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RECORDING REQUESTED BY: :  
SMITH'S FOOD & DRUG CENTERS, INC. :

WHEN RECORDED, MAIL TO: :  
SMITH'S FOOD & DRUG CENTERS, INC. :  
Attention: Director of Real Estate Legal Services :  
1550 South Redwood Road :  
Salt Lake City, UT 84104 :

8544976  
02/26/2003 03:58 PM 49.00  
Book - 8745 Pg - 1714-1732  
GARY W. OTT  
RECORDER, SALT LAKE COUNTY, UTAH  
INTEGRATED TITLE INS. SERVICES  
BY: ZJM, DEPUTY - WI 19 P.

SPACE ABOVE FOR RECORDER'S USE

## RESTRICTIONS AND EASEMENTS AGREEMENT

THIS RESTRICTIONS AND EASEMENTS AGREEMENT ("REA") is made to be effective as of the 13<sup>th</sup> day of Feb, 2003, between SMITH'S FOOD & DRUG CENTERS, INC., a Delaware corporation, herein called "Smith's," and H. V. COMMERCIAL, L.L.C., a Utah limited liability company, herein called "Developer."

### RECITALS

A. **Smith's Parcel.** Smith's is the owner of the Smith's Parcel as shown on the "Site Plan" attached hereto as Exhibit "A" and which is more particularly described on Exhibit "B" hereto.

B. **Developer Parcels.** Developer is the owner of the Developer Parcels as shown on the Site Plan, which are more particularly described on Exhibit "C" hereto.

C. **Purpose.** Smith's and Developer desire that the Smith's Parcel and the Developer Parcels be developed and operated in conjunction with each other in an orderly fashion so as to create a commercial shopping center as set forth herein and further desire that the Smith's Parcel and the Developer Parcels be subject to certain easements, covenants, conditions and restrictions all as hereinafter set forth.

### AGREEMENT

In consideration that the following encumbrances shall be binding upon the parties hereto and shall attach to and run with the Smith's Parcel and the Developer Parcels, and shall be for the benefit of and shall be limitations upon all future owners of the Smith's Parcel and the Developer Parcels and that all easements, restrictions and other covenants herein set forth shall be appurtenant to the dominant estates and obligations on the servient estates, and in consideration of the promises,

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covenants, conditions, restrictions, easements and encumbrances contained herein, Smith's and Developer do hereby agree as follows:

1. **Definitions.**

a. **"Shopping Center."** The **"Shopping Center"** shall consist of the Developer Parcels and the Smith's Parcel.

b. **"Building Area; Floor Area."** The **"Building Area"** in the Shopping Center is the portion thereof upon which buildings may be constructed, as outlined and identified on the Site Plan. Initially approximately sixty-three thousand one hundred twenty (63,120) square feet of Floor Area of buildings, as defined below, are planned to be constructed within the Building Area on the Smith's Parcel (56,640 square feet for the Smith's store; 2,880 square feet for the Smith's gas canopy; and 5,000 square feet for Pad B); approximately thirty-two thousand six hundred ninety-three (32,693) square feet of Floor Area are planned to be constructed within the Building Areas on Developer Parcels (8,058 square feet for Retail A; 4,000 square feet for Pad C; 10,860 square feet for Retail B; 6,515 square feet for Retail C; and 3,260 square feet for Pad A). In no event shall any of Developer's Parcels be developed into a use with floor area greater than the amount of floor area designated for each Parcel as set forth on the Site Plan. For purposes hereof, **"Floor Area"** shall be defined as the square foot floor area within exterior walls of any building or structure, excluding any equipment, restroom, or other raised mezzanine, exterior trash enclosures; open loading docks which are not heated or air conditioned; canopies and roof overhangs; and vestibules for ingress and egress. Such exclusions from Floor Area may project from any building or structure up to a distance of twenty-five feet (25') over or outside of the Floor Area on any Parcel, and up to forty feet (40') for canopies or projections used by any financial institution for drive-through service; provided, any such projection or extension complies with all applicable laws, rules, ordinances and regulations of every governmental body having jurisdiction over the Shopping Center; and provided further, no such extension or projection shall be allowed if it materially alters the parking configuration or vehicular or pedestrian circulation, and/or access in and through the entire Shopping Center as shown on the Site Plan. "Floor Area" shall also include, with respect to the Smith/s Parcel, the areas under canopy for the sale of gasoline and related products as identified on the Site Plan.

c. **"Common Areas."** The Common Area is all real property within the Shopping Center except the Building Area; provided, those portions of the Building Area upon which the Parties are not obligated to construct buildings pursuant to this REA shall be deemed to be Common Area until such time as construction of buildings thereon commences. Docks, loading areas, service areas and canopies which are attached to buildings but which extend over Common Area shall be deemed to be part of the building which they serve or to which they are attached and not part of the Common Area.

d. Conversion to Common Areas. Those portions of the Building Areas on each parcel which are not from time to time used or cannot under the terms of this REA be used for buildings shall become part of the Common Area for the uses permitted hereunder and shall be improved, kept and maintained as provided in this REA. An area converted to Common Area may be, as set forth below, converted back to Building Area, if at the time of conversion back to Building Area, it meets the requirements of this REA.

e. Expansion of Floor Area. Smith's and the Developer shall have the right at any time subsequent to the execution of this REA by written notice to the other party hereto to expand the Floor Area on the their respective Parcel to the limits of the Expansion Area shown by the dotted line on Exhibit "A" hereto, provided that such expansion does not reduce the number of available parking spaces below that required by applicable governmental authorities on such Parcel (without taking into account the parking which may exist on the other party's Parcel or Parcels).

2. **Buildings.**

a. Retail Limitation. The buildings shall be commercial buildings of the type usually found in first-class retail shopping centers in the greater metropolitan area in which the Shopping Center is located. The tenants occupying the buildings shall be primarily retail sales and retail service tenants of the type normally associated with first-class retail shopping centers in such metropolitan area. "Retail services" means restaurants, financial institutions, real estate and stock brokerage offices, travel or insurance agencies, medical and dental offices, and similar uses providing services directly to the public, but "retail services" specifically excludes nonprofit organization offices, government offices, office uses that do not involve direct service to consumers, office uses in excess of 5,000 square feet of floor area, and other uses not customarily associated with or contained in first-class retail developments. Without limiting the generality of the foregoing, without Smith's consent (which consent may be withheld in Smith's sole discretion), no portion of the Developer Parcels shall be used for (i) flea markets, fire, bankruptcy or liquidation sales, or sales of "second-hand" or "surplus" merchandise; (ii) training or educational facilities (other than on-site employee training by an occupant incidental to the conduct of its business); or (iii) automotive or other vehicle service or tire or battery sales or service facilities (except that a "Pep Boys", "Auto Zone", "Jiffy Lube" or other auto parts store or similar service center shall be permissible); and (iv) the renting, leasing, sale or display of any motor vehicle, truck, trailer, recreational vehicle or boats.

b. Restrictions on Types of Use. Developer recognizes the needs of Smith's customers to have adequate parking facilities in close proximity to the building upon the Smith's Parcel, and the importance of protecting against unreasonable or extensive use of parking spaces which is likely to result from

parking by patrons or employees of certain types of business establishments. Developer further recognizes Smith's interest in not having tenants occupying space in close proximity to the Smith's building who create or cause excessive noise, litter or odor or which are duplicative of the uses found in Smith's Store. To safeguard Smith's interest in having a clean, quiet and proper environment and in having adequate parking for its customers, Developer covenants and agrees that it shall not permit the use or operation of any portion of the Developer "In-line shops" within two hundred twenty feet (220') of any exterior building wall of Smith's building for a restaurant in excess of 50 seats (fast-food or quick serve). No portion of the Developer's pad "A" shall be used for a sit down only type restaurant with table waiter/waitress service only (fast food with quick serve counter service not excluded). No portion of the Developer's Parcels within two hundred twenty feet (220') of the exterior building wall of the Smith's building shall be used for schools, general or business offices other than offices for travel agencies, doctors, dentists or other health care provider, mortgage companies, eyewear sales, insurance agencies, consumer lending or check cashing purposes. No portion of the Developer Parcels within one hundred (100) feet of any exterior building wall of the Smith's Building shall be used for a game room or other entertainment facility with video arcades and/or electronic games. All uses allowed and existing within the Developer Parcels must include, within the Parcel upon which such use is located, parking equal to the greater of (i) that required by applicable laws and ordinances or (ii) five (5) spaces per thousand (1,000) square feet of floor area for any non-restaurant use and ten (10) spaces per thousand (1,000) square feet of floor area for any restaurant use in excess of 3,500 square feet in area (without taking into account the parking which may exist on the other party's parcel or parcels).

c. Restrictions on Certain Parcels. During the term of this REA, Developer shall not use or permit the use of any portion of the Developer Parcels for (i) any supermarket or grocery store or drug store (which for purposes of this REA means any store, department or area within a store, containing at least 1,000 square feet of sales floor area, including aisle space and storage, primarily devoted to the retail sale of food or liquor for off-premises consumption) or the retail sale of pharmaceutical or non-pharmaceutical drugs; or for the sale of fresh or frozen meat, fish, poultry or produce for off-premises consumption; (ii) any delicatessen (however, "delicatessen" is not to exclude a sandwich shop such as Subway or Quizno's or other similar operation) or convenience store; (iii) any gasoline/fuel station; (iv) the sale of any prescription pharmaceuticals requiring the services of a registered pharmacist; or (v) the operation of a cigarette or smoke shop or any other shop or store the primary business of which is to sell tobacco products. Additionally, during the term of this REA, Developer shall not use or permit the use of any portion of any other property owned by Developer or its successor within a one-mile radius of the Shopping Center for any supermarket or grocery store (which, for purposes of this REA, means any store, department or area within a store, containing at least 1,000 square feet of sales floor area, including aisle space and storage, primarily devoted to the retail sale of food for off-premises consumption), nor shall any portion

of any other property owned by Developer or its successor within a one-mile radius of the Shopping Center be used for the sale of liquor, pharmaceutical or non-pharmaceutical drugs.

d. General Restrictions on Use. Neither the Developer Parcels nor the Smith's Parcel nor any portion thereof shall in any event be leased, subleased, operated or otherwise used for (i) the display, distribution or sale of any "adult" books, "adult" films, "adult" periodicals or "adult" entertainment; (ii) the establishment or maintenance of a massage parlor, "adult" theater, "adult" bookstore, "sex" shop, "peep show" or bawdy house or brothel, (iii) the operation, establishment or maintenance of a movie theater, children's playland (other than in connection with a fast-food restaurant, such as McDonalds), night club, dance hall, bowling alley, skating or roller rink, large animal veterinary clinic (small animal veterinary clinic is allowed), pool or billiard hall, health spa (more than 2,000 square feet in floor area and not to exclude small additional day spa services to a full service tanning or beauty salon), a second hand or pawn shop type of business, or any use in violation of applicable zoning and other governmental laws and regulations. In addition, and not in limitation of the foregoing, neither the Developer's Parcel nor the Smith's Parcel, nor any portion thereof, shall be used or permitted to be used for (i) any use which emits an obnoxious odor, noise or sound which can be heard or smelled outside of any building in the Shopping Center; or (ii) any use which is a public or private nuisance, or which is likely to generate public protests or controversy interfering with the operation of the Shopping Center as a retail center; nor shall there be thereon any (iii) distilling, refining, smelting, agricultural, animal raising or boarding (other than consumer pet shops), or mining operation; (iv) any short or long-term residential use, (v) any primary use as a warehousing, assembling, manufacturing, waste processing or other industrial operation; (vi) any place for public assembly (such as a church, mortuary or meeting hall).

e. Liquor Sales. Except as otherwise specifically approved in writing by Smith's and the Developer (which either Smith's and the Developer may withhold in its sole discretion), in no event shall any portion of the Shopping Center be used for any bar, tavern or other business operation involved in the sale of alcoholic beverages for on-site or off-site consumption; provided, however, that liquor sales for on-premises consumption shall be permitted in conjunction with a restaurant or other eating or food service establishment, in which case, the bar area of the restaurant shall not exceed twenty-five percent (25%) of the restaurant's total sales floor area.

f. Location. No building shall be constructed on the Smith's Parcel or the Developer Parcels, except within the Building Areas shown on Exhibit "A".

g. Design and Construction. The buildings shall be designed so that the exterior elevation of each will be architecturally and aesthetically compatible. The design and construction shall be in conformity with sound architectural and engineering standards and the construction shall be first quality. Except for the

building on the Smith's Parcel, all buildings shall be one story and shall not exceed twenty-four feet (24') in height, excluding roof top equipment (but which may include, in addition, an architectural element, raised mezzanines for equipment, storage, offices (to which the public is not invited), restrooms or lounges). Developer acknowledges that Smith's is a national grocery and drug supermarket retailer and that the architectural theme of its store is related to operational strategies which change from time to time. Although Smith's has no reason to believe that the architectural theme and signage, once adopted, will be subject to change, Smith's, subject to first obtaining approval of all applicable governmental authorities, may make such changes as are instructed to the signage and exterior design, materials, color, elevations and/or other elements of the architectural theme as it pertains to the Smith's Building.

h. Footing Easements. In the event it is appropriate or practical to have building wall footings encroach from one parcel onto the other parcel, the party onto whose parcel the footings encroach shall cooperate in granting an encroachment permit or easement to the party who desires to have its building wall footings so encroach.

i. Fire Protection. Smith's building will be constructed to meet a Type II (Uniform Commercial Building Code) non-rated building and will be sprinklered. Developer will provide that any building(s) constructed immediately adjacent or within a close proximity to Smith's building will be constructed and situated with necessary setbacks in a manner which will preserve Smith's building rating and shall be maintained in a manner to preserve the type and sprinklered insurance rate initially obtained on Smith's building. Developer covenants to provide no-build easements or yard agreements as may be required by the appropriate governmental agencies to preserve Smith's construction classification.

j. No Covenant to Construct or Operate. Notwithstanding anything contained anywhere in this REA to the contrary, nothing herein shall be deemed to create an obligation on Smith's to construct or operate any business on the Smith's Parcel.

k. Expansion of Shopping Center. Developer agrees that the Shopping Center will not be expanded, nor will Developer grant any cross-access to any other property, other than as set forth herein, without the express written consent of Smith's.

3. **Common Areas Use.**

a. Grant of Easements. Each party, as grantor, hereby grants to the other party for the benefit of said other party, its customers, invitees and employees, a nonexclusive easement for pedestrian and vehicular access, ingress and egress, the parking of motor vehicles in designated areas and use of facilities installed for the

comfort and convenience of customers, invitees and employees on the Common Areas of the grantor's parcel.

b. Use. Subject to existing easements of record, the Common Areas shall be used for roadways, walkways, ingress and egress, parking of motor vehicles, loading and unloading of commercial and other vehicles, for driveway purposes, and for the comfort and convenience of customers, invitees and employees of all businesses and occupants of the buildings constructed on the Building Areas defined above.

c. No Barriers. No walls, fences, or barriers of any kind shall be constructed or maintained on the Common Areas, or any portion thereof, by any party which shall prevent or impair the use or exercise of any of the easements granted herein, or the free access and movement, including without limitation, of pedestrians and vehicular traffic between the various parcels; provided, however, reasonable traffic controls approved in advance by Smith's (which approval shall not be unreasonably withheld or delayed) as may be necessary to guide and control the orderly flow of traffic may be installed so long as access driveways to the parking areas in the Common Areas are not closed or blocked. The only exceptions to this provision shall be (1) for changes to the Building Areas and Common Areas permitted by this REA, (2) for incidental encroachments upon the Common Areas which may occur as a result of the use of the ladders, scaffolding, storefront barricades and similar facilities resulting in temporary obstruction of the Common Areas, all of which are permitted hereunder so long as their use is kept within reasonable requirements of construction work being expeditiously pursued, (3) for incidental, immaterial and temporary encroachments upon the Common Areas which may occur in conjunction with the construction, maintenance or repair of buildings and improvements on the Smith's Parcel or Developer's Parcels, so long as such construction, maintenance or repair is being diligently pursued, and (4) for temporary blockage of certain areas deemed necessary by the parties to prevent a public dedication of an easement or access right.

d. Limitations on Use.

(1) Customers. Customers and invitees shall not be permitted to park on the Common Areas except while shopping or transacting business on the Smith's Parcel or the Developer Parcels with the occupants thereof.

(2) Employees. Employees shall not be permitted to park on the Common Areas, except in areas designated as "employee parking areas." The parties hereto may from time to time mutually designate and approve "employee parking areas"; however, if they do not, each party may designate "employee parking areas" on its own Parcel.

(3) General. All of the uses permitted within the Common Areas shall be used with reason and judgment so as not to interfere with the primary purpose of the Common Areas which is to provide for parking for the customers, invitees and employees of those businesses conducted within the Building Areas and for the servicing and supplying of such businesses. Persons using the Common Areas in accordance with this REA shall not be charged any fee for such use.

e. Utility and Service Easements. The parties shall cooperate in the granting of appropriate and proper easements for the installation, repair and replacement of storm drains, sewers, utilities and other proper services necessary for the orderly development and operation of the Common Areas and buildings to be erected upon the Building Areas. The parties will use their best reasonable efforts to cause the installation of such utility and service lines prior to paving of the Common Areas.

4. **Common Areas: Development, Maintenance and Taxes.**

a. Development Timing.

(1) By Owner of Parcel. When any building is constructed within the Building Areas on a Parcel, the Common Areas on that Parcel associated with such building shall be developed in accordance with Exhibit "A" and the Development Agreement to be negotiated in good faith and executed by the parties, all at the expense of the owner of said Parcel.

(2) On- and Off-Site Improvements. All on- and off-site improvements shall be constructed in accordance with plans and specifications approved by Smith's and Developer, and shall be completed in a lien-free condition. Developer shall reimburse Smith's a fraction of the costs for said improvements, the numerator of which shall be the total square footage of the Smith's Parcel, and the denominator of which shall be the total square footage of the entire Shopping Center, including Smith's Parcel.

(3) By Smith's. If Smith's constructs improvements on the Smith's Parcel prior to the development of the Developer Parcels, Smith's may grade, pave and otherwise improve and use any portion of the Common Areas of the Developer Parcels in accordance with Exhibit "A". Smith's shall cause all of said common area improvement work to be separately bid on a competitive basis, and the costs and proposed work shall be subject to Developer's prior written approval, such approval to be not unreasonably withheld or delayed. Developer agrees to reimburse Smith's for the costs of the common area improvement work done on the Developer Parcel(s) by Smith's when buildings on any portion of the Developer Parcels are developed or upon the sale of any portion of the Developer Parcels, whichever first occurs.



b. Maintenance.

(1) Standards. Following completion of the improvement of the Common Areas, the Common Areas shall be maintained in good condition and repair. The maintenance is to include, without limiting the generality of the foregoing, the following:

A. Maintaining the surfaces in a level, smooth and evenly covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use and durability.

B. Removing all papers, debris, filth and refuse and thoroughly sweeping the area to the extent reasonably necessary to keep the area in a clean and orderly condition, and free of snow, ice, dirt, and debris.

C. Placing, keeping in repair and replacing any necessary or appropriate directional signs, markers and lines.

D. Operating, keeping in repair and replacing, where necessary, such artificial lighting facilities as shall be reasonably required for adequate lighting.

E. Maintaining all perimeter walls in good condition and state of repair; and

F. Maintaining all landscaped areas in a thriving and trimmed condition and making such replacements of shrubs and other landscaping as is necessary.

G. Maintaining all common area lighting, electrical and other utilities serving the Common Areas, as well as the cost of operating and maintaining pylon or monument signs.

(2) By Agent. The Developer shall be appointed as agent to maintain the Common Areas in the Shopping Center in the manner as above outlined, subject to the revocable mutual agreement of the parties hereto. Said third party may receive for such agency a fee that is mutually acceptable to all parties to cover supervision, management, accounting and similar costs, which sums are to be included in the general maintenance expense paid by the respective owners of the Common Areas. The owner of each parcel shall be responsible for reimbursing the third party agent its prorata share of Common Area maintenance expenses, which prorata share shall be a fraction of the total expenses, the numerator of which shall be the total square footage of the owner's parcel(s), and the denominator of which shall be the total square footage of the entire Shopping Center.

c. Taxes. Each of the parties hereto agrees to pay or cause to be paid, prior to delinquency, directly to the appropriate taxing authorities, all real property taxes and assessments which are levied against the respective portion of the Common Areas owned by it.

5. **Signs.**

Except for directional signs for guidance upon the Common Areas, no pylon or pole signs shall be located on the Common Areas on the Smith's Parcel or the Developer Parcels except in accordance with the terms and conditions of this REA and all applicable governmental requirements. Smith's and up to three (3) other "major tenants" designated by Developer ("major tenant" meaning an operation of more than 5,000 square feet in the Shopping Center) will jointly design and construct a mutually acceptable common pylon sign with marquee in the place designated on the Site Plan. The cost of the common pylon sign shall be shared in accordance with the ratio that the surface area of the facia of each party's designation bears to the total surface area of the facia of the common sign. The common pylon sign shall bear only the designation of the Shopping Center name, the designation of the trade name of the operator of the Smith's Building, and the designation of the trade name of the "major tenant(s)." Smith's or its successor shall have the first priority position on any common pylon sign(s) in the Shopping Center.

6. **Indemnification/Insurance.**

a. Indemnification. Each party hereby agrees to indemnify, defend and save the other party harmless from any and all liability, damage, expense, causes of action, suits, claims or judgments arising from injury to person or property and occurring on its own Parcel, except if caused by the act or neglect of the other party hereto.

b. Insurance. Each party shall provide commercial general liability insurance affording protection to itself and the other party on its own parcel(s), naming the other party as an "additional insured" under the policy or policies, for a combined bodily injury and property damage limit of liability of not less than Two Million Dollars (\$2,000,000) per occurrence, Three Million Dollars (\$3,000,000) aggregate. The insurance company providing such insurance shall be rated at least A- VII, A.M. Best's rating. Such insurance may be a part of blanket liability coverage carried by a party so long as such blanket policy does not reduce the limits or diminish the coverage required herein.

c. Self Insurance. Each party shall have the right to satisfy its insurance obligations hereunder by means of self-insurance to the extent of all or part of the insurance required hereunder, in accordance with each party's established corporate policy; provided, however, that the party electing to self-insure must have a net worth

of at least Fifty Million Dollars (\$50,000,000). Any party providing self-insurance shall, upon request, provide the other party with a description of such self-insurance program, financial statements, and evidence of any partial insurance coverage which may be supplementing any plan of partial self-insurance.

d. Other Insurance Matters. All policies of insurance required by this REA shall insure the performance of the party insured thereunder of the indemnity agreement contained in this Section 6, shall name the other party an additional insured and shall contain a provision that the insurance company will provide all parties with twenty (20) days advance written notice of any cancellation or lapse, or the effective date of any material reduction in the amounts or scope of coverage. Developer shall deliver to Smith's a certificate or statement from the party's insurance company that such insurance insures the performance by the party insured of the indemnity agreement specified in this Section 6 and the existence of the insurance coverage to the limits herein required. Each party shall promptly notify each other party of any asserted claim with respect to which such party is or may be indemnified against hereunder and shall deliver to such party copies of process and pleadings.

7. **Eminent Domain.**

a. Owner's Right to Award. Nothing herein shall be construed to give either party any interest in any award or payment made to the other party in connection with any exercise of eminent domain or transfer in lieu thereof affecting said other party's parcel or give the public or any government any rights in the Smith's Parcel or the Developer Parcels. In the event of any exercise of eminent domain or transfer in lieu thereof of any part of the Common Areas located on the Smith's Parcel or the Developer Parcels, the award attributable to the land and improvements of such portion of the Common Areas shall be payable only to the owner in fee thereof and no claim thereon shall be made by the owners of any other portion of the Common Areas.

b. Collateral Claims. All other Owners of the Common Areas may file collateral claims with the condemning authority for their losses which are separate and apart from the value of the land area and improvements taken from another owner.

c. Tenant's Claim. Nothing in this Section 7 shall prevent a tenant from making a claim against an owner pursuant to the provisions of any lease between such tenant and owner for all or a portion of any such award or payment.

d. Restoration of Common Areas. The owner of the fee of each portion of the Common Areas so condemned shall promptly repair and restore the remaining portion of the Common Areas so owned as near as practicable to the condition of same immediately prior to such condemnation or transfer to the extent that the

proceeds of such award are sufficient to pay the cost of such restoration and repair and without contribution from any other owner.

8. **Agreement.**

a. Modification, Cancellation and Delegation of Authority. This REA (including Exhibit "A") may be modified or cancelled only by written consent of all record owners of the Smith's Parcel and at least fifty percent (50%) of all record owners of the Developer Parcels, which consents shall not be unreasonably withheld. It is agreed that as long as either Smith's or the Developer is the initial user and/or operator of one or both the Parcels, whether as owner or lessee, that the authority for modifying this REA shall rest with them alone as to the Parcel(s) they own, use or operate. Any purchaser, lender, mortgagee, lessee, assignee, grantee, sublessee or other party having any interest in any portions of the Smith's Parcel and/or the Developer Parcels shall be deemed to have appointed Smith's and/or Developer, as the case may be, as their attorneys-in-fact for their respective Parcels for the purpose of negotiating and entering into any modifications of this REA, except for extending the duration hereof. Cancellation of this REA shall not be considered a modification.

b. Breach. In the event of breach or threatened breach of this REA, only all record owners of the Smith's Parcel as a group, or all the record owners of the Developer Parcels as a group, or Smith's so long as it has an interest as owner or tenant in the Smith's Parcel, or Developer so long as it has an interest in any part of the Developer Parcels, shall be entitled to institute proceedings for full and adequate relief from the consequences of said breach. The unsuccessful party in any action shall pay to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

c. Remedies for Default; Waiver. If the owner of any Parcel shall, during the term of this REA, default in the full, faithful and punctual performance of any obligation required hereunder and if at the end of thirty (30) days after written notice from any owner of a Parcel or the party to whom its authority has been delegated, stating with particularity the nature and extent of such default, the defaulting owner has failed to cure such default, and if a diligent effort is not then being made to cure such default, then any other owner of a Parcel of land subject to this REA or the party to whom its authority has been delegated shall, in addition to all other remedies it may have at law or in equity, have the right to perform such obligation of this REA on behalf of such defaulting owner and be reimbursed by such defaulting owner for the cost thereof with interest thereon at the rate of ten percent (10%) per annum. Any such claim for reimbursement, together with interest as aforesaid, shall be a secured claim and a lien shall attach and take effect upon recordation of a property claim of lien by the claimant in the office of the county recorder of the county in which the land is located. The claim of lien shall include the following: (1) the name of the claimant; (2) a statement concerning the basis of

the claim of lien, (3) the last known name and address of the owner or reputed owner of the Parcel against which the lien is claimed; (4) a description of the property against which the lien is claimed; (5) a description of the "work performed or payment made" which has given rise to the claim of lien hereunder and a statement itemizing the amount thereof; and (6) a statement that the lien is claimed pursuant to the provision of this REA reciting the date, book and page of the recordation hereof. The notice shall be duly verified, acknowledged and contain a certificate that a copy thereof has been served upon the party against whom the lien is claimed, either by personal service or by mailing (first class, certified, or return receipt requested) to the defaulting owner, at the address for mailing of tax statements with respect to the property against which the lien is claimed. The lien so claimed shall attach from the date of recordation solely in the amount claimed thereby and it may be enforced in any manner allowed by law for the foreclosure of liens. Notwithstanding the foregoing, such lien shall be subordinate to any mortgage or deed of trust given in good faith and for value now or hereafter encumbering the property subjected to the lien, and any purchaser at any foreclosure or trustee's sale (as well as any grantee by deed in lieu of foreclosure or trustee's sale) under any mortgage or deed of trust shall take free and clear from any such then existing lien, but otherwise subject to the provisions of this REA. The failure of the owner or owners of any of the Parcels subject to this REA to insist in any one or more cases upon the strict performance of any of the promises, covenants, conditions, restrictions or agreements herein, shall not be construed as a waiver or relinquishment of any future breach of the same or other provisions hereof.

d. Non-Merger. So long as a party is a tenant of a Parcel, this REA shall not be subject to the doctrine of merger, even though the underlying fee ownership to the Parcels described herein is vested in such party.

e. Duration. Unless otherwise cancelled and terminated, this REA and all the easements, rights and obligations hereof shall automatically terminate and be of no further force or effect after fifty-five (55) years from the date hereof, except that the access easements (but not the parking easements) described in Section 3(a) and except that the utility easements granted pursuant to Section 3(e), if any, shall continue in full force and effect until terminated in writing by the parties entitled to modify this REA in accordance with the provisions of Section 8(a) hereof.

9. **Rights and Obligations of Lenders.**

Subject to, and except as provided under, the provisions of Section 8(c) above, the restrictions and burdens of this REA are, and shall at all times be, prior and therefore superior to the lien or encumbrance of any mortgage or deed of trust made in good faith and for value affecting the Smith's Parcel or the Developer Parcels or any part thereof, or any improvements now or hereafter placed thereon. However, a breach of any of the easements, covenants, or restrictions hereof shall not defeat or render invalid the lien or encumbrance of any mortgage or deed of trust.

The superiority of this REA shall be limited to the extent that title to any property acquired through sale under foreclosure of any mortgage or deed of trust effected by powers of sale, judicial proceedings, or otherwise, shall be subject to all the restrictions and burdens affecting the Smith's Parcel and the Developer Parcels by virtue of this REA, as noted in Section 8(c) hereof.

10. **Release from Liability.**

Any person acquiring fee or leasehold title to the Smith's Parcel or the Developer Parcels or any portion thereon shall be bound by this REA only as to the Parcels or portion of the Parcels acquired by such person. Such person shall be bound by this REA only during the period such person is the fee or leasehold owner of such Parcel(s) or portion of the Parcel(s), except as to obligations, liabilities or responsibilities that accrue during said period. Although persons may be released under this Section, the easements, covenants and restrictions in this REA shall continue to be benefits and servitudes which run with the land as described in Section 11 next below.

11. **Rights of Successors.**

The easements, covenants, conditions, restrictions, benefits, and obligations hereunder shall create mutual benefits and servitudes upon the Smith's Parcel and the Developer Parcels and shall run with the land. This REA shall bind and inure to the benefit of the parties hereto, their respective heirs, personal representatives, tenants, successors, and/or assigns. The singular number includes the plural and any gender includes all other genders.

12. **Paragraph Headings.**

The paragraph headings herein contained are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.

13. **Not a Public Dedication.**

Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Common Areas to the general public or for the general public or for any public purposes whatsoever, it being the intention of the parties hereto that this REA shall be strictly limited to and for the purposes herein expressed. The right of the public or any person to make any use whatsoever of the Common Areas of the Parcels herein affected, or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to the control of the owner. Notwithstanding any other provisions herein to the contrary, the owners of the Parcels affected hereby may periodically restrict ingress and egress from the Common Areas in order to prevent a prescriptive

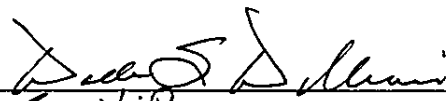
easement from arising by reason of continued public use. Any restriction on ingress and egress shall be limited to the minimum period necessary to prevent the creation of a prescriptive easement and shall occur at such at time as to have a minimum effect on the parties in occupancy within the Shopping Center.

14. **Document Execution and Change.**


It is understood and agreed that until this REA is fully executed and delivered by both Developer and Smith's there is not and shall not be an agreement of any kind between the parties hereto upon which any commitment, undertaking or obligation can be based. It is further agreed that once this document is fully executed and delivered that it contains the entire agreement between the parties hereto and that, in executing it, the parties do not rely upon any statement, promise or representation not herein expressed, and this document, once executed and delivered, shall not be modified, changed or altered in any respect except by writing executed and delivered in the same manner as required for this document.

**IN WITNESS WHEREOF**, the parties hereto have executed this REA the day and year first above written.

**SMITH'S FOOD & DRUG CENTERS, INC.,**  
a Delaware corporation

By:   
Its: Sr. VP.

**H. V. COMMERCIAL, L.L.C.,** a Utah limited liability company,

By:   
Its: Manager

STATE OF UTAH )  
 : ss.  
COUNTY OF SALT LAKE )

Before me, the undersigned authority, on this day personally appeared WADE S. WILLIAMS, SR. VICE PRESIDENT of SMITH'S FOOD & DRUG CENTERS, INC., a Delaware corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said corporation.

Given under my hand and seal of office on this 7<sup>th</sup> day of FEBRUARY, 2003

Susan T. Thomson



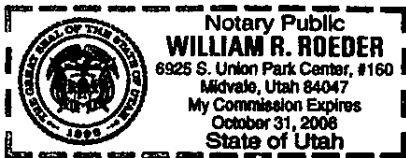
Notary Public  
Notary's name printed:  
SUSAN T. THOMSON

My Commission Expires:  
8-8-06

STATE OF Utah )  
 : ss.  
COUNTY OF Salt Lake )

Before me, the undersigned authority, on this day personally appeared Milton P. Shipp, MANAGER of H. V. COMMERCIAL, L.L.C., a Utah limited liability company, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said corporation.

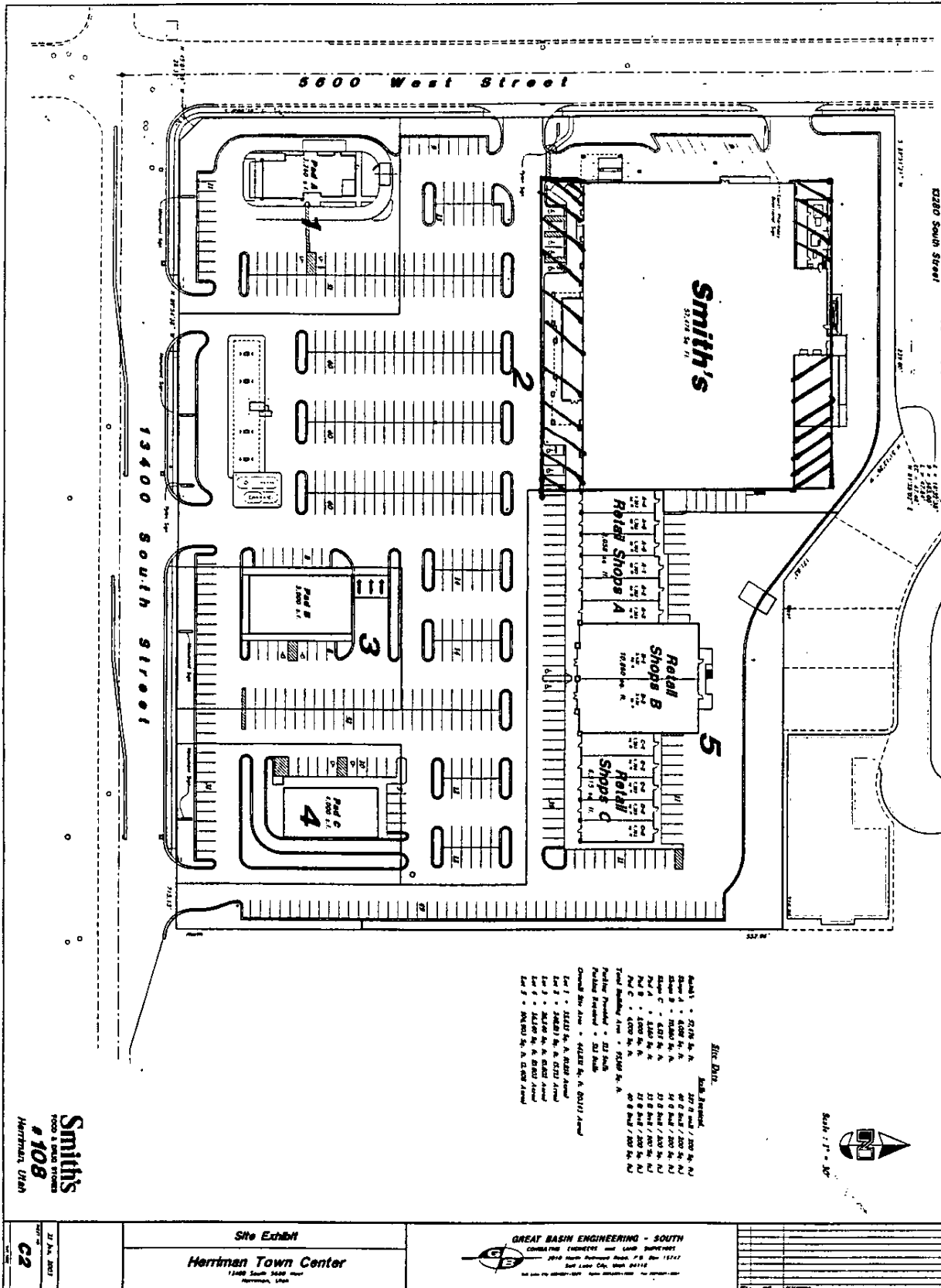
Given under my hand and seal of office on this 13<sup>th</sup> day of February, 2003.



William R. Roeder  
Notary Public  
Notary's name printed:  
\_\_\_\_\_

My Commission Expires:  
\_\_\_\_\_





Expansion Area

**Smith's**  
 1000 S. HERRIMAN BLVD.  
 #108  
 HERRIMAN, UTAH

**Site Data**

Area	Area (Sq. Ft.)	Area (Sq. Ft.)	Area (Sq. Ft.)
Shop A	5778 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop B	6000 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop C	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop D	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop E	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop F	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop G	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop H	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop I	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop J	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop K	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop L	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop M	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop N	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop O	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop P	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop Q	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop R	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop S	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop T	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop U	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop V	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop W	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop X	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop Y	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.
Shop Z	6307 Sq. Ft.	1200 Sq. Ft.	1200 Sq. Ft.

**Site Exhibit**  
**Herriman Town Center**  
 13400 South 5400 West  
 Herriman, Utah

**GREAT BASH ENGINEERING - SOUTH**  
 CONSULTING ENGINEERS AND LAND SURVEYORS  
 2010 South Parkway Blvd., P.O. Box 15747  
 Salt Lake City, Utah 84116  
 Tel: 801-466-8800 Fax: 801-466-8801

27 JAN 2003  
**C2**

BK 8745 PG 1730

EXHIBIT "A"

# GREAT BASIN ENGINEERING - South

2010 North Redwood Road • P.O. Box 16747 • Salt Lake City, Utah 84116  
(801) 521-8529 • (801) 394-7288 • Fax (801) 521-9551



CONSULTING ENGINEERS  
AND LAND SURVEYORS

**Smith's #108  
Herriman Village Town Center  
Lot 2**

**August 12, 2002**

All of the future Lot 2 of the forthcoming Herriman Village Town Center, A Commercial Subdivision, described as follows:

A part of the Southwest Quarter of Section 36, Township 3 South, Range 2 West, Salt Lake Base and Meridian, U.S. Survey in Herriman, Salt Lake County, Utah:

Beginning at a point on the North Line of 13400 South Street as widened to 53.00 foot half-width being 445.79 feet South 89°54'38" East along the Section Line and 53.00 feet North 0°05'22" East from the Southwest Corner of said Section 36; and running thence North 89°54'38" West 230.00 feet along said North Line of 13400 South Street; thence North 0°05'22" East 202.00 feet; thence North 89°54'38" West 176.82 feet to the East Line of 5600 West Street as widened to 40.00 foot half-width; thence North 0°08'39" West 449.02 feet along said East Line of 5600 West Street to a point on the South Boundary of future Herriman Village P.U.D. Subdivision; thence along said South Boundary the following three courses: North 89°51'21" East 239.00 feet to a point of curvature; Northeasterly along the arc of a 165.00 foot radius curve to the Left a distance of 47.64 feet (Central Angle equals 16°32'38" and Long Chord bears North 81°35'02" East 47.48 feet); and South 51°12'26" East 93.32 feet; thence South 0°05'22" West 159.22 feet; thence North 89°54'38" West 20.00 feet; thence South 0°05'22" West 122.00 feet; thence South 89°54'38" East 357.89 feet; thence South 0°05'22" West 114.44 feet; thence North 89°54'38" West 128.00 feet; thence South 0°05'22" West 205.00 feet to the North Line of 13400 South Street as widened to 53.00 foot half-width; thence North 89°54'38" West 32.00 feet along said North Line; thence North 0°05'22" East 205.00 feet; thence North 89°54'38" West 128.00 feet; thence South 0°05'22" West 205.00 feet to the point of beginning.

**Contains 248,813 sq. ft.  
or 5.712 acres**

ATTACHED EXHIBIT "C"

LOTS 3, 4, and 5, HERRIMAN TOWN CENTER, A COMMERCIAL SUBDIVISION,  
according to the official plat thereof, as recorded in the office of the Salt Lake County  
Recorder.

Parcel Identification No. Part of 26-36-300-011

BK8745PG1732