Staff Summary Report

Tempe

Council Meeting Date: 05/7/09 **Agenda Item Number:** _____

SUBJECT: Request approval of a resolution approving a Development Agreement with Rural Baseline, LLC and Rural Baseline Two, LLC with regard to signage for their development at the southwest corner of Baseline and Rural Road.

DOCUMENT NAME: 20090507cdcm01 **DEVELOPMENT PROJECT (0406)** Resolution No. 2009.18

SUPPORTING DOCS: Yes

COMMENTS: The shopping center on the southwest corner of Rural Road and Baseline Road (the Lowe's center) has been subdivided into more than one lot. Even though the Center is on more than one piece of property it functions as one Center. The sign code does not allow signage for one property to be displayed on another property. In other words Lowe's would not be allowed to have tenant signage on some parts of Baseline Road. This agreement would treat all of the properties as one and allow such signage to exist.

PREPARED BY: Chris Messer, Principle Planner (Ext. 8562)

REVIEWED BY: Chris Salomone, Community Development Director (Ext. 8294)
Jeff Tamulevich, Commercial Code Administrator (Ext. 8441)

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

FISCAL NOTE: Not applicable

RECOMMENDATION: Staff recommends approval of the Resolution No 2009.18.

RESOLUTION NO. 2009.18

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF TEMPE AND RURAL BASELINE, LLC, AN ARIZONA LIMITED LIABILITY COMPANY, AND RURAL BASELINE TWO, LLC, AN ARIZONA LIMITED LIABILITY COMPANY.

WHEREAS, Rural Baseline, LLC, an Arizona limited liability company and Rural Baseline Two, LLC, an Arizona limited liability company ("Owner") intends to develop their separate properties as one shopping center (the "Project") at the southwest corner of Rural Road and Baseline road (the "Property") in Tempe, Arizona; and

WHEREAS, Owner desires to establish and maintain a uniform appearance within the shopping center, including a uniform approach to signage; and

WHEREAS, the existing sign code would not allow certain signage if the Property were not treated as one site.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

Section 1: That the Mayor or his designee be and hereby is authorized to execute the Development Agreement and other documents referenced therein, copies of which are on file with the City Clerk's office and to take such further actions as are necessary to implement its terms.

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

_____
Hugh L. Hallman, Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

When recorded, return to:
City of Tempe Basket

DEVELOPMENT AGREEMENT
(C2009-__)

THIS DEVELOPMENT AGREEMENT ("Agreement") is made as of the _____ day of _____, 2009, by and among THE CITY OF TEMPE, an Arizona municipal corporation ("City"), and Rural Baseline, LLC, an Arizona limited liability company ("Rural One"), and Rural Baseline Two, LLC, an Arizona limited liability company ("Rural Two") (Rural One and Rural Two are sometimes hereafter collectively referred to as, "Owner").

RECITALS

A. Rural One owns that certain real property within the City of Tempe, described on Exhibit A-1 (the "Rural One Property"). Rural Two owns a parcel of land within the City of Tempe, adjacent to the Rural One Property, which parcel is more particularly described on Exhibit A-2 (the "Adjacent Property"). The Rural One Property and the Adjacent Property are hereafter referred to as the "Property".

B. Owner intends to develop the Property as a shopping center, and although title to and possession of the Property may change from time to time, during the existence of the shopping center, Owner desires to establish and maintain a uniform appearance within the shopping center, including a uniform approach to signage.

C. City and Owner desire to set forth herein their understandings and agreements with respect to the transactions contemplated herein.

D. This Agreement is a development agreement within the meaning of A.R.S. §900.05.

AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties hereby agree as follows:

1. Development Issues. City and Owner acknowledge the distinctive characteristics of the Property and that appropriate signage is an integral and important part of the development of the Property. Therefore, during the term of this Agreement, the Property shall be treated as a single parcel of land for purposes of Chapter 9 - "Signs" of Part 4 - "Development Standards" of the Tempe Zoning & Development Code. Such treatment shall not extend to any other portion or

provision of the Tempe City Code (including without limitation, the Building Code), and shall not exempt Owner from obtaining any licenses and permits required for the construction of signage on the Property.

2. Term; Enforcement. Unless sooner terminated as hereafter provided, this Agreement shall remain in effect until the 20th anniversary of the date it is executed by the later of the City and Owner. Owner acknowledges that, in accordance with applicable law, this Agreement is enforceable by the City and by each Owner, City and Owner agree that on expiration or termination of this Agreement, each sign on the Property shall become a legal non-conforming sign but must continue to comply with the permit issued for such sign in connection with its construction except that the individual tenant panel may be modified to reflect new tenants from time to time as needed. In addition, upon expiration or termination of this Agreement, any new signs that require a sign permit must conform to the Codes in place at the time a new sign permit is requested. In accordance with applicable law, following the occurrence of any noncompliance, breach, or default, City may revoke this Agreement as to any sign not in compliance with its permit, and in such case, may require Owner to bring that sign into compliance with all applicable Code requirements.

3. General Cooperation. City and Owner acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to perform their respective obligations under this Agreement, including, without limitation, executing all documents and taking all additional reasonable and necessary actions to give full force and effect to the intent and terms of this Agreement.

4. Indemnification of City. Owner shall indemnify, protect, defend and hold harmless City, its Council members, officers, employees, and agents from any and all third party claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by Owner.

5. Default; Remedies; Termination.

5.1 Default. It shall be a default hereunder if either party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of the failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days or such period as may reasonably be required to cure such default, if longer.

5.2 City's Remedies; Right to Terminate Agreement. If, after notice and the passage of any applicable cure period, Owner remains in default under this Agreement, then City shall have the right and option, without obligation to (a) terminate this Agreement as to any sign not in compliance with its permit, immediately upon written notice to Owner, in which event Owner shall cause such sign to be removed or to comply with applicable provisions of the Zoning & Development Code within 60 days after termination, and (b) exercise such other remedies as are available at law or in equity for breach of contract. On any such termination, this Agreement shall be of no further force or effect other than the indemnification provisions which shall survive the expiration or termination of this Agreement.

5.3 **Owner's Remedies**. If City is in default under this Agreement and the parties do not resolve City's default pursuant to the nonbinding mediation described in this Agreement, Owner shall have the right to terminate this Agreement upon written notice to City.

6. General Provisions.

6.1 Notices. All Notices which shall or may be given pursuant to this Agreement shall be in writing and may be given in person or transmitted by registered or certified mail, return receipt requested, addressed as follows:

TO Owner:	Rural Baseline, LLC 1707 E. Highland Avenue, Suite #100 Phoenix, AZ 85016 Attn: Mark Sleeth
and	Rural Baseline Two, LLC 1707 E. Highland Avenue, Suite #100 Phoenix, AZ 85016 Attn: Mark Sleeth
With a copy to:	Charles Huellmantel, Esq. PO Box 1833 Tempe, AZ 85280-001
TO THE CITY:	City Manager City of Tempe P. O. Box 5002 31 East 5th Street Tempe, Arizona 85281

With a copy to: *City Attorney*
Tempe City Attorney's Office
P. O. Box 5002
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281

Any Party hereto shall have the right to change its designated notice address by providing to the other Parties written notice of such change in the manner described above.

6.2 Dispute Resolution. If there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Owner and City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, City and Owner shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between City and Owner. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

6.3 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

6.4 Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

6.5 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

6.6 Attorneys' Fees. If any litigation between the parties in connection with this Agreement, excluding the mediation process pursuant to Section 6.2, the party prevailing in such action shall be entitled to recover from the other party all of its costs, expenses and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

6.7 Severability; No Merger. If any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be

affected thereby and shall remain in full force and effect to the fullest extent permitted by law, to the extent the material provisions of this agreement are not vitiated.

6.8 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

6.9 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

6.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

6.11 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

6.12 No Partnership or Joint Venture. Under no circumstances shall the parties hereto be considered partners or joint venturers.

6.13 Conflict. This Agreement is subject to cancellation per ARS 38-511.

{Signature pages follow}

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

CITY OF TEMPE,
an Arizona municipal corporation

ATTEST:

_____
City Clerk

By_____
Hugh L. Hallman, Mayor

APPROVED AS TO FORM:

_____
City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2009, by Hugh Hallman the Mayor of the **CITY OF TEMPE**, an Arizona municipal corporation, for and on behalf of the City.

_____
Notary Public

My Commission Expires:

_____

OWNER:

Rural Baseline, LLC,
an Arizona Limited Liability Company

By: Kitchell Development Company,
an Arizona corporation
Its Manager and Member

By: _____
Mark Sleeth, Vice President

STATE OF _____)
) ss.
County of _____)

On this ____ day of _____, 2009, before me, the undersigned Notary Public, personally appeared Mark Sleeth, who acknowledged himself to be the Vice President of Kitchell Development Company, an Arizona corporation, the Manager of Rural Baseline, LLC, an Arizona limited liability company, and that the executed the foregoing instrument for the purposes therein contained on behalf of said entity.

_____
Notary Public

My Commission Expires:
_____

OWNER:

Rural Baseline Two, LLC,
an Arizona Limited Liability Company

By: Kitchell Development Company,
an Arizona corporation

Its Manager and Member

By: _____
Mark Sleeth, Vice President

STATE OF _____)
) ss.
County of _____)

On this ____ day of _____, 2009, before me, the undersigned Notary Public, personally appeared Mark Sleeth, who acknowledged himself to be the Vice President of Kitchell Development Company, an Arizona corporation, the Manager of Rural Baseline Two, LLC, an Arizona limited liability company, and that the executed the foregoing instrument for the purposes therein contained on behalf of said entity.

_____
Notary Public

My Commission Expires:
_____

List of Exhibits

Exhibit A-1 (the "Rural One Property")
Exhibit A-2 (the "Adjacent Property")

EXHIBIT A-1

LEGAL DESCRIPTION - OVERALL SUBJECT PROPERTY

THAT PART OF THE NORTH HALF OF THE NORTHEAST QUARTER OF SECTION 3, TOWNSHIP 1 SOUTH, RANGE 4 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF SAID SECTION 3;
THENCE WEST 1401.60 FEET;
THENCE SOUTH 777.00 FEET;
THENCE EAST 1401.60 FEET;
THENCE NORTH 777.00 FEET TO THE POINT OF BEGINNING;

EXCEPT THE NORTH 55.00 FEET AND THE EAST 55.00 FEET;

EXCEPT THAT PART OF THE NORTHEAST QUARTER OF SECTION 3, DESCRIBED AS LYING BETWEEN A LINE PARALLEL TO AND 55.00 FEET SOUTH OF THE NORTH LINE OF SAID NORTHEAST QUARTER; A LINE PARALLEL AND 55.00 FEET WEST OF THE EAST LINE OF SAID NORTHEAST QUARTER; AND AN ARC OF 30.00 FOOT RADIUS, CONCAVE TO THE SOUTHWEST, TANGENT TO SAID LINE;

EXCEPT COMMENCING AT THE NORTHEAST CORNER OF SAID SECTION 3;
THENCE SOUTH 00 DEGREES 16 MINUTES 20 SECONDS EAST ALONG THE EAST LINE OF SAID SECTION 3, A DISTANCE OF 56.91 FEET;
THENCE SOUTH 89 DEGREES 51 MINUTES 45 SECONDS WEST ALONG A LINE PARALLEL TO AND SOUTH OF ARIZONA HIGHWAY DEPARTMENT SURVEY LINE ALONG BASELINE ROAD TO AN INTERSECTION WITH A LINE PARALLEL TO AND 55.00 FEET WEST OF THE EAST LINE OF SAID SECTION 3, SAID INTERSECTION BEING THE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 89 DEGREES 51 MINUTES 45 SECONDS WEST, PARALLEL TO SAID ARIZONA HIGHWAY DEPARTMENT SURVEY LINE, A DISTANCE OF 1346.61 FEET TO A CORNER OF UNIVERSITY ROYAL, A SUBDIVISION RECORDED IN BOOK 143 OF MAPS, PAGE 44, RECORDS OF THE COUNTY RECORDER, MARICOPA COUNTY, ARIZONA;
THENCE NORTH 00 DEGREES 16 MINUTES 20 SECONDS WEST ALONG AN EAST LINE OF SAID UNIVERSITY ROYAL, A DISTANCE OF 6.165 FEET TO A POINT 55.00 FEET SOUTH OF THE NORTH LINE OF SAID SECTION 3;
THENCE SOUTH 89 DEGREES 57 MINUTES 45 SECONDS EAST, ALONG A LINE 55.00 SOUTH OF AND PARALLEL TO THE NORTH LINE OF SAID SECTION 3, A DISTANCE OF 1346.61 FEET TO A POINT 55.00 FEET SOUTH OF AND 55.00 FEET WEST OF THE NORTHEAST CORNER OF SAID SECTION 3;
THENCE SOUTH 00 DEGREES 16 MINUTES 20 SECONDS EAST TO THE POINT OF BEGINNING;

(CONTINUED ON NEXT PAGE)

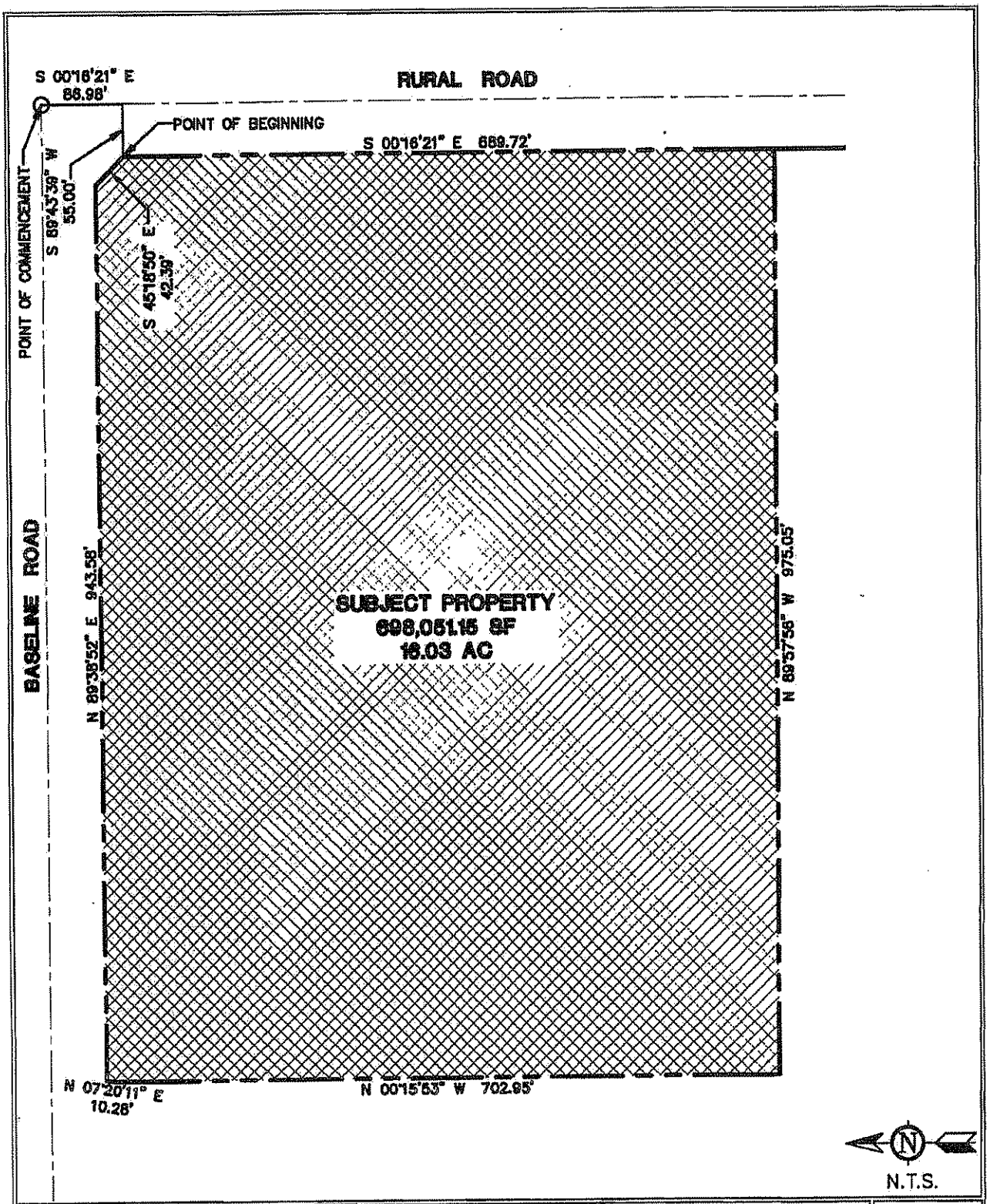
LEGAL DESCRIPTION - OVERALL SUBJECT PROPERTY (CONT'D)

EXCEPT COMMENCING AT THE NORTHEAST CORNER OF SAID SECTION 3;
THENCE SOUTH 00 DEGREES 16 MINUTES 16 SECONDS EAST, ALONG THE EAST LINE OF SAID SECTION 3, A DISTANCE OF 56.91 FEET;
THENCE SOUTH 89 DEGREES 51 MINUTES 45 SECONDS WEST ALONG A LINE PARALLEL TO AND SOUTH OF THE ARIZONA HIGHWAY DEPARTMENT SURVEY LINE ALONG BASELINE ROAD, TO AN INTERSECTION WITH A LINE PARALLEL TO AND 55.00 FEET WEST OF THE EAST LINE OF SAID SECTION 3, SAID INTERSECTION BEING THE POINT OF BEGINNING;
THENCE CONTINUING SOUTH 89 DEGREES 51 MINUTES 45 SECONDS WEST, PARALLEL TO SAID ARIZONA HIGHWAY DEPARTMENT SURVEY LINE, A DISTANCE OF 30.00 FEET;
THENCE SOUTHEASTERLY TO AN INTERSECTION WITH A LINE PARALLEL TO AND 55.00 FEET WEST OF THE EAST LINE OF SAID SECTION 3, SAID INTERSECTION BEING 30.00 FEET SOUTH OF THE POINT OF BEGINNING;
THENCE NORTH ALONG A LINE PARALLEL TO AND 55.00 FEET WEST OF THE EAST LINE OF SAID SECTION 3 TO THE POINT OF BEGINNING; AND

EXCEPT THE WEST 358.00 FEET;

EXCEPT THAT PORTION DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER OF SAID SECTION 3, AS SAID NORTHEAST CORNER IS SHOWN ON THE PLAT OF UNIVERSITY ROYAL GARDEN HOMES, ACCORDING TO BOOK 167 OF MAPS, PAGE 19, RECORDS OF MARICOPA COUNTY, ARIZONA;
THENCE SOUTH 00 DEGREES 15 MINUTES 46 SECONDS EAST, ALONG THE EAST LINE OF THE NORTHEAST QUARTER OF SAID SECTION 3 A DISTANCE OF 777.00 FEET TO THE NORTHEAST CORNER OF SAID UNIVERSITY ROYAL GARDEN HOMES;
THENCE NORTH 89 DEGREES 15 MINUTES 29 SECONDS WEST, ALONG THE NORTH LINE OF SAID UNIVERSITY ROYAL GARDENS HOMES A DISTANCE OF 1030.09 FEET TO THE POINT OF BEGINNING;
THENCE CONTINUING NORTH 89 DEGREES 57 MINUTES 29 SECONDS WEST, ALONG SAID NORTH LINE , A DISTANCE OF 13.50 FEET;
THENCE N 00 DEGREES 15 MINUTES 53 SECONDS WEST A DISTANCE OF 717.03 FEET TO THE SOUTH LINE OF THE BASELINE ROAD RIGHT OF WAY AS SAID RIGHT OF WAY IS DESCRIBED IN DOCKET 11560, PAGE 543, RECORDS OF MARICOPA COUNTY, ARIZONA;
THENCE NORTH 89 DEGREES 52 MINUTES 18 SECONDS EAST, ALONG SAID SOUTH LINE A DISTANCE OF 15.61 FEET;
THENCE SOUTH 08 DEGREES 14 MINUTES 44 SECONDS WEST A DISTANCE OF 14.28 FEET;
THENCE SOUTH 00 DEGREES 15 MINUTES 53 SECONDS EAST A DISTANCE OF 702.95 FEET TO THE POINT OF BEGINNING.



1983 - 2007
25
YEARS OF EXCELLENCE
DEI Professional Services, L.L.C.

DEI Professional Services, LLC
6225 N. 24th St., Ste. 200
Phoenix, AZ 85016
Phone: (602)954-0080
Fax: (602)944-8665

LEGAL DESCRIPTION OF PROPERTY
LOWE'S OF TEMPE, AZ
SWC OF RURAL ROAD & BASELINE ROAD, TEMPE, AZ

DATE: [illegible] | SCALE: N.T.S. | PROJ. NO: [illegible] | CAD FILE: [illegible]

EXHIBIT
A
3 of 3

EXHIBIT A-2

477 E. Baseline

Parcel 1:

That part of the Northwest quarter of the Northeast quarter of Section 3, Township 1 South, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at the North quarter corner of Section 3;

Thence S89°54'43"E 1240.73 feet along the North line of said Section 3;

Thence S00°13'47"E 61.16 feet to the TRUE POINT OF BEGINNING;

Thence S00°13'47"E 307.00 feet;

Thence S89°54'50"W 565.16 feet;

Thence N00°05'10"W 287.00 feet;

Thence N44°54'50"E 28.28 feet;

Thence N89°54'50"E 544.39 feet to the TRUE POINT OF BEGINNING;

Except the improvements located thereon.

Parcel No. 2:

The improvements located upon the following described parcel:

That part of the Northwest quarter of the Northeast quarter of Section 3, Township 1 South, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at the North quarter corner of Section 3;

Thence S89°54'43"E 1240.73 feet along the North line of said Section 3;

Thence S00°13'47"E 61.16 feet to the TRUE POINT OF BEGINNING;

Thence S00°13'47"E 307.00 feet;

Thence S89°54'50"W 565.16 feet;

Thence N00°05'10"W 287.00 feet;

Thence N44°54'50"E 28.28 feet;

Thence N44°54'50"E 544.39 feet to the TRUE POINT OF BEGINNING;

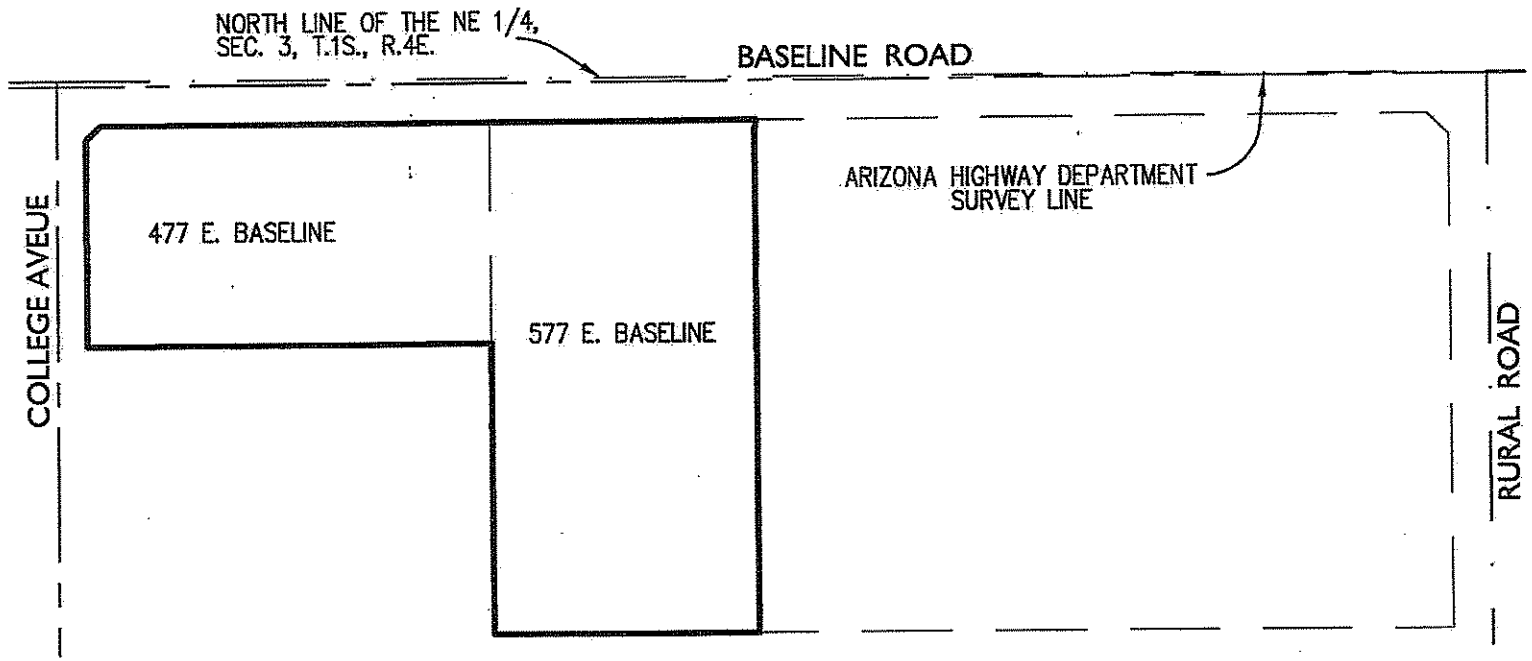
577 E. Baseline

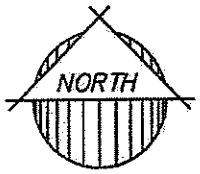
The West 358 feet of that part of the North half of the Northeast quarter of Section 3, Township 1 South, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the Northeast corner of said Section 3;
THENCE West 1401.60 feet;
THENCE South 777.00 feet;
THENCE East 1401.60 feet;
THENCE N 777.00 feet to the point of beginning;

EXCEPT the North 55 feet; and

EXCEPT COMMENCING at the Northeast corner of said Section 3;
THENCE S00°16'20"E along the East line of said Section 3, a distance of 56.91 feet;
THENCE S89°51'45"W along a line parallel to and South of the Arizona Highway Department survey line along Baseline Road to an intersection with a line parallel to and 55.00 feet West of the East line of said Section 3, said intersection being the point of beginning;
THENCE continuing S89°51'45"W, parallel to said Arizona Highway Department survey line, a distance of 1346.61 feet to a corner of UNIVERSITY ROYAL, a subdivision recorded in Book 143, page 44, records of the County Recorder of Maricopa County, Arizona;
THENCE N00°16'20"W along an East line of said UNIVERSITY ROYAL, a distance of 6.165 feet to a point 55.00 feet South of the North line of said Section 3:
THENCE S89°57'45"E along a line 55.00 feet South of and parallel to the North line of said Section 3, a distance 1346.61 feet to a point 55.00 feet South of and 55.00 feet West of the Northeast corner of said Section 3;
THENCE S00°16'20"E to the point of beginning.





N.T.S.

07-035

eps group, Inc.
Engineers, Planners & Surveyors
2045 S. Vineyard, Ste. 101, Mesa, Arizona 85210
Phone (480) 503-2250 Fax (480) 503-2258

Project: SW Corner of Baseline & Rural Roads

Exhibit