten (10) days following notice from Seller of its inability to cure in which Buyer shall elect either to waive its objection or terminate this Agreement; failure by Buyer to make a timely election shall constitute an election to terminate this Agreement. Notwithstanding anything herein to the contrary, Seller shall satisfy and remove all monetary liens from the Property and cause the parties-in-possession title exception, if any, shown on the Title Commitment to be deleted on or before the Closing, and Buyer need not expressly object to any such matters as may be disclosed on the Title Commitment or any amendment thereto.

(b) Survey and Examination of Property. Buyer shall have the right to survey and examine the Property and any improvements thereon, including, but not limited to, the physical condition of the improvements, the availability of access, water, sewer and other utilities and services to the Property and the costs of securing same, the existence of hazardous or toxic substances or pollutants, and the zoning and applicable governmental regulations, statutes and ordinances pertaining to the Property, at any time after the execution of this Agreement, with any persons whom it shall designate, including, without limitation of the foregoing, appraisers, contractors, engineers and soil testing personnel. Seller shall permit access to the Property to Buyer and any persons designated by Buyer, and Seller shall afford them the opportunity to conduct, prepare and perform any surveys, appraisals, and any hydrological, topographical, environmental, traffic, feasibility and other engineering tests, studies, and reports upon the Property that Buyer deems necessary or appropriate to assist it in determining whether the Property is appropriate for the purposes contemplated by Buyer. Upon completion of all such tests, studies and reports, Buyer shall fill all holes produced by it and restore the Property to its condition existing prior to any tests or inspections. Buyer shall indemnify, protect, defend and hold Seller harmless from all claims, costs, fees or liability of any kind arising out of the acts of Buyer or Buyer's agents pursuant to this Section 7(b), except that Buyer shall have no liability for discovery of pre-existing conditions (e.g. Buyer shall not be responsible for remediating environmental contamination discovered by Buyer). In the event Buyer in its sole and absolute discretion determines that the Property is not suitable for its purposes, or the area of the Property is inadequate, Buyer may, at any time prior to

5:00 P.M. on the 45th day following the Opening of Escrow (the "Feasibility Date"), to terminate this Agreement by written notice to Seller and Escrow Agent.

(c) City Council Approval. Prior to the Feasibility Date, the City Council of the City of Tempe shall have adopted a resolution authorizing the transaction contemplated hereby and ratifying the execution of this Agreement.

(d) Termination of Existing Tenancies. Prior to Close of Escrow, Seller shall have terminated any leases or other occupancy agreements affecting the Property.

(e) Approvals. Buyer prior to the expiration the Feasibility Date shall have obtained all approvals necessary for the contemplated use of the Property by the Fire Department.

8. Conveyance. The Property, including any and all improvements thereon and rights, easements and privileges appurtenant thereto, including any water rights, shall be conveyed to Buyer, upon the Closing, by special warranty deed (the "Deed"), and any other instruments of assignment or transfer that may be necessary or appropriate, free and clear of all liens, restrictions, reservations, encumbrances and exceptions to title whatsoever, except only those matters of record that appear as exceptions on Schedule B of the Title Commitment described in Section 7(a) hereof and which are not objected to or which are waived in the manner described in said section. The Deed shall be deposited with Escrow Agent on or before Closing and shall be recorded at Closing. Seller and Buyer hereby authorize and direct Escrow Agent to execute on behalf of Seller and Buyer any Affidavits of Value required by Arizona law to be provided to the County Recorder in order to record the Deed. At Closing (and thereafter upon reasonable request by Buyer), Seller shall execute any documents reasonably requested by Buyer to transfer to Buyer any water rights appurtenant to or used in connection with the Property.

9. Remedies.

(a) In the event Buyer learns prior to Closing of a failure by Seller to meet any of its obligations under this Agreement, Buyer may (i) terminate this Agreement and recover from Seller all of Buyer's actual, out-of-pocket expenses in connection with the Property, not to exceed Fifteen Thousand Dollars (\$15,000) (ii) waive such breach and close Escrow, or (iii) and if Seller's failure is a failure to close and provided that Buyer has waived all conditions precedent to Buyer's obligation to close except Seller's obligations in Section 7(a) above, institute an action for specific performance. Seller hereby acknowledges that the Property is unique and that, accordingly, it would be equitable for any court of competent jurisdiction to order the specific performance by Seller of Seller's obligations hereunder.

(b) In the event Seller learns prior to a Closing of a failure by Buyer to meet all of its obligations under this Agreement, Seller may, as its exclusive remedy, terminate this Agreement and recover from Buyer all of Seller's actual, out-of-pocket expenses in

connection with the Property not to exceed Fifteen Thousand Dollars (\$15,000), or alternatively, at Seller's election, retain that portion of the Extension Fee applicable to the Purchase Price, if any, as liquidated damages. In the event of any termination under this Section 9(b), neither party shall have any further obligation or liability to the other in connection with the Escrow or under this Agreement.

(c) Notwithstanding the provisions of sections (a) and (b) above, neither party shall take any action or remedy as a result of a breach by the other party hereto unless the non-breaching party first gives five (5) business days written notice and opportunity to cure to the alleged breaching party.

10. Brokers. If and only if the Closing occurs, Seller shall pay a real estate commission to Grubb & Ellis/BRE Commercial, LLC and Jones Lang LaSalle Americas, Inc. ("Broker") in accordance with a separate written agreement with such Broker. No commission shall be payable hereunder if this Agreement fails to close for any reason, including without limitation mutual cancellation or default by Buyer or Seller. Buyer and Seller mutually agree to indemnify and hold harmless the other of, from and against any real estate commission to any other broker that may be asserted to be payable as a result of any action of Buyer or Seller respectively. Seller and Buyer acknowledge that Buyer and its various officers, employees, and affiliates of Buyer and Seller may hold Arizona real estate licenses as brokers and/or salespersons. The indemnity provided in this Section shall survive Close of Escrow or earlier termination of this Agreement.

11. Seller's Representations, Warranties and Additional Covenants. Seller hereby represents and warrants to, and covenants with, Buyer that:

(a) There are no (i) claims, actions, suits, condemnation actions or other proceedings pending or threatened by any entity regarding Seller or the Property, except claims that Seller may have against the former tenant (ii) approvals, permits, easements, rights-of-way, zoning changes, uses or rights that have been denied or to the knowledge of Seller may be denied, by any governmental department or agency regarding the Property, or (iii) to Seller's actual knowledge there are no violations of any law, statute, government regulation or requirement, that in any manner or to any extent may materially and adversely affect the Property.

(b) Seller shall not sell, convey, assign, lease or otherwise transfer all or any part of the Property, or cause or permit any new liability, encumbrance or obligation to be placed or imposed upon all or any part of the Property from the date hereof until Close of Escrow and recordation of the Deed.

(c) Seller has not received notice and is not otherwise aware of any adverse claims by any person or persons (including but not limited to adjoining property owners) and except as shown on the Survey, Seller has no actual knowledge of any encroachments

with respect to the Property, and to Seller's actual knowledge, all fences and walls located on the Property are within the Property boundaries.

(d) To Seller's actual knowledge, all written information, schedules and documents delivered by Seller to Buyer are, complete, true and accurate. Seller has not withheld any part of the Reports, as defined in Paragraph 14 herein, or any other material information pertaining to the Property.

(e) Seller is the owner of the Property and has full power and authority to enter into and perform this Agreement in accordance with its terms.

(f) The individuals executing this Agreement are authorized to do so and, upon executing this Agreement, this Agreement shall be binding and enforceable upon Seller in accordance with its terms.

(g) Except as disclosed in the Phase I Report, Seller has not received notice and is not otherwise aware that the Property is in violation of , nor has it been or is it currently under investigation for violation of any federal, state or local law, ordinance or regulation relating to industrial hygiene, worker health and safety, or to the environmental conditions in, at, on or under or about the Property, including, but not limited to, soil and groundwater conditions ("Environmental Laws"); (ii) the Property has not been subject to a deposit of any Hazardous Substance (as defined below); (iii) neither Seller nor any third party has used, generated, manufactured, stored or disposed in, at, on or under the Property any Hazardous Substance; (iv) there is not now in, on or under the Property any underground or above ground storage tanks or surface impoundments, any asbestos containing materials or any polychlorinated biphenyls used in hydraulic oils, electrical transformers or other equipment; and (v) Seller has not received any notice of any violation of any Environmental Laws or any information which would constitute or lead to a violation thereof. Seller hereby assigns to Buyer as of the Close of Escrow all claims, counterclaims, defenses and actions, whether at common law or pursuant to any other applicable federal, state or other laws which Seller may have against any third party or parties relating to the existence or presence of any Hazardous Substance in, at, on, under or about the Property. For purpose of this Agreement, the term "Hazardous Substance" shall be deemed to include any wastes, materials, substances, pollutants and other matters regulated by Environmental Laws. The foregoing notwithstanding, Buyer acknowledges and is aware that diesel fuel used in portable generator and cleaning solvents and chemicals used in the cleaning of Port-o Potties have been used and stored on the Property.

(h) No representation, warranty or statement of Seller in this Agreement or in any exhibit attached hereto contains any untrue statement of a material fact or omits a material fact. Seller shall promptly notify Buyer of any material change in any circumstance which makes any representation or warranty of Seller under this Agreement materially untrue or misleading, or any covenant of Seller under this Agreement incapable

or less likely of being performed. Except as set forth in this Section or elsewhere in this Agreement, Seller is making no other representations, warranties or covenants.

(i) There are no existing formal or informal agreements, understandings or arrangements with any government authority regarding any conditions to the current or future zoning or use of the Property, and there are no commitments or requirements for dedications or payment of funds for municipal improvements or other matters.

(j) No attachments, execution proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization or other similar proceedings are pending or, to Seller's knowledge, threatened against Seller, nor are any of such proceedings contemplated by Seller.

(k) To Seller's actual knowledge, there are no defects or conditions of the soil that will impair the use and operation of any portion of the Property, except as disclosed by the Phase 1 Report. Seller has not used the Property and, to Seller's actual knowledge, the Property has never been used as a landfill, waste disposal site or burial site.

(l) Seller agrees to reasonably cooperate with Buyer in obtaining any required zoning approvals or other approvals and entitlements as may be required for Buyer's intended use of the Property; provided such activities do not require Seller to incur any costs or expenses. Seller agrees to reasonably cooperate with Buyer in replatting the Property if required for Buyer's intended use provided that Buyer will pay any costs, expenses and fees associated with such replat.

(m) To Seller's actual knowledge, the Property is not subject to the provisions of any federal, state or local ordinances regarding flood plains and is not subject to any drainage, run-off or flooding problems. All storm water flowing from the Property drains either into a public collection system or onto a permitted location.

(n) All taxes of any kind or nature which are or could become a lien against the Property (including but not limited to income, employment, construction, transaction, privilege, sales, use and real or personal property taxes) have been and will be paid current through the Close of Escrow.

As used in this Agreement the terms Seller's knowledge or Seller's actual knowledge means the present knowledge Seller's Manager Robb M. Corwin without inquiry or duty to make inquiry. The person who has reviewed and is executed this Agreement on Seller's behalf is the person primarily responsible for the property. The foregoing representations, warranties and covenants shall be true as of the date hereof and as of Close of Escrow and shall survive the Close of Escrow for a period of two (2) years.

12. Buyer's Representations, Warranties and Additional Covenants. Buyer hereby represents and warrants to and covenants with, Seller, that:

(a) Buyer has full power and authority to enter into and perform this Agreement in accordance with its terms.

(b) The individual executing this Agreement on behalf of Buyer is authorized to do so and, upon his executing this Agreement, this Agreement shall be binding and enforceable upon Buyer in accordance with its terms.

The foregoing representations, warranties and covenants shall be true as of the date hereof and as of Close of Escrow.

13. Survey; Phase I Report. Within ten (10) days after Opening of Escrow, Seller shall, at its sole expense, provide to Buyer a certified ALTA survey (the "Survey") of the Property and Phase I Environmental Assessment (the "Phase I Report"). The Survey shall set forth an accurate legal description of the Property (which legal description shall replace the legal description attached to this Agreement), and be certified to Buyer, Seller and Escrow Agent. If the Phase I Report reveals any matters of concern, then Seller shall (at its sole cost and expense) cause to be performed such additional testing as may be recommended, and the Closing shall automatically be postponed until completion and review of such tests by Buyer and Seller, or at Seller's option Seller may terminate this Agreement and cancel the Escrow. Prior to the Feasibility Date, Seller shall provide Buyer with the results of random core sampling conducted throughout the interior concrete slab and break test results to verify floor loading capacity.

14. Reports. Within five (5) days following the Opening of Escrow, Seller shall deliver to Buyer copies of all correspondence, reports, surveys, studies, documents, approvals, drawings, plats, plans, specifications, filings or similar writings (collectively "Reports") pertaining to the Property or the development thereof, including but not limited to any Reports pertaining to drainage, soil, flood, hazardous or toxic substance or pollutants, archaeological or environmental conditions, or power or transmission lines on or adjacent to the Property, as well as all topographical surveys, "as-built" drawings, engineering drawings, plans and specifications for utilities or roadways, preliminary title reports previously received together with underlying documents pertaining thereto, subdivision reports, and approvals received from any city or agency that are in Seller's possession.. Any such Reports not in Seller's possession concurrently with the execution hereof but which come into Seller's possession prior to Close of Escrow shall be delivered immediately to Buyer. If this Agreement is terminated for any reason, Buyer shall return the Reports to Seller.

15. Notices. Any and all notices, demands or requests required or permitted hereunder shall be in writing and shall be effective upon personal delivery or facsimile transmission (facsimile transmission must include verification of transmission) or two (2) business days after being deposited in the U. S. Mail, registered or certified, return receipt requested, postage prepaid, or one (1) business day after being deposited with any commercial air courier or express service, addressed as follows:

To Buyer: City of Tempe
31 East 5th Street
Tempe, Arizona 85281

With a copy to: Tempe City Attorney's Office
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281
Attn: City Attorney

To Seller: Gorilla Holdings, LLC
P.O.Box 11100
Chandler, Arizona
Attn: Robb M Corwin
Telephone: 480.222.4922
FAX: 1.888.344.0909
e-mail: Robb@GreatDaysLLC.com

With a copy to: Gordon E Dudley Esq.
Hymson Goldstein & Pantiliat PA
14646 N, Kierland Blvd Suite 255 Tempe, Arizona 85281
Scottsdale, Arizona 85254y

To Escrow Agent: Fidelity Title Insurance Company
Attn: Christine Hughes
60 E. Rio Salado Parkway, #1102
Tempe, AZ 85281
Telephone: 480-214-4548 FAX: 480-214-1752
e-mail: christine.hughes@fnf.com

Buyer, Seller or Escrow Agent may change its address for notice by giving notice in the manner provided above. The inability to deliver because of a changed address of which no notice was given, or rejection or other refusal to accept any notice, shall be deemed to be the receipt of the notice as of the date of such inability to deliver or rejection or refusal to accept. Any telephone numbers or e-mail addresses provided in this Agreement are for aiding informal communications only, and notices shall not be effective if provided orally or if sent only by e-mail.

16. Time of the Essence. Time is of the essence of this Agreement, and Buyer and Seller hereby agree to perform each and every obligation hereunder in a prompt and timely manner; provided, however, that if the date for the performance of any action or the giving of any

notice which is required hereunder, occurs on a Saturday, Sunday or legal holiday, the date for performance or giving of notice shall be the next succeeding business day.

17. Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be valid under applicable law, but if any provision of this Agreement shall be invalid or prohibited hereunder, such provision shall be ineffective to the extent of such prohibition or invalidation which shall not invalidate the remainder of such provision or the remaining provisions of this Agreement.

18. Waiver. The waiver by either party hereto of any right granted to it hereunder shall not be deemed to be a waiver of any other right granted herein, nor shall same be deemed to be a waiver of a subsequent right obtained by reason of the continuation of any matter previously waived.

19. Legal Fees. If it becomes necessary for either Seller or Buyer to employ legal counsel or to bring action at law or other proceeding to enforce any of the terms, covenants or conditions of this Agreement, the prevailing party in any such action or proceeding shall be entitled to recover its costs and expenses incurred, including its reasonable attorneys' fees, from the other party.

20. Entire Agreement. This Agreement contains the entire agreement of the parties hereto with respect to the matters covered hereby, and supersedes all prior agreements, arrangements and understandings between the parties, and no other agreement, statement or promise made by either party hereto that is not contained herein shall be binding or valid.

21. Amendments. This Agreement may be amended only by written document signed by each of the parties hereto.

22. Further Performance. Each party shall, whenever and as often as it shall be requested by the other party, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such further instruments and documents, including supplemental escrow instructions, as may be necessary in order to complete the sale, conveyance and transfer herein provided and to do any and all things as may be requested in order to carry out the intent and purpose of this Agreement, including without limitation execution of any documents reasonably requested by Buyer to allow Buyer to deal with governmental entities, utility companies and other third parties from whom permits or approvals may be required for development of the Property.

23. Counterparts. This Agreement may be executed simultaneously or in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. A party's signature on this Agreement or any amendment hereto may be provided by facsimile or pdf and shall be effective upon transmission to the other party hereto.

24. Assignment. Buyer may not assign any of its right, title and interest in and to this Agreement. .

25. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, devisees, personal and legal representatives, successors and assigns.

26. Governing Law. This Agreement shall be construed and interpreted under, and governed and enforced according to the laws of the State of Arizona. The parties hereto hereby submit to the jurisdiction of the courts of the State of Arizona in the event of any action or dispute arising from this Agreement.

27. Headings and Construction. The headings set forth in this Agreement are inserted only for convenience and are not in any way to be construed as part of this Agreement or a limitation on the scope of the particular paragraph to which it refers. Where the context requires herein, the singular shall be construed as the plural, and neuter pronouns shall be construed as masculine and feminine pronouns, and vice versa. This Agreement shall be constructed according to its fair meaning and neither for nor against either party hereto.

28. Survival. The representations, warranties and covenants set forth in this Agreement shall survive the close of the Escrow and the recordation of the Deed.

29. Subsequent Acts. The terms and provisions of this Agreement shall not merge with, be extinguished by or otherwise be affected by any subsequent conveyance or instrument by or between the parties hereto unless such instrument shall specifically so state and be signed by the parties hereto.

30. Risk of Loss. The risk of any loss or destruction of all or any part of the Property prior to Close of Escrow is upon Seller. If, prior to Close of Escrow, the Property is partially damaged or destroyed as a result of flood, fire or other casualty, including a taking by eminent domain or as a result of an eminent domain action threatened by any governmental entity, Buyer may elect, at its option, prior to Close of Escrow, to do one of the following:

(a) Accept an assignment at Close of Escrow of all proceeds of insurance from insurance policies or amounts due from any governmental entity covering the damage or destruction of the Property or the taking thereof, Seller then being obligated to assist Buyer in collecting said proceeds.

(b) Terminate this Agreement and receive a refund of all Earnest Money.

31. Non-Foreign Person. Seller represents and warrants that it is not a "foreign person", as that term is defined in Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended, (the "Code"). Prior to Close of Escrow, Seller shall furnish to Buyer and Escrow Agent Seller's United States taxpayer identification number and such affidavit and other

EXHIBIT A

PROPERTY DESCRIPTION

[The legal description shall be determined by Escrow Agent from the legal description used in the previous conveyance to Seller. The Property consists of approximately 1.85 acres of real property located at 1425 South Clark Drive, Tempe, Arizona in Maricopa County, Arizona and comprising Maricopa County, Arizona assessor parcel number 133-01-444. If Buyer does not terminate this Agreement by the Feasibility Date, the legal description of the Property contained in the most recent prior Title Commitment shall be used as the legal description of the Property unless Survey establishes a different legal description.]

information as Buyer or Escrow Agent may determine to be necessary or reasonable under Section 1445(b)(2) of the Code, or otherwise, to assure that Buyer shall not be subject to United States federal income tax withholding liability under Section 1445 of the Code. Seller shall in any event indemnify and hold harmless Buyer from and against any such cost, loss or liability that Buyer may incur under said Section 1445 of the Code.

32. Tax Reporting. Escrow Agent, as the party responsible for Closing the transaction contemplated hereby within the meaning of Section 6045(e) of the Code, shall file all necessary information, reports, returns and statements (collectively, the "Tax Reports") regarding this transaction as required by the Code, including, without limitation, the Tax Reports required pursuant to Section 6045 of the Code. Escrow Agent further agrees to indemnify and hold Buyer and Seller, and their respective attorneys and brokers, harmless from and against all claims, costs, liabilities, penalties, or expenses resulting from Escrow Agent's failure to file the Tax Reports which Escrow Agent is required to file pursuant to this paragraph.

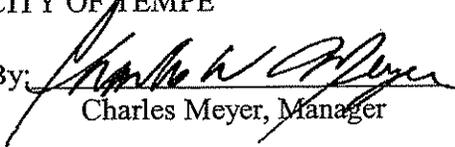
33. Exchange. Either Buyer or Seller may elect to participate in a tax deferred exchange pursuant to the United States Internal Revenue Code. If a party elects to so participate, the other party shall reasonably cooperate with such election, provided, however, that the cooperating party shall have no obligation to incur any cost or liability of any nature, the cooperating party shall have no obligation to take title to any real property (other than Buyer's acquisition of the Property pursuant to this Agreement, and no Closing shall be conditioned on or delayed by any exchange. A party electing to exchange hereunder shall provide all documents requested from the other party not less than five (5) business days prior to the relevant Closing and shall indemnify, defend and hold the cooperating party harmless from any claims, liabilities or damages of any nature arising from such cooperation.

IN WITNESS WHEREOF, Buyer and Seller have executed this Agreement effective as of the date first written above.

BUYER:

CITY OF TEMPE

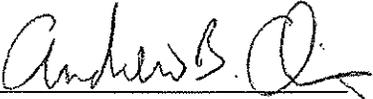
By:


Charles Meyer, Manager

ATTEST:


for City Clerk

APPROVED AS TO FORM:



City Attorney

SELLER:

Gorilla Holdings, LLC
an Arizona limited liability company



By Robb M. Corwin, Manager

This Purchase and Sale Agreement is accepted and Escrow is opened this ____ day of _____, 2009. The Escrow Number, if assigned, is _____. Escrow Agent specifically accepts the responsibilities set out in Paragraph 32.

FIDELITY TITLE INSURANCE COMPANY

By: _____

Its: _____