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City of Las Cruces[®]
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Council Action and Executive Summary

Item # 30 Ordinance/Resolution# 2711

For Meeting of April 7, 2014
 (Ordinance First Reading Date)

For Meeting of April 21, 2014
 (Adoption Date)

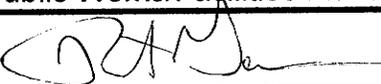
Please check box that applies to this item:

QUASI JUDICIAL LEGISLATIVE ADMINISTRATIVE

TITLE: AN ORDINANCE TO AUTHORIZE THE CONVEYANCE OF A PARCEL OF CITY-OWNED PROPERTY LOCATED AT MAIN STREET AND PICACHO AVENUE FROM THE CITY OF LAS CRUCES TO ARMSTRONG DEVELOPMENT PROPERTIES, INC., IN ACCORDANCE WITH PROVISIONS OF LCMC 1997, SECTION 2-1312.

PURPOSE(S) OF ACTION:

To convey ownership of City-owned property.

COUNCIL DISTRICT: 1		
<u>Drafter/Staff Contact:</u> Bill R. Hamm	<u>Department/Section:</u> Public Works/Facilities Management	<u>Phone:</u> 541- 3410
<u>City Manager Signature:</u>		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

On December 17, 2012, Las Cruces City Council approved Resolution 13-088, which authorized the City Manager to negotiate a Property Conveyance and Development Agreement ("Agreement") as shown in Exhibit "A" between the City of Las Cruces and Armstrong Development Properties, Inc., (Armstrong) as representative of CVS Pharmacy. The negotiated agreement was fully executed between the City Manager and Armstrong Development Properties, Inc., on August 8, 2013.

In general, the negotiated Agreement allows for the City to convey the land directly west and adjacent to Fire Station No.1 to Armstrong for incorporation into the development of a new pharmacy/retail business at the northeast corner of Picacho Ave. / Spruce Ave. and Main St. This land has been used primarily as an overflow parking lot for Fire Station No. 1. In exchange, Armstrong will construct a new parking lot to replace the overflow parking currently served by City-owned land. The value of the parking lot improvements and land exchanged from Armstrong to the City is \$393,107.50 and the value of the land the City will convey to Armstrong is \$346,000.00. Armstrong and City staff have agreed that this constitutes an equal exchange as negotiated under the Agreement and as such, the City should not be required to compensate Armstrong for the excess.

The conditions as set forth within the executed Agreement have been met to the City's satisfaction and the City property may now be transferred to Armstrong, pursuant to the terms of the Agreement.

This Ordinance has been prepared by City staff in accordance with LCMC 1997, Section 2-1312. The closing date for the transfer will not occur until forty-five (45) days after the adoption of the Ordinance and would occur no later than ninety (90) days after adoption. This Ordinance has been published prior to its adoption and will be published at least once after its adoption.

SUPPORT INFORMATION:

1. Ordinance.
2. Exhibit "A". Executed Agreement.
3. Attachment "A". Site Plan.
4. Attachment "B". Plat of City Property being Conveyed.

SOURCE OF FUNDING:

N/A	Is this action already budgeted?	
	Yes	<input type="checkbox"/> See fund summary below
	No	<input type="checkbox"/> If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/> Expense reallocated from: <input type="checkbox"/> Proposed funding is from a new revenue source (i.e. grant; see details below) <input type="checkbox"/> Proposed funding is from fund balance in the _____ Fund.
	Does this action create any revenue?	
	N/A	<input type="checkbox"/> Funds will be deposited into this fund: _____ in the amount of \$ _____ for FY _____
	No	<input checked="" type="checkbox"/> There is no new revenue generated by this action.

BUDGET NARRATIVE:

The City of Las Cruces' Finance Department will account for the resulting property transfer and Development Agreement into the City's accounting system.

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
N/A	N/A	N/A	N/A	N/A	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve authorization for the conveyance of the City-owned property to Armstrong Development Properties, Inc., for the development of the City-owned property adjacent to Fire Station Number 1.
2. Vote "No"; this will not approve authorization the conveyance of the City-owned property to Armstrong Development Properties, Inc., for the development of the City-owned property adjacent to Fire Station Number 1.
3. Vote to "Amend"; this would allow Council to modify the conditions for conveyance of the City-owned property conveyance as it deems appropriate.
4. Vote to "Table"; this would allow Council to postpone consideration of authorization the conveyance of the City-owned property to Armstrong Development Properties, Inc., and direct staff accordingly.

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. Resolution 13-088.

COUNCIL BILL NO. 14-026
ORDINANCE NO. 2711

AN ORDINANCE TO AUTHORIZE THE CONVEYANCE OF A PARCEL OF CITY-OWNED PROPERTY LOCATED AT MAIN STREET AND PICACHO AVENUE FROM THE CITY OF LAS CRUCES TO ARMSTRONG DEVELOPMENT PROPERTIES, INC., IN ACCORDANCE WITH PROVISIONS OF LCMC 1997, SECTION 2-1312.

The City Council is informed that:

WHEREAS, on December 17, 2012, Las Cruces City Council approved Resolution 13-088, which authorized the City Manager to negotiate a property conveyance and development agreement, as shown as Exhibit "A", between the City of Las Cruces and Armstrong Development Properties, Inc., (Armstrong) as representative of CVS Pharmacy; and

WHEREAS, the negotiated agreement was fully executed between the City Manager and Armstrong on August 8, 2013; and

WHEREAS, the negotiated agreement allows for the City to provide the land directly west and adjacent to Fire Station No.1 to Armstrong for incorporation into the development of a new pharmacy/retail business on the northeast corner of Picacho Ave./Spruce Ave. and Main St.; and

WHEREAS, in exchange, Armstrong will construct a new parking lot to replace the overflow parking currently served by City-owned property; and

WHEREAS, the value of the parking lot improvements and land exchanged from Armstrong to the City is \$393,107.50 and the value of the land the City will convey to Armstrong is \$346,000; and

WHEREAS, the parties have agreed that this constitutes an equal exchange as negotiated under the agreement and as such, the City shall not be required to compensate Armstrong for the excess; and

WHEREAS, the conditions as set forth within the executed agreement have been met to the City's satisfaction and the City property may now be transferred to Armstrong, pursuant to the terms of the agreement.

NOW, THEREFORE, be it ordained by the governing body of the City of Las Cruces:

(I)

THAT the conveyance of a parcel of City-owned property located at Picacho Ave. and Main St. from the City of Las Cruces to Armstrong Development Properties, Inc., attached hereto as Exhibit "A", is hereby approved.

(II)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this _____ day of _____, 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

VOTE:

Mayor Miyagishima: _____
Councillor Silva: _____
Councillor Smith: _____
Councillor Pedroza: _____
Councillor Small: _____
Councillor Sorg: _____
Councillor Levatino: _____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:



City Attorney

PROPERTY CONVEYANCE AND DEVELOPMENT AGREEMENT

This Property Conveyance and Development Agreement ("Agreement" or "Contract") is made and entered into this 8th day of August, 2013, by and between ARMSTRONG DEVELOPMENT PROPERTIES, INC., a Pennsylvania corporation ("Developer"), or its assigns, and THE CITY OF LAS CRUCES, a body politic and corporate of the State of New Mexico (the "City").

RECITALS:

- A. Developer is a preferred developer for CVS PHARMACY, INC., a Rhode Island corporation ("CVS"), and is seeking to construct a CVS store at the northeast corner of the intersection of Picacho Avenue and Main Street in Las Cruces, New Mexico.
- B. The City is the owner of the real property more particularly described in Exhibit "A" attached hereto (the "City Parcel").
- C. In order to develop the proposed CVS store, Developer, in its capacity as developer for CVS, would like to acquire a portion of the City Parcel, which portion is approximately depicted in Exhibit "B" (the "City Exchange Property Parcel B").
- D. The City is willing to exchange the City Exchange Property Parcel B, provided that certain requirements of the City are met.
- E. Among the requirements of the City are (i) that Developer and/or CVS convey to City the property depicted on Exhibit "B" and labeled as the "CVS Exchange Property Parcel A", (ii) that certain improvements be completed on the CVS Exchange Property Parcel A for the use and benefit of the City, and (iii) that Developer compensate the City in cash in the event that the value of the City Exchange Property exceeds the aggregate of (a) the value of the CVS Exchange Property Parcel A and (b) the hard and soft costs of the improvements to be performed by Developer pursuant to this Agreement.
- F. A list of the improvements the City requires to be performed by Developer on CVS Exchange Property Parcel A in connection with this transaction is set forth on Exhibit "C" attached hereto, and general location thereof is depicted on Exhibit "C-1" attached hereto (the "Improvements").
- G. The parties now desire to enter into this Agreement to provide for an exchange of land on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and intending to be legally bound, the parties hereto agree as follows:

1. **Agreement.** Upon the Effective Date (as defined herein), this Agreement will constitute a binding and effective agreement, subject to all of the terms and conditions set forth therein, of (a) the City to convey the City Exchange Property Parcel B to Developer, (b) Developer to convey the CVS Exchange Property Parcel A to the City, and (c) Developer to complete or cause to be completed the Improvements on the CVS Exchange Property Parcel A and the City Parcel for the use and benefit of the City.
2. **Properties.**
 - a. The City Exchange Property Parcel B and CVS Exchange Property Parcel A shall each be conveyed with all easements, licenses, interests, rights, privileges, and appurtenances held by the then owner of such parcel as of the Closing Date that in any way benefit the parcel or relate to the ownership of the parcel, including, without limitation: (i) any and all mineral, water, and irrigation rights running with or pertaining to the parcel; (ii) all of the fee owner's interest in any road, street, or alleyway adjoining the parcel; (iii) any rights or interests that may accrue to the benefit of the fee owner or the parcel as a result

of the abandonment of any road, street, or alleyway adjoining the parcel, and (iv) any and all replacements, renewals, substitutions, and additions of or to the parcel that may be made or acquired after the Effective Date.

- b. **Final Legal Descriptions.** Developer shall cause to be prepared, at Developer's sole cost and expense, legal descriptions of the City Exchange Property Parcel B and the CVS Exchange Property Parcel A. The legal descriptions shall be substantially in conformance with the boundaries as indicated on the depiction set forth on **Exhibit "B"**. Upon their completion, and the mutual approval of the parties, not to be unreasonably withheld, conditioned, or delayed, such legal descriptions shall be inserted into the Contract as **Exhibit "B-1"** (Legal Description of the City Exchange Property Parcel B) and **Exhibit "B-2"** (Legal Description of the CVS Exchange Property Parcel A), shall govern as the descriptions of the parcels, shall be used for the subdivision of the City Exchange Property Parcel B from the City Parcel and the subdivision of the CVS Retained Property, and shall be used in the conveyance deeds provided for in this Agreement. The City's failure to provide written notice to Developer of its approval or disapproval of either of the proposed legal descriptions within fifteen (15) business days after Developer's delivery of such legal description will constitute the City's deemed approval of such legal description.
3. **Title Agent.** The title agent for the closing of the transaction contemplated by this Agreement shall be Southwest Title & Abstract, 3880 Foothills Road, Las Cruces, NM 88011, Attention: Carl Hunter, E-Mail: chunter@swatlc.com, Telephone: (575) 528-6990, Facsimile: (575) 532-7052 (the "Title Agent"). The address is designated as the place for the consummation of the closing of the real property transfers contemplated by this Agreement.
4. **Consideration.** The consideration the City shall receive from Developer for the City's transfer of the City Exchange Property Parcel B to Developer is (i) the value of the CVS Exchange Property Parcel A, which Developer and the City hereby acknowledge for the purpose of this Agreement is \$85,000.00 and (ii) the value of the Improvements to be completed by Developer to benefit the City as specified in Section 8 below, which the Developer and the City hereby acknowledge for the purpose of this Agreement is \$308,107.50. The consideration Developer shall receive from the City is the value of the City Exchange Property Parcel B, which Developer and the City acknowledge for the purpose of this Agreement is \$346,000.00. Notwithstanding that the value the City shall receive exceeds the value of the improvements, the parties hereby agree that the exchange contemplated under this Agreement shall be considered an equal exchange, and the City shall not be required to compensate the Developer for such excess.
5. **Developer Conditions.** Developer shall not be required to complete the transaction described in this Agreement unless all of the following conditions have been satisfied:
- a. **Title.** As of the date of the Closing, the City Exchange Property Parcel B shall not be subject as of Closing to any encumbrances other than those encumbrances listed in **Exhibit "D"** attached hereto, which encumbrances shall be specifically set forth in the deed from the City of the City Exchange Property Parcel B as permitted encumbrances.
 - b. **Approvals.** Developer shall have obtained from the City, the Army Corps of Engineers, the Elephant Butte Irrigation District (sometimes known as "EBID"), El Paso Electric (sometimes known as "EPE"), and the New Mexico Department of Transportation, on or before the Closing, all necessary final and written permits and approvals, including any zoning changes, zoning variances, site plan approvals, use permits, liquor licenses, subdivision and consolidation approvals for the City Exchange Property Parcel B and all land use entitlements and building permits and approvals necessary for Developer's intended development of the City Exchange Property Parcel B, the CVS Retained

Property, and the Adjacent Land (the "Approvals"), subject to only those matters as are acceptable to Developer in its sole discretion. The City will cooperate with Developer in obtaining all of the Approvals necessary for the transaction contemplated by this Agreement. If Developer delivers notice to the City on or before the Closing that Developer has been unable to obtain any of the Approvals and such approval is reasonably required for the development of the CVS store in the sole discretion of Developer, then this Agreement and the Escrow shall be deemed cancelled as of that date.

- c. **Platting of Parcels for the Closing.**
- i. **Subdivision Plat to Create the City Exchange Property Parcel B.** In order to convey the City Exchange Property Parcel B to Developer as of the closing, and as an integral part of Developer's Approvals, Developer will prepare, at its cost and expense, and submit for approval, a subdivision plat to create the City Exchange Property Parcel B as a separate legal parcel. At the Closing, the deed of the City Exchange Property Parcel B shall utilize the legal description approved as to such parcel by both parties.
 - ii. **Subdivision to Create CVS Retained Property.** In order to convey the CVS Exchange Property Parcel A to the City as of Closing, and as an integral part of Developer's Approvals, Developer will prepare, at its cost and expense, and submit for approval, a subdivision plat to split the CVS Retained Property from the Ryan Parcel. At the Closing, the deed of the CVS Exchange Property Parcel A to the City shall utilize the legal description approved as to such parcel by both parties.
 - iii. **Consolidation Re-Plat.** As part of its Approvals, Developer, with the cooperation of the City, shall prepare and process a plat ("Consolidation Re-Plat") to consolidate the City Exchange Property Parcel B, the CVS Retained Property, and the Adjacent Land. Developer shall seek to obtain all necessary approvals of the Consolidation Re-Plat prior to the Closing.
- d. **Assemblage Matters.** Developer shall have acquired fee simple title on the date of Closing to the lands located adjacent to the City Exchange Property Parcel B and depicted in **Exhibit "B"** (the "Adjacent Land"). If, despite its commercially reasonable efforts to do so, Developer is unable to acquire the Adjacent Land on or before the date of Closing, Developer may elect, by delivering written notice to the City and Title Agent, to either: (i) proceed with the purchase and sale of the City Exchange Property Parcel B; (ii) extend the date of Closing for a period not to exceed sixty (60) days; or (iii) cancel this Contract and the Escrow. If Developer exercises its cancellation remedy under subsection (iii) above, this Contract and the Escrow shall be deemed cancelled as of the date of Developer's notice.
- e. **Cross Easement Agreement.** Developer and the City shall have agreed on a form of perpetual easement agreement (the "Easement Agreement") for the purposes of (i) an underground utilities easement for the area of the City Parcel more particularly depicted as "El Paso Electric Easement" on **Exhibit "C-1"**, provided that the parties and the utility company shall have been reasonably satisfied that installing an underground electrical line in such area will not risk the underground electrical line installed within such area, or, in the alternative, an easement for utility poles and overhead wiring at such locations on the City Parcel as Developer, the City, and El Paso Electric may agree; provided, however, that in no event may the Easement Agreement permit the installation of any utility pole within any parking lot on the City Parcel; and (ii) a temporary construction

easement across the CVS Exchange Property Parcel A and the City Parcel for the purpose of permitting the completion of the Improvements.

- f. **Improvement Plans.** Developer and the City shall have agreed upon on the Plans (as defined in Section 8(b) of this Agreement) for the Improvements.
6. **City Conditions.** Notwithstanding any other provision of this Agreement, the City shall not be required to complete the transaction described in this Agreement unless all of the following conditions have been satisfied:
- a. The City shall have reviewed and approved the engineering and design plans for the development of the Adjacent Land, the CVS Retained Property, and the City Exchange Property Parcel B are satisfactory to the City, in its reasonable discretion.
 - b. The City shall have been satisfied that the New Mexico Department of Transportation has reviewed and approved the then-current engineering and design plans for the development of the Adjacent Land, the CVS Retained Property, and the City Exchange Property Parcel B.
 - c. The City shall have approved plans for addressing the stormwater infrastructure that traverses the City Exchange Property Parcel B and the portion of the City Parcel on which Improvements are to be constructed.
 - d. As of the date of the Closing, the CVS Exchange Property Parcel A shall not be subject as of Closing to any encumbrances other than those encumbrances listed in Exhibit "E" attached hereto.
 - e. Developer and the City shall have agreed upon the Plans (as defined in Section 8(b) of this Agreement) for the Improvements.
 - f. City Council must approve the sale/transfer of land to Developer/ CVS by ordinance subject to referendum as required by state law.
 - g. City conditions 7a. through 7f. listed above must be met before closing.

7. **Closing.**

- a. **Date of Closing.** The escrow will close not later than November 30, 2013 or an earlier date if agreed by both parties. Each party shall deliver a special warranty deed for the property to be exchanged by such party pursuant to this Agreement.
- b. **City's Closing Deliveries.** The City, at the Closing, will deposit with Title Agent (for recordation, if applicable, and delivery to Developer):
 - i. a Special Warranty Deed as to the City Exchange Property Parcel B using the general form attached as Exhibit "F".
 - ii. one counterpart of the Easement Agreement,
 - iii. any document required and in the form prescribed by applicable local or state law,
 - iv. an affidavit regarding debts, liens and parties in possession as required by the Title Agent, dated as of the date of the Closing, executed by or on behalf of the City,

- v. any funds required to pay for any owner's title policy and endorsements that the City may request on the CVS Exchange Property Parcel A, and
 - vi. all resolutions and authorizations required by Title Agent to insure the City's authority and ability to convey the City Exchange Property Parcel B.
- c. **Developer's Closing Deliveries.** Developer, on the date of the Closing, will deliver to Title Agent (for recordation, if applicable, and delivery to Buyer):
- i. a Special Warranty Deed as to the CVS Exchange Property Parcel A using the general form attached as Exhibit "F" (it being expressly understood and agreed that the deed for the CVS Exchange Property Parcel A may come directly from such third party as may own the CVS Exchange Property Parcel A and that such property does not need to first be conveyed to Developer or CVS before being transferred to the City),
 - ii. the Closing Cash, if any, plus all additional sums necessary to pay Developer's portion of the closing costs and prorations,
 - iii. one counterpart of the Easement Agreement,
 - iv. any document required and in the form prescribed by applicable local or state law,
 - v. an affidavit regarding debts, liens and parties in possession as required by the Title Agent, dated as of the date of the Closing, executed by or on behalf of the then owner of the CVS Exchange Property Parcel A, and
 - vi. and all resolutions and authorizations required by Title Agent to insure the authority and ability of the then owner of the CVS Exchange Property Parcel A to convey the City Exchange Property Parcel B.
- d. **Closing Costs.** All costs and expenses of the Closing, including recording and escrow fees and charges, are to be paid by Developer including but not limited to the costs of any title policy endorsements that the City may request as to the CVS Exchange Property Parcel A.
- e. **Possession.** As of the date of Closing, the City shall deliver exclusive possession of the City Exchange Property Parcel B, free and clear of any tenants, leases or other occupancy rights, and Developer shall deliver or caused to be delivered exclusive possession of the CVS Exchange Property Parcel A, subject to the right of Developer pursuant to the terms of this Agreement and the REA to enter upon the CVS Exchange Property Parcel A and complete the Improvements.
- f. **Release of Monetary Matters.** As to each property to be conveyed pursuant to this Agreement, the party responsible for transferring such property pursuant to this Agreement, at such party's sole cost and expense, shall fully pay and discharge and release, or cause to be paid, discharged, and released, any and all recorded or unrecorded mortgages, deeds of trust, installment land contracts, judgments, tax liens, mechanics liens, lawsuits, or other monetary liens affecting or purporting to affect title to such property.

8. Construction of Improvements on the CVS Exchange Property Parcel A. All of this Section 8 shall survive the Closing.
- a. **Generally.** After the Closing and the exchange of deeds described in Section 7 of this Agreement, Developer, at Developer's sole cost and expense, shall complete the Improvements to the CVS Exchange Property Parcel A and the balance of the City Parcel (i) in substantial accordance with the Plans (defined below), (ii) in a good and workmanlike manner and according to applicable construction industry standards, (iii) in conformance with all laws, ordinances, requirements, orders, codes, directives, rules and regulations of the federal, state, county and municipal governments (collectively, the "Laws"), (iv) in compliance with all matters of record affecting same, (v) in a lien-free condition, and (vi) built to City's reasonable satisfaction and standards, at a grade with the existing fire station adjacent to the CVS Exchange Property Parcel A. The Improvements shall be completed by no later than 120 days after Closing, subject to the application of Section 9(c) of this Agreement.
 - b. **Approval of Plans.** Developer and the City shall cooperate to establish formal construction plans consistent with Exhibit "C" and Exhibit "C-1" that shall be used for the construction of the Improvements (the "Plans"). Any material deviation in the Plans shall require the prior written approval of both of the Parties.
 - c. **Manner of Completion of Improvements.** The construction of the Improvements shall be accomplished in a manner which will avoid any damage to any other improvements on the balance of the City Parcel, and will minimize the adverse impact on the use, quiet enjoyment and business operations on the balance of the City Parcel during the period of construction. The City shall have the right to inspect and accept improvements as built to engineering plans.
 - d. **Construction Escrow.** To assure payment of the cost of the Improvements on the CVS Exchange Property Parcel A, Developer shall deposit into a construction escrow (the "Construction Escrow") established with Escrow Agent on the date of Closing, to be held and administered by Escrow Agent according to the terms and provisions set forth herein, the amount of the cost of completing the Improvements, as determined by obtaining a bid from a reputable contractor reasonably acceptable to both Developer and the City as to the cost of completing the Improvements (the "Escrowed Funds").
 - i. Completion of and Final Payment for the Work. Within ten (10) business days following delivery by Developer to Escrow Agent and the City of written notice that substantial completion of the Improvements has occurred, accompanied by a final written request for disbursement from the Construction Escrow, together with: (i) a Final Application for Payment from each contractor having performed any of the work for which a disbursement is being requested, on a standard AIA or other customarily used form in the State of New Mexico, (ii) final conditional lien releases and waivers, (iii) copies of all invoices, bills or such other commercially reasonable documentation evidencing that such costs being the subject of the disbursement have, in fact, been expended, (iv) final inspection by the City for any Improvements, and (v) an Affidavit of Completion (herein so called) setting forth the date of substantial completion of the Improvements, together with a list by name and mailing address of each and every subcontractor who furnished labor or materials in connection with the Improvements, unless the City delivers to Escrow Agent and Developer a written objection to such request for payment within such ten (10) day period, Escrow Agent is instructed to disburse ninety percent (90%) of the amount shown in the Final Application for

Payment with ten percent (10%) being held back as General Retainage. Notwithstanding the foregoing, in the event the City timely delivers to Developer and Escrow Agent a written objection to the request for payment, Escrow Agent shall disburse ninety percent (90%) of such portion of the Final Application for Payment to which the City did not object, less one hundred fifty percent (150%) Dispute Retainage for the costs disputed. The Escrow Agent shall be authorized and instructed to disburse the General Retainage to Developer on the forty-sixth (46th) day following the date of substantial completion set forth in the Affidavit of Completion unless the Escrow Agent has received any notice of any lien(s) or claimed lien(s) against the General Retainage or all or any of the property described herein by any mechanic, materialman or artisan who performed any portion of the work relating to the Improvements.

- ii. Excess Escrowed Funds. If and to the extent there are any remaining Escrowed Funds after all pay applications have been paid and all retainage has been released in accordance with the terms hereof, such excess Escrowed Funds shall be disbursed to Developer.
- iii. Deficient Escrow Funds. If and to the extent the Escrowed Funds are not sufficient to pay for the actual costs of the Improvements (excluding any change orders requested by the City), Developer shall be responsible for prompt payment of any such shortage.
- iv. Escrow Agent's Reliance and Responsibility. Escrow Agent is entitled to rely in good faith on the truth and correctness of all documentation submitted by a party in making the disbursements from the Escrowed Funds, and is not responsible or liable for performing onsite inspections or otherwise verifying that such costs and expenses have actually been incurred. Escrow Agent's sole responsibility is limited to safekeeping the Escrowed Funds and making disbursements in accordance with, and upon satisfaction of the requisite conditions set forth in this Agreement. In the event a written objection to a request for payment is made which is not resolved within ten (10) business days thereafter, or in the event conflicting demands are otherwise made on Escrow Agent concerning the Escrowed Funds, or in the event the Escrowed Funds have not been disbursed in full within three (3) years following the date hereof, Escrow Agent has the right, at its election, to hold the Escrowed Funds until an action is brought in a court of competent jurisdiction to determine the respective rights of Developer and the City, or Escrow Agent may interplead the Escrowed Funds. Any cost relative to interpleader shall be deducted from the Escrowed Funds. Deposit by Escrow Agent of said funds and documents with the court in any such action shall relieve Escrow Agent of all further liability and responsibility under this Agreement (exclusive of liability for negligence or failure to comply with the express instructions contained in this Agreement).
- e. No Liens. Developer shall not permit any lien or claim of lien to stand against the CVS Exchange Property Parcel A for any work done by, or materials furnished to, such party in connection with construction of the Improvements or other improvements for which the Developer is responsible. Developer shall indemnify and hold the City harmless against any such lien and from any and all expense and liability in connection with any such lien including, but not limited to, reasonable attorneys' fees and court costs resulting therefrom and actually incurred. In the event any such lien or claim of lien arises, Developer shall cause the same to be released of record (either by payment or posting of a statutory bond) within sixty (60) days following written demand from the City, or if

Developer desires to contest any such liens or claims, then Developer shall take such other action as necessary to remove the effect thereof, in good faith, within sixty (60) business days of its notice of such liens or claims. If Developer shall fail to obtain the release of any such lien within said sixty (60) day period, and Developer is not contesting such claim as provided for herein, the City, at its option, may bond for and obtain the release of any such lien, in which case Developer shall, within ten (10) business days of its receipt of a written request therefor, reimburse the City for all costs and expenses incurred by the City in obtaining such bond and release.

- f. **Insurance.** The Developer's contractor shall, prior to its commencement of any of the Improvements, obtain, and maintain during the entire period of its construction of the Improvements, policies of builder's risk, workers compensation, employer's liability and commercial general liability insurance, including contractual liability coverage against claims for personal injury, death and/or property damage occurring in connection with the construction of the Improvements.

9. General.

- a. **Risk of Damage.** Risk of damage from any cause to the respective properties prior to the close of escrow is assumed by the then owner of each property, respectively.
- b. **Notice.** Except as otherwise required by law, any notice required or permitted under this Contract must be in writing and must be given either: (i) by personal delivery; (ii) by United States certified mail, return-receipt requested, postage prepaid, and properly addressed; or (iii) by any private overnight, "same day", or "next-day" delivery service, delivery charges prepaid with proof of receipt. Notice sent in any of the manners set forth above must be addressed or sent to the City, Developer, and/or Title Agent at the addresses set forth below this paragraph. Any party may change its address for the purposes of delivery and receipt of notices by advising all other parties in writing of the change. Notice delivered in one of the foregoing manners will be deemed to be received: (I) on the date of delivery, if personally delivered; (II) on the date that is two days after deposit in the United States mail, if given by certified mail; or (III) on the day after deposit with an express delivery service, if given by overnight, "same day", or "next-day" delivery service. No notice will be deemed effective unless sent in one of the manners described above.

The City: City of Las Cruces
700 North Main Street
Las Cruces, NM 88004
Attn: City Manager

with a copy to: City of Las Cruces
700 North Main Street
Las Cruces, NM 88004
Attn: City Attorney

Developer: Armstrong Development Properties, Inc.
2121 Chandler Boulevard, Suite 106
Chandler, AZ 85224
Attention: Brandon Stein
E-Mail: bstein@agoc.com
Facsimile: (602) 385-4101

and with a copy to: Armstrong Development Properties, Inc.
 One Armstrong Place
 Butler, PA 16001
 Attn: Jeff C. Stewart, Esq.
 E-Mail: jstewart5@agoc.com
 Facsimile: (724) 256-8098

- c. **Developer's Right to Nominate and Assign.** Developer, by written notice to Seller and Title Agent, may assign its interest in this Agreement, its rights and obligations under this Agreement, this Escrow, and the rights of Developer in the City Exchange Property Parcel B to a nominee or assignee. Upon any assignment, the nominee or assignee will be deemed "Developer" for all purposes and Developer, upon the assignment, will be relieved of all obligations under this Agreement and the Escrow, except for the acts of that person or entity prior to the nomination.
- d. **Attorneys' Fees.** If there is any litigation or arbitration between the City and Developer to enforce or interpret any provision of or right under this Contract, each side will bear their own attorneys fees and costs.
- e. **Additional Acts.** The parties agree to execute promptly any other documents and to perform promptly any other acts as may be reasonably necessary to carry out the purpose and intent of this Agreement.
- f. **Governing Law.** This Agreement will be governed by and construed and enforced in accordance with the laws of the State of New Mexico, and any action will be filed in the 3rd Judicial District Court, Dona Ana County, New Mexico.
- g. **Headings.** The headings of this Contract are for reference only and do not limit or define the meaning of any provision of this Contract.
- h. **Incorporation by Reference.** All exhibits to this Contract are fully incorporated in the text of this Contract.
- i. **Counterparts.** This Contract may be executed in any number of counterparts, whether by original, copy, or telecopy signature, each of which, when executed and delivered, shall be deemed an original, but all of which when taken together will constitute one binding contract and instrument.
- j. **Severability.** If any one or more of the provisions of this Contract or the applicability of any provision to a specific situation is held to be invalid or unenforceable, the provision will be modified to the minimum extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other provisions of this Contract and all other applications of such provisions will not be affected by any such invalidity or unenforceability.

[BALANCE OF PAGE INTENTIONALLY LEFT BLANK]

Executed as of the dates set forth below.

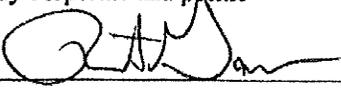
DEVELOPER:

ARMSTRONG DEVELOPMENT PROPERTIES, INC.,
a Pennsylvania corporation

By: 
Its: Treasurer
Date: 8/2/2013

CITY:

THE CITY OF LAS CRUCES,
a body corporate and politic

By: 
Its: City Manager
Date: 8-7-13

Approved as to Form:


Harry Connelly, City Attorney

EXHIBIT "A"**LEGAL DESCRIPTION OF THE CITY PARCEL****TRACT 1:**

A tract of land lying in the Dona Ana Bend Colony Grant, being part of U.S.R.S. Tract 32A, of Property Map 9A in Section 7, T.23S., R.2E., of the U.S.R.S. Surveys and within the corporate limits of the City of Las Cruces, Dona Ana County, New Mexico and more particularly described as follows to wit:

Beginning at the southeast corner of this tract marked by an iron pipe found in place at the southeast corner of U.S.R.S. Tract 9A-32A, and on the north side of Picacho Avenue, formerly Mesa Avenue, the same being the southwest corner of the property of Demetrio C. Chavez; thence along Picacho Avenue S. 81° 05' W., 183.86 feet to the southwest corner of this tract; thence along the Las Cruces Lateral, and 25 feet from the centering thereof the following five courses and distances, N. 3° 42' E., 70.10 feet to the P.C. of a curve; thence around the arc of a curve to the left having a radius of 121.57 feet, an arc length of 80.63 feet through a central angle of 38° 00'; thence around the arc of a curve to the right having a radius of 40.25 feet, an arc length of 44.89 feet through a central angle of 63° 54'; thence around a curve to the right having a radius of 73.53 feet, an arc distance of 48.00 feet through a central angle of 37° 24'; thence N. 66° 41' 30" E., 126.45 feet; thence leaving the lateral N. 88° 04' 30" E., 3.14 feet to the northeast corner of this tract marked by a fence post; thence along a fence line on the west property boundary of Demetrio C. Chavez, S. 10° 44' E., 246.28 feet to the place of beginning containing 0.880 acres of land more or less.

TRACT 2:

A tract of land lying in the Dona Ana Bend Colony Grant, being part of U.S.R.S. Tract 32A of Property Map 9A in Section 7, T.23S., R.2E., of the U.S.R.S. Surveys and within the corporate limits of the City of Las Cruces, Dona Ana County, New Mexico and more particularly described as follows to wit:

Beginning at the most westerly corner of the tract herein described identical with the southeast corner of the Barbaro Lucero Estates, Lot 5, and the Southwest corner of a 1.906 acre tract shown as U.S.R.S. Tract 9A-32A on the property maps of the U.S. Bureau of Reclamation; thence along the east line of said Lot 5, N. 3° 23' 30" E., 198.05 feet to a point near a fence corner at an angle point for the northwest corner of this tract; thence N. 89° 59' E., 168.82 feet to a point about 2 feet south of the present fence; thence N. 88° 04' 30" E., 8.24 feet to the west line of the Las Cruces Lateral; thence southerly along the west line of the Las Cruces Lateral and 25 feet from the centerline of the same, the following four courses and distances, around the arc of a curve to the left having a radius of 123.53 feet, an arc distance of 79.14 feet through a central angle of 36° 42' 30", the long chord bearing S. 66° 20' 45" W., 77.79 feet; thence around the arc of a curve to the left having a radius of 90.25 feet, an arc distance of 100.65 feet through a central angle of 63° 54'; thence around the arc of a curve to the right having a radius of 71.57 feet, an arc distance of 47.47 feet through a central angle of 38° 00'; thence S. 3° 42' W., 81.29 feet to the north line of Picacho Avenue; thence S. 81° 05' W., 4.04 feet to a corner of this tract marked by an iron pipe found in place; thence N. 8° 20' W., 62.25 feet to an iron pipe found in place; thence N. 83° 32' W., 130.45 feet along the north

side of some apartment building to the place of beginning containing 0.640 acres of land more or less.

TRACT 3:

A 1.906 acre tract being U.S.R.S. TRACT 32A Map 9A, less to City 1.52 acre total left .37 acre described in Book 151 Page 384, in Section 7, T.23S., R2E.

TRACT 4:

A 0.269 acre tract of land being part of Lot 6 of the Barbaro Lucero Estate in Las Cruces, Dona Ana County, New Mexico, and more particularly described as follows:

Beginning at an iron pipe at the northwest corner of this tract, identical with the northwest corner of Lot 6 of the Barbara Lucero Estate, also identical with the northeast corner of U.S. Reclamation Service Tract 9A-30C; thence S. 82° 56' 40" E., 14.09 feet to an iron rod; thence S. 83° 42' 30" E., 130.45 feet to the northeast corner of this tract marked by an iron rod; thence S. 8° 30" E., 65.85 feet to the southeast corner of this tract marked by an iron rod on the north line of Picacho Avenue; thence following the north line of Picacho Avenue S. 83° 06' W., 143.70 feet to the southwest corner of this tract marked by an iron rod; thence N. 6° 13' W., 99.00 feet to the place of beginning containing 0.269 acres more or less.

TRACT 5:

A tract of land in Las Cruces, New Mexico, bounded on the North by property of LaFel E. Oman; bounded on the East by property of the City of Las Cruces; bounded on the South by property of the City of Las Cruces; and bounded on the West by property of E.F. Adams, and being more particularly described as follows:

Beginning at a monument at the NW corner of Lot 28-A2A, Bureau of Reclamation Map and, as shown on sheet 9A dated 1960; thence N. 5° 45' 30" W., a distance of 20 feet to a monument; thence N. 79° 52' 10" E., a distance of 19.68 feet to an iron rod; thence S. 3° 23' 30" W., a distance of 22.75 feet to an iron rod; thence N. 82° 56' 40" W., a distance of 14.09 feet to point and place of beginning; said tract containing 300.394 square feet more or less.

EXHIBIT "B"

**DIAGRAM DEPICTING THE CITY EXCHANGE PROPERTY PARCEL B AND THE CVS
EXCHANGE PROPERTY PARCEL A**

[See following page]

EXHIBIT B-1LEGAL DESCRIPTION - PARCEL B
CITY EXCHANGE PROPERTY B-1

That certain parcel of land situate within Section 7, Township 23 South, Range 2 East, New Mexico Principal Meridian, City of Las Cruces, Dona Ana County, New Mexico, comprising portions of TRACT 2 (U.S.R.S. Tract 32A of Property Map 9A in Section 7, T.23S., R.2E., of the U.S.R.S. Surveys), TRACT 4 (part of Lot 6 of the Barbaro Lucero Estate), and TRACT 5 as described in Commitment For Title Insurance prepared by Fidelity National Title Insurance Company, File No. 032228, Effective Date: August 22, 2012, more particularly described by survey performed by Russ P. Hugg, New Mexico Professional Surveyor Number 9750, using New Mexico State Plane Grid bearings (Central Zone - NAD 83) and ground distances as follows:

BEGINNING at the southwesterly corner of the parcel herein described, said point also being a point on the northerly right of way line of Pichaco Avenue, and also being the southeasterly corner of the land at #900 North Main Street, whence (1) National Geodetic Survey Monument "GPS 18" bears N 07°42'34" E, 10,704.28 feet, and (2) a 1/2" rebar (rejected) bears S 60°29'59" W, 1.63 feet distant; Thence,

N 05°31'08" W, 78.28 feet to an angle point; Thence,

N 05°03'38" W, 20.00 feet to an angle point; Thence,

N 80°34'02" E, 19.68 feet to an angle point; Thence,

N 02°59'37" E, 174.53 feet to the northwesterly corner of the parcel herein described (a 1/2" rebar found in place), said point also being a point on the southerly boundary of Parcel 46A, as the same is shown and designated on the survey entitled "PLAT OF SURVEY OF PARCEL 46A (CONTAINING 0.8098 ACRE) LOCATED IN SECTION 7, T.23S., R.2E., N.M.P.M. U.S.R.S. SURVEYS AS PART OF U.S.R.S. TRACTS 9A-33B AND PART OF LOT 5 OF THE SUBDIVISION OF THE BARBARO LUCERO ESTATE PLAT FILED MARCH 19, 1918 IN PLAT RECORD 5 PAGE 19, DONA ANA COUNTY RECORDS ALSO AS LOT 1 & THE NORTH 15 FEET OF LOT 2 & ALL OF LOTS 14, 15, 16, AND 17 OF THE SUBDIVISION OF LOT 5 OF THE BARBARO LUCERO ESTATE PREPARED BY C.L. POST DATED MARCH 1916 (AN UNRECORDED SUBDIVISION) CITY OF LAS CRUCES, DONA ANA COUNTY, NEW MEXICO", by Development

Services Division, City of Las Cruces, North Las Cruces Flood Control Project, Project No. 98-S-120 PARCEL 46A, Surveyor Gilbert Chavez PLS, 4/5/1999; Thence, along said southerly boundary of Parcel 46A,

S 89°19'05" E, 103.05 feet to the northeasterly corner of the parcel herein described; Thence,

S 00°44'45" E, 245.74 feet to a point of curvature; Thence,

Southeasterly, 23.55 feet on the arc of a curve to the left (said curve having a radius of 21.50 feet, a central angle of 62°45'31", and a chord that bears S 32°07'31" E, 22.39 feet) to the southeasterly corner of the parcel herein described; Thence,

S 86°03'50" W, 137.70 feet to the point of beginning.

Said parcel contains 0.7236 acres, more or less.

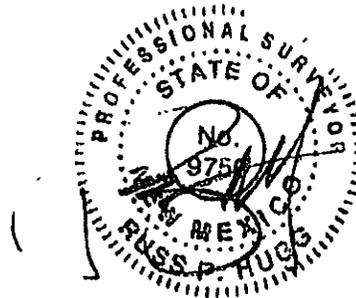


EXHIBIT B-2LEGAL DESCRIPTION - PARCEL A
C.V.S. EXCHANGE PROPERTY B-2

That certain parcel of land situate within Section 7, Township 23 South, Range 2 East, New Mexico Principal Meridian, City of Las Cruces, Dona Ana County, New Mexico, comprising an easterly portion of Parcel 46A, (known as #990 North Main Street) as the same is shown and designated on the survey entitled "PLAT OF SURVEY OF PARCEL 46A (CONTAINING 0.8098 ACRE) LOCATED IN SECTION 7, T.23S., R.2E., N.M.P.M. U.S.R.S. SURVEYS AS PART OF U.S.R.S. TRACTS 9A-33B AND PART OF LOT 5 OF THE SUBDIVISION OF THE BARBARO LUCERO ESTATE PLAT FILED MARCH 19, 1918 IN PLAT RECORD 5 PAGE 19, DONA ANA COUNTY RECORDS ALSO AS LOT 1 & THE NORTH 15 FEET OF LOT 2 & ALL OF LOTS 14, 15, 16, AND 17 OF THE SUBDIVISION OF LOT 5 OF THE BARBARO LUCERO ESTATE PREPARED BY C.L. POST DATED MARCH 1916 (AN UNRECORDED SUBDIVISION) CITY OF LAS CRUCES, DONA ANA COUNTY, NEW MEXICO", by Development Services Division, City of Las Cruces, North Las Cruces Flood Control Project, Project No. 98-S-120 PARCEL 46A, Surveyor Gilbert Chavez PLS, 4/5/1999, more particularly described by survey performed by Russ P. Hugg, New Mexico Professional Surveyor Number 9750, using New Mexico State Plane Grid bearings (Central Zone - NAD 83) and ground distances as follows:

BEGINNING at the northwesterly corner of the parcel herein described, said point being a point on the northerly boundary of said Parcel 46A, and also being a point on the southerly boundary of lands described in Warranty Deed filed in Book 174, Page 254, whence (1) National Geodetic Survey Monument "GPS 18" bears N 07°30'21" E, 10,309.14 feet distant, and (2) a 1/2" rebar bears N 84°10'14" W, 60.69 feet distant; Thence, along said northerly boundary of Parcel 46A,

S 84°10'14" E, 125.18 feet to the northeasterly corner of the parcel herein described, said point also being the northwesterly corner of Parcel 46, as the same is shown and designated of the survey entitled "PLAT OF SURVEY OF PARCEL 46 SHOWING R-O-W TAKE OF 5536.12 SQ.FT. FOR THE NORTH LAS CRUCES FLOOD CONTROL PROJECT LOCATED IN SECTION 7, T.23S., R.2E., N.M.P.M. U.S.R.S. SURVEYS AS PART OF U.S.R.S. TRACT 9A-33B, CITY OF LAS CRUCES, DONA ANA COUNTY, NEW MEXICO", by Development Services Division, City of Las Cruces, North Las Cruces Flood Control Project, Project No. 98-S-120 PARCEL 46, Surveyor Gilbert Chavez

PLS, 4/5/1999; Thence,

S 05°49'44" W, 60.00 feet to an angle point; Thence,

S 45°09'22" E, 31.18 feet to an angle point, said point also being
the southerly corner of said Parcel 46; Thence,

S 64°21'46" W, 43.72 feet to the southeasterly corner of the parcel
herein described, said point also being a point
on the southerly boundary of said Parcel 46A;
Thence, along said southerly boundary of Parcel
46A,

S 88°46'22" W, 2.46 feet to an angle point; Thence,

N 89°19' 08" W, 65.77 feet to the southwesterly corner of the parcel
herein described; Thence,

N 00°44'45" W, 19.37 feet to a point of curvature; Thence,

Northwesterly, 47.82 feet on the arc of a curve to the left (said
curve having a radius of 28.71 feet, a central
angle of 95°26'39", and a chord that bears N
48°36'30" W, 42.48 feet) to an angle point;
Thence,

N 00°41'36" W, 65.13 feet to the point of beginning.

Said parcel contains 0.2691 acres, more or less.

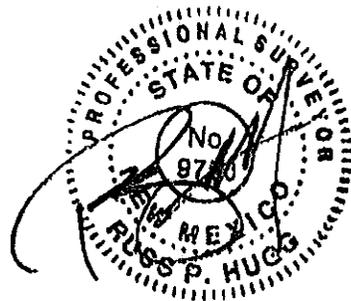


EXHIBIT "C"

DESCRIPTION OF IMPROVEMENTS

The work depicted in the "Construction Plans for Fire Station No. 1 Parking Lot Improvements, Las Cruces, New Mexico" dated May 18, 2013 prepared by Bohannon Huston

EXHIBIT "C-1"

DEPICTION OF THE APPROXIMATE LOCATION OF THE IMPROVEMENTS

[See following page]

EXHIBIT "D"**LIST OF PERMISSIBLE ENCUMBRANCES ON THE CITY EXCHANGE PROPERTY
PARCEL B**

1. ~~Reservations contained in the Patent from the United States of America recorded in Book 30 at Page 55 of the Deed Records of Dona Ana County, New Mexico.~~
2. Interest of Elephant Butte Irrigation District in and to any portion of the property within the boundaries of the Las Cruces Lateral.
3. Encroachments that would be shown by an accurate survey and inspection of the property.
4. Zoning and building laws and ordinances.
5. Taxes and assessments not yet due and payable.
6. Corps of Engineer requirements

EXHIBIT "E"

PERMISSIBLE ENCUMBRANCES ON THE CVS EXCHANGE PROPERTY PARCEL A

1. Reservations contained in the Patent from the United States of America recorded in Book 30 at Page 55 of the Deed Records of Dona Ana County, New Mexico (the "Official Records").
2. Easement in favor of The Mountain States Telephone and Telegraph Company, affecting said land, recorded March 31, 1937, in Book 15 at Page 94 of the Official Records.
3. Interest of Elephant Butte Irrigation District in and to any portion of the property within the boundaries of the Las Cruces Lateral.
4. Encroachments that would be shown by an accurate survey and inspection of the property.
5. Zoning and building laws and ordinances.
6. Taxes and assessments not yet due and payable.
7. Corps of Engineers requirements.

EXHIBIT "F"

FORM OF SPECIAL WARRANTY DEED

WHEN RECORDED RETURN TO:

SPECIAL WARRANTY DEED

For valuable consideration, the receipt and sufficiency of which are acknowledged, _____
_____ ("Grantor"), conveys to _____, a(n)
_____ ("Grantee"), the following real property situated in Dona Ana County, New
Mexico, together with all appurtenant interests, benefits, rights, and privileges and any improvements
located thereon (collectively, the "Property"):

See Exhibit "A" attached and incorporated by this reference

The Property includes all easements, licenses, interests, rights, privileges, and appurtenances held by
Grantor as of the recordation of this Deed that in any way benefit the Property or relate to the ownership
of the Property.

with special warranty covenants.

DATED as of _____, 20____.

STATE OF _____)

) ss.

County of _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 20___, by

_____.

Notary Public

Aerial Site View

