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Gary W. Ott  
Recorder, Salt Lake County, UT  
METRO NATIONAL TITLE  
BY: eCASH, DEPUTY - EF 29 P.

After Recording Return to:

Douglas Fielding  
2398 East Camelback Road, Ste. 550  
Phoenix, AZ 85016

*MNT 08057388*  
*# 28-30-100-027*

**DECLARATION OF COVENANTS AND RECIPROCAL EASEMENTS**

**THIS DECLARATION OF COVENANTS AND RECIPROCAL EASEMENTS**

(this "Declaration") is made this *13<sup>th</sup>* day of *January*, 2009, by DRAPER LTD, LLC, an Arizona limited liability company, SANCHEZ UTAH II, LLC, a Utah limited liability company, and STRATEGIC ASSETS LTD, LLC, an Arizona limited liability company (collectively, "Declarant").

**WITNESSETH:**

**WHEREAS**, Declarant is the owner of that tract or parcel of land located in Draper City, Salt Lake County, Utah, being more particularly described as Lot 1 on that certain Factory Stores of America Subdivision (the "Subdivision Plat") recorded as Entry Number 6168179 in Book 95-9P, Page 235 of the real estate records of the Office of the Recorder of Salt Lake County, Utah (said tract or parcel of land, together with all improvements and personal property located thereon, including any future development of said tract or parcel of land, being hereinafter referred to as "Declarant Parcel"); and

**WHEREAS**, Declarant has filed a parcel map and a boundary line adjustment which created out of the Declarant Parcel, a new parcel described in Exhibit "A" attached hereto, which parcel, together with all improvements and personal property located thereon, including any future development of said tract or parcel of land, being hereinafter referred to as "Grantee Parcel"; and

**WHEREAS**, Declarant has entered into a contract to transfer Grantee Parcel to COWABUNGA BAY LAND LLC, a Utah limited liability company ("Grantee"); and

**WHEREAS**, Grantee Parcel is contiguous with Declarant Parcel (Declarant Parcel and Grantee Parcel hereinafter being collectively referred to as the "Parcels" and individually being referred to as a "Parcel"); and

**WHEREAS**, Declarant desires to dedicate, create, grant and establish certain easements over the Declarant Parcel and the Grantee Parcel in favor of the other Parcel and to otherwise create certain rights and obligations benefiting and burdening each Parcel (the owners, occupants, successors and assigns of any Parcel, or any portion thereof, as well as any lessee of any Parcel or portion thereof who has assumed all of the obligations of the owning party, are hereinafter individually called the "Owner", and collectively, the "Owners");

**NOW, THEREFORE**, for and in consideration of the premises and other benefits to be derived by Declarant and each and every subsequent Owner and its successors and assigns of each of the Parcels, Declarant hereby declares that each of the Parcels shall be held, sold, and conveyed subject and subordinate to the easements and other rights and obligations granted, created, established, declared or otherwise set forth herein for the use, benefit and enjoyment of the applicable Parcel.

1. **Easements.**

(a) **Access and Parking.**

(1) Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of the Grantee Parcel and the Owner thereof its officers, agents, employees, customers, guests, invitees, licensees, tenants, subtenants and the successors and assigns of each of them, the right, privilege and easement of a perpetual, non-exclusive easement to go upon and use the roadways, drives and parking facilities on the Declarant Parcel for the purposes of access, ingress, egress, and regress by pedestrian and vehicular traffic to and from Grantee Parcel and for parking for guests, customers, invitees, employees and contractors.

(2) So long as the traffic flow on the Declarant Parcel is not materially and adversely impacted, and there remains direct access between Declarant Parcel and Grantee Parcel, the Owner of the Declarant Parcel shall have the right to relocate the roadways and drives on its Declarant Parcel and to locate or relocate and configure or reconfigure, on its Parcel, the parking areas and individual parking places located thereon; provided that the Owner of the Declarant Parcel shall at all times comply with the federal, state and local requirements (including, without limitation, the Americans With Disabilities Act and zoning requirements) applicable to the Declarant Parcel. Notwithstanding the above, the Owner of the Declarant Parcel shall not, without the written consent of the Owner of the Grantee Parcel relocate or modify in any way the driveways or parking spaces within that portion of the Declarant Parcel which are depicted on Exhibit "B" ("Adjacent Parking"). Pursuant to a separate agreement between Grantee and Declarant, Grantee shall install certain improvements in the Adjacent Parking area which shall thereafter be maintained by Declarant.

(b) **Drainage.**

(1) Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Declarant Parcel and the Owner thereof, a perpetual, non-exclusive easement for the drainage and discharge of storm water from Declarant Parcel in, to, over, under, across and through Grantee Parcel; provided, however, said

drainage and discharge shall not materially and adversely affect Grantee Parcel. The Owner of the Declarant Parcel shall not alter the Declarant Parcel in any manner which would materially change the direction, volume or velocity of storm water coming onto the Grantee Parcel without the written consent of the Owner of the Grantee Parcel. The Owner of the Declarant Parcel shall be responsible for compliance with any present or future governmental requirements for treatment of surface storm water prior to discharging it onto the Grantee Parcel. If any governmental authority requires installation of oil/water separators or diffusers at the common boundary between the Declarant Parcel and the Grantee Parcel, the Owners of the Parcels shall divide the cost thereof equitably (based on relative use of the surface area draining onto the Grantee Parcel).

(2) Declarant further does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Grantee Parcel and the Owner thereof, a perpetual, non-exclusive easement for the installation of a storm water pipe and inlet over and across an area of approximately three (3) feet wide along the entire easterly and southerly boundary of the Grantee Parcel as shown on Exhibit "C" and for installation of a subdrain in the location shown on Exhibit "C". Subject to approval of any governmental agencies having jurisdiction, the Owner of the Grantee Parcel shall install a storm drain system which shall accept drainage from its current point of entry from the Declarant Parcel and, together with any drainage from the Grantee Parcel, direct the same by underground pipe onto property along the southeast boundary of the Grantee Parcel. Storm water drainage shall be implemented by the use of catch basins and underground storm lines on Grantee Parcel; no open ditches will be permitted.

(3) Declarant further does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, Grantee Parcel and the Owner thereof and a perpetual, non-exclusive easement for the drainage and discharge of storm water from the Grantee Parcel, to, over, under, across and through Declarant Parcel from the boundary of the Grantee Parcel to the drainage basin located on the Declarant Parcel; provided, however, said drainage and discharge shall not materially and adversely affect Declarant Parcel.

(c) **Sewer**. No on-site septic system or sanitary sewer treatment facility will be permitted on either Parcel.

(d) **Utility Easement**. Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, the Grantee Parcel, and the Owner thereof, a perpetual non-exclusive easement in, to, upon, over, under and across Declarant Parcel (but not within the areas on or over which buildings are from time to time constructed) for the purpose of the operation, installation, maintenance, repair, replacement and use of and connection with underground water, sewer, and gas mains, electric power lines

and other underground utility lines and related facilities (collectively, the "Utility Line(s)") necessary to serve the improvements from time to time located on the Grantee Parcel. The location of the easement for each such Utility Line shall be as shown on the Survey (subject to relocation as provided below) and on Exhibit "C" attached hereto. Notwithstanding anything to the contrary set forth herein-above, the Owner of Declarant Parcel shall have the right, at its sole cost and expense, to relocate elsewhere within Declarant Parcel any Utility Line(s) serving the Grantee Parcel, provided that the utility service or capacity for Grantee Parcel served by such Utility Line(s) shall not be unreasonably interrupted or materially reduced in connection with such relocation; and provided, further, that any such Utility Line(s) shall be entirely underground. The Owner of the Grantee Parcel may maintain, repair and replace such Utility Line(s) on Declarant Parcel serving the Grantee Parcel, provided that such repair, maintenance and replacement is performed expeditiously, in accordance with all governmental regulations, and in a manner so as not unreasonably to interfere with the conduct or operation of any business on Declarant Parcel affected thereby. Promptly after each exercise by the Owner of the Grantee Parcel of any such installation, maintenance, repair, replacement or connection work on Declarant Parcel, the Owner of the Grantee Parcel shall, at its sole cost and expense, restore those portions of Declarant Parcel affected by such installation, maintenance, repair, replacement or connection to no less than their condition and appearance prior to such installation, maintenance, repair, replacement or connection.

(e) **General Use.** The Owner of each of the Parcels shall be entitled to use its respective Parcel for any purpose not inconsistent with the rights or limitations hereby granted or created. Any reconfiguration of roadways, parking and traffic flow on the Declarant Parcel shall not materially and adversely affect the other Grantee Parcel.

(f) **No Rights to General Public.** Nothing contained herein shall ever be deemed to create any rights for the benefit of the general public, or to constitute any of the affected areas a dedicated public thoroughfare for either vehicles and/or pedestrians or other lawful use. The parties shall do all things necessary to perpetuate the status of the easements created by this Declaration as private easements, including cooperating with each other in the periodic publication of legal notices or physically barring access to the affected areas as may be required by law.

(g) **Grease Trap.** Declarant does hereby dedicate, create, grant and establish for the benefit of, and as an appurtenance to the ownership of, the Grantee Parcel, and the Owner thereof, a perpetual non-exclusive easement in, to, upon, over, under and across that portion of the Declarant Parcel depicted on Exhibit "E" for the installation, maintenance, replacement and use of a grease trap to serve the snack bar located on the Grantee Parcel. Such grease trap shall not obstruct or impair any parking or traffic flow on the Declarant Parcel. Grantee shall indemnify and hold Declarant harmless from any claims or liabilities or obligations relating to such grease trap.

2. **Maintenance Covenant.** The Owner of each Parcel shall maintain, repair and replace, or shall cause to be maintained, repaired and replaced, all buildings and improvements on its respective Parcel, including, without limitation, the exterior facades of all buildings and other structures located on its respective Parcel, so as to keep the same at all times in a safe, attractive, good and functional condition. The Owner of the Declarant Parcel shall maintain all parking lot improvements including, without limitation, asphalt surface, striping, barriers, lighting fixtures and bulbs, landscaping and medians. The Owner of each Parcel shall be responsible for keeping its respective Parcel free from refuse, rubbish, oil spills, garbage and trash and shall cause the same to be removed at its own expense or at the expense of its tenants.

3. **Grantee Parcel Operating Covenants.** As partial consideration for the easements set forth in Paragraph 1 above, Grantee Parcel shall be held, transferred, sold, conveyed, used, occupied, rented, mortgaged or otherwise encumbered subject to the following covenants and restrictions:

(a) **Permitted Use.** Subject to the limitations of subparagraph 1(e), the Owner of Grantee Parcel may use the Grantee Parcel for the purpose of operating a neighborhood water park (including, without limitation, a snack bar incidental thereto), retail store or stores, professional office space, or a bank, and for such other purposes as may be approved by Declarant, which approval shall not be unreasonably withheld, conditioned or delayed.

(b) **Architectural and Design Approval.** Preliminary plans and specifications for buildings, utilities, signs, improvements, and landscaping to be constructed and installed on Grantee Parcel are attached hereto as Exhibit "D"; include, without limitation, (i) site plans and drawings, (ii) elevations, exterior designs and descriptions of proposed exterior materials, (iii) sign plans, (iv) parking plans, (v) exterior lighting plans, (vi) landscaping plans, and (vii) the location and appearance of all exterior trash containers; and are hereby approved by the Owner of Declarant Parcel. Such plans and specifications include perimeter walls, fences or similar barriers around the perimeter of the Grantee Parcel.

Upon the completion of the construction and installation of any such buildings, utilities, signs, improvements or landscaping, the same shall not be materially or substantially changed or altered (any material or substantial change or alteration herein an "Alteration") without the prior written approval of the Owner of Declarant Parcel; provided, however, that any Alteration (i) as to which no building height is in excess of thirty-five (35) feet, including false façade, if any, measured from finished floor elevation to the top of the highest building protrusion or appurtenance, including roof-mounted equipment; decorative roof screening, and the like; (ii) which shall be compatible and in substantial conformity with the general architectural design, aesthetic quality and exterior materials of the improvements erected, or to be erected, on Declarant Parcel and (iii) additions to water slides and related improvements, (the building height limitation and compatibility and conformity provisions in the foregoing clauses (i) and (ii) herein collectively the "Height/Compatibility/Conformity

Requirements"), shall not require such approval. Prior to the commencement of any Alteration, the Owner of Grantee Parcel shall deliver for approval to the Owner of Declarant Parcel or its successors or assigns with respect to this Paragraph 3(b), or for its information if such approval is not required pursuant to the foregoing sentence, plans and specifications in the same detail as those attached as Exhibit "D" (which plans and specifications shall, without limiting the generality of the foregoing, reflect the placement of any building and other improvements on Grantee Parcel in substantial conformity with said Exhibit "D"). Within thirty (30) days after receipt of such plans and specifications, the Owner of Declarant Parcel shall give the Owner of Grantee Parcel notice of its approval or disapproval of the same if approval is required; failure by the Owner of Declarant Parcel so to give notice shall be deemed approval. Such approval shall not be unreasonably withheld; provided, however, that the Owner of Declarant Parcel shall in all events have the right to reject any such plans or specifications if any of the Height/Compatibility/Conformity Requirements are not met. Furthermore, in all events decorative screening and/or landscaping shall be installed in Grantee Parcel so as to obscure from public view all trash rooms, trash holding receptacles, loading or service areas, mechanical or electrical equipment, storage facilities or bins, or other unsightly building appurtenances. Appropriate screening shall be provided to obscure all roof mounted equipment and appurtenances, roof vents, and the like from public view.

All construction on Grantee Parcel shall be constructed and installed substantially in accordance with approved plans and specifications as provided in this Paragraph 3(a), in a safe, good and workmanlike manner and in accordance with all governmental requirements. All such construction shall be staged and completed on Grantee Parcel unless Declarant approves temporary staging in a suitable location offsite to the Grantee Parcel. Furthermore, all such construction shall be performed expeditiously and in a manner so as to not unreasonably interfere with the conduct of business on Declarant Parcel. The approval of any plans or specifications hereunder by the Owner of Declarant Parcel with respect to this Paragraph 3(a) shall not impose any liability or responsibility whatsoever upon the Owner of Declarant Parcel with respect to this Paragraph 3(a) as regards to the compliance or non-compliance of such plans and specifications, or any improvements erected or installed in accordance therewith, or with the applicable zoning ordinances, building codes or other applicable governmental laws, ordinances or regulations.

(c) **Other Prohibited Activities.** No portion of Grantee Parcel shall be leased, used or occupied for an activity or business (a "Prohibited Activity") which shall include, without limitation: (1) a noxious or offensive use; (2) for manufacturing (except for such manufacturing use as shall be incidental to a permitted retail use); (3) a theater; (4) a funeral parlor; (5) a warehouse or office (except for such office or warehouse use as shall be incidental to a permitted retail, professional office or bank use); (6) a nightclub, discotheque, cabaret, bar, or lounge; or (7) a public transportation parking lot.

(d)**Curb Construction.** Concrete curbs shall be constructed on or adjacent to Grantee Parcel in each of the following locations: (a) along the entire east boundary of Grantee Parcel at the edge of the pavement to separate the paved area from the adjacent buildings and park perimeter; and (b) on the north boundary along the future roadway. The latter curb will be constructed at the time the City of Draper determines to build the roadway. However, the Owner of Declarant Parcel and the Owner of the Grantee Parcel shall only be responsible for such portion of any improvements required under the Improvement Agreements by and between Declarant and the City of Draper, dated September 30, 1994 and recorded as Entry No. 5967779 in Book 7056 at Page 1202 of the Salt Lake County records, and dated August 7, 1995 and recorded as Entry No. 6168181 in Book 7229 at Page 2906 of the Salt Lake County records, as are adjacent to the boundary of its respective parcel.

(e)**Parking.** Except as shown on Exhibit "B" the Owner of the Grantee Parcel shall not be required to maintain any parking on the Grantee Parcel.

(f)**Landscaping.** All buffer strips and other undeveloped land areas in Grantee Parcel shall be landscaped with trees, shrubs, or suitable ground cover in a uniform manner. All internal landscaping in Grantee Parcel shall be protected from vehicular encroachment by concrete curbing.

**4. Mutual Operating Covenants.** As partial consideration for the easements set forth in Paragraph 1 above, each Parcel shall be held, transferred, sold, conveyed, used, occupied, rented, mortgaged or otherwise encumbered subject to the covenants and restrictions that no portion of either Parcel shall be leased, used or occupied for a business or use which (i) creates strong, unusual or offensive odors, fumes, dust or vapors; (ii) is a public or private nuisance; (iii) emits noise or sounds which are objectionable and in excess of those normal for the use permitted by this Declaration; (iv) creates unusual fire, explosive or other hazards; (v) may injure the reputation of the business operated on either Parcel; or (vi) parks, or permits the parking of, trucks and delivery vehicles so as to unreasonably interfere with the use of the easements granted herein. Declarant acknowledges that Grantee intends to operate its waterpark between approximately May through September of each year and intends to close the facility during the other months of the year. Nothing in this Declaration shall be interpreted to require Grantee to be open for business. All loudspeaker communication, video equipment and lighting shall be in accordance with City ordinances and/or Grantee's conditional use permit. Furthermore, no portion of either Parcel shall be used for the sale of pornographic or sexually explicit materials.

#### **5. Sign Criteria.**

##### **(a) General Requirements and Prohibitions:**

(1) Any signs constructed on the Grantee Parcel shall be in accordance with City ordinance and/or as permitted in Grantee's conditional use permit issued by the City. It is acknowledged that use of the Grantee Parcel as a waterpark, is an entertainment facility which will include theme structures, art, lighting and music to enhance the

include theme structures, art, lighting and music to enhance the entertainment experience of guests. Nothing permitted under Grantee's conditional use permit or shown on Exhibit "D" hereto shall be prohibited under the terms of this Declaration. As used herein, "signs" shall mean signs which have, as their primary purpose, attracting attention from those outside the Grantee Parcel rather than enhancing the entertainment experience of those on site. Subject to the above, no signs or other advertising devices shall be installed or permitted on Grantee Parcel except to the extent specifically permitted hereby.

(2) Except as provided above, flashing, blinking, moving, animated or audible signs will not be permitted.

(3) No exposed wiring, conduits, tubing, lamps, ballast boxes or raceways will be permitted.

(4) All cabinets, conductors, transformers, ballast, attachment devices, and other equipment shall be concealed.

(b) **Freestanding Signs:**

(1) No more than two (2) permanently affixed freestanding name identification signs may be installed on Grantee Parcel.

(2) The maximum heights from the bottom of the base to the top of any such freestanding, type sign structure, including the sign panel, shall be the size as allowed by code and/or Grantee's conditional use permit.



6. **Eminent Domain.** In the event the whole or any part of Declarant Parcel or Grantee Parcel shall be taken by right of eminent domain or condemnation or any similar authority of law, or is sold in lieu of such condemnation, the entire award for the value of the land and improvements so taken shall belong to the Owner of the Parcel (or portion thereof) so taken or to such Owner's mortgagees or tenants, as their interests may appear, and no other Owner shall have a right to claim any portion of such award by virtue of any interest created by this Declaration. Provided, however, if such taking results in a reduction of parking or access which materially impacts the use of the Grantee Parcel, the Owner of the Grantee Parcel shall be entitled to recover from the condemning agency for the losses sustained by reason thereof. In the event of a total taking of a Parcel, any Owner of a Parcel which is not the subject of a taking may, however, file a collateral claim with the condemning authority over and above the value of the land and improvements being so taken and related income loss to the extent of any damage suffered by such Owner resulting from the severance of the land or improvements so taken if such claim shall not operate to reduce the award allocable to the Parcel (or portion thereof) taken.

7. **Remedies.**

(a) If the Owner of Grantee Parcel fails to commence construction of the initial improvements depicted on Exhibit "D" within twenty-four (24) months after the date of such Owner's acquisition of Grantee Parcel, or fails to substantially complete construction of such initial improvements and open for business within eighteen (18) months after commencing construction as described above, and said failure or refusal is not due to (aa) construction, remodeling, or repairs of the said Parcel, (bb) governmental order, (cc) war, (dd) civil insurrection, (ee) fire, flood or acts of God, or (ff) other causes beyond the control of the Owner of Grantee Parcel, then the Owner of Declarant Parcel shall for the defaults specified in paragraph 6(a)(i) or 6(a)(ii) have the right, exercisable by written notice (the "Exercise Notice") to the Owner of Grantee Parcel given within six (6) months of learning of the event of default giving rise to such right (the date on which the Exercise Notice is given being herein the "Exercise Date"), to purchase Grantee Parcel for the Repurchase Amount. As used herein, "Repurchase Amount" means an amount equal to the greater of (A) seventy-five percent (75%) of the current fair market value of Grantee Parcel and the improvements thereon (such market value being determined as the average of the respective fair market values determined in written appraisals provided to each Owner within thirty (30) days after the Exercise Date by each of two independent MAI appraisers, one selected by the Owner of Declarant Parcel and one selected by the Owner of Grantee Parcel; or, if such appraiser as either Owner shall select shall not provide a written appraisal within such thirty (30) day period, then such market value shall be the amount determined in the only appraisal provided within such thirty (30) day period) or (B) a sum equal to the aggregate of the outstanding balance of principal, accrued and unpaid interest and other amounts due to pay in full all liens for Borrowed Money filed against Grantee Parcel or (C) the Purchase Price. Should the Owner of Declarant Parcel elect to repurchase Grantee Parcel pursuant to the terms of this provision, the amount due under the terms hereof shall be payable in cash at closing, which closing shall be held at the offices of

Metro National Title, in Salt Lake City at a date and time appointed by the Owner of Declarant Parcel which date shall be not less than sixty (60) and not more than ninety (90) days after the Exercise Date. Failure of the Owner of Declarant Parcel to exercise its right within the period specified above shall be deemed a waiver of its right to purchase Grantee Parcel. "Borrowed Money" shall be all financing by any bank, savings and loan association, or other independent financial institution secured by Grantee Parcel to the extent that the principal amount of such financing does not exceed the fair market value of Grantee Parcel and the improvements on Grantee Parcel at the time the financing is obtained. (The highest independent MAI appraisal obtained by a lienholder or prospective lienholder and prepared within six (6) months of the date of the funding of the financing may be relied on by such lienholder or prospective lienholder as the fair market value of Grantee Parcel and the improvements on Grantee Parcel at the time of the financing.)

(b) If the Owner of either Parcel shall default or fail in the performance or observance of any other covenant, obligation or responsibility imposed on such Owner hereunder (such Owner herein the "Defaulting Owner"), which default or failure affects the other Owner (the "Non-Defaulting Owner"), the latter shall have the following rights and remedies:

(1) The Non-Defaulting Owner shall have the right, upon the expiration of thirty (30) days after written notice to the Defaulting Owner for a non-monetary default, or ten (10) days following notice of a monetary default, to pursue full legal and equitable remedies against the Defaulting Owner, including, without limitation, the payment of reasonable attorneys' fees actually incurred as a result of pursuing said legal and equitable remedies; provided, however, for non-monetary defaults which cannot reasonably be cured within said thirty (30) day period, the Defaulting Owner shall have such additional time as may be required in order to cure the same, provided that the Defaulting Owner diligently pursues such cure to completion, as reasonably required to effect such cure; provided, further, in no event shall the Defaulting Owner have longer than a total of ninety (90) days following said notice to cure any non-monetary default; and

(2) After thirty (30) days' prior written notice to (aa) the Owner of the Parcel in default and (bb) any holder of a first priority trust deed or mortgage to secure debt (the "First Mortgage") then affecting such Parcel, or in the event of an Emergency (as hereinafter defined) after such shorter notice as is practical under the circumstances, the Non-Defaulting Owner shall have the right to go upon such Defaulting Owner's Parcel and perform such obligation on behalf of the Defaulting Owner. In such event, the Non-Defaulting Owner shall send the Defaulting Owner a bill which itemizes the costs and expenses incurred by the Non-Defaulting Owner in curing such default. The Defaulting Owner shall reimburse the Non-Defaulting Owner for said costs and expenses within thirty (30) days of its

receipt of said bill for the costs and expenses of such cure, together with interest thereon from the date of payment thereof at a rate equal to the Prime Rate, as announced from time to time by, Bank One, Dayton, NA or its successors, plus three percent (3%) per annum.

Any such claim for reimbursement, together with interest accrued thereon as aforesaid, shall be secured by an equitable charge and lien on the Parcel owned by the Defaulting Owner and improvements thereon owned by the Defaulting Owner, which lien shall be effective upon the recording of a notice thereof in the Office of the Recorder of the County in which such Parcel is located, but which lien may not be filed more than fifteen (15) days prior to the actual commencement of such work. The lien shall be subordinate to any First Mortgage and to the interest of any party who has purchased the Defaulting Owner's Parcel and leased it back to the preceding Owner, or its subsidiary or affiliate, under an SL Lease (hereafter defined); and any Grantee at any foreclosure sale (as well as any grantee by deed in lieu of foreclosure) under any such First Mortgage or any lessor or assignee of such lessor under any such SL Lease shall take title subject only to liens thereafter accruing pursuant to this Paragraph 7. Furthermore, the right of possession and leasehold interest or tenancy or any tenant or occupant of the Parcel encumbered by any lien accruing pursuant to this Paragraph 7 shall not be terminated, affected or disturbed by such lien or any foreclosure thereof.

As used herein, the term "Emergency" shall mean any condition on either Parcel, which poses an imminent risk of personal injury or serious property damage, and the term "SL Lease" shall mean a lease by which a party that has purchased the Parcel from the previous Owner has leased it back to the Owner, or its subsidiary or affiliate, on a net lease basis assuming all obligations in what is commonly referred to as a "sale-leaseback" transaction.

8. **Hazardous Substances.** Except as in compliance with all applicable Environmental Laws (as hereinafter defined), no pollutants, contaminants, chemicals, hazardous, toxic or dangerous waste, substance or material, or any other substance or material regulated or controlled pursuant to any Environmental Law now or at any time hereafter in effect, including, without limiting the generality of the foregoing, asbestos, PCBs, or other substances defined as "hazardous substances" or "toxic substances" in any Environmental Law (collectively, the foregoing are herein called "Hazardous Substances"), shall be made, stored, used, treated or disposed of on Grantee Parcel. The Owner of Grantee Parcel shall also prevent its officers, employees, agents, customers and invitees from placing, whether or not intentional, trash or Hazardous Substances on Declarant Parcel.

As used herein, the term "Environmental Law" shall mean, any federal, state, local or foreign law, statute, decree, ordinance, code, rule, or regulation, as applicable, including, without limiting the generality of the foregoing, the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, the Hazardous Materials Transportation

Act, the Resource Conservation and Recovery Act, the Toxic Substance Control Act of 1976, and any federal, state, or local so-called "Superfund" or "Superlien" law or ordinance relating to the omission, discharge, release or threatened release into the environment (including, without limitation, ambient air, surface water, groundwater or land) of any gasoline, oil or petrochemicals, or any other pollutant, contaminant, chemical, hazardous, toxic or dangerous waste, substance or material, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of such substances and any and all regulations, codes, plans, orders, decrees, judgments, injunctions, notices or demand letters issued, entered, promulgated or approved thereunder.

9. **Realty Taxes and Assessments.**

Each Owner shall pay when due, all real estate taxes and assessments which may be levied, assessed, or charged by any public authority against such Owner's Parcel, the improvements thereon or any other part thereof including, but not limited to, all assessments payable with respect to any assessment district that has been formed and recorded against such Owner's Parcel. In the event an Owner shall deem any real estate tax or assessment (including the rate thereof or the assessed valuation of the property) to be excessive or illegal, such Owner shall have the right, at its own costs and expense, to contest the same by appropriate proceedings, and nothing contained in this Paragraph shall require such Owner to pay any such real estate tax or assessment as long as (a) no other Owner's Parcel would be immediately affected by such failure to pay (or bond); and (b) the amount or validity thereof shall be contested in good faith. If the failure to pay (or bond) such tax would affect another Owner's Parcel, such other Owner shall have the right to pay such tax and shall have a lien on the nonpaying Owner's Parcel for the amount so paid until reimbursed for such payment. Any such lien shall be subject to and junior to, and shall in no way impair or defeat the lien or charge of any Mortgagee.

10. **Indemnification.**

To the extent not covered by the insurance policies described below, each Party (the "Indemnitor") will pay, and indemnify and save harmless the other Party (the "Indemnitee") from and against, all liabilities, losses, damages, costs, expenses (including attorneys' fees and expenses), causes of action, suits, claims, demands or judgments of any nature arising from: (i) any injury to or death of a person or loss of or damage to property occurring on the Indemnitor's Parcel; (ii) any use or condition of the Indemnitor's Parcel; and (iii) any negligence or tortious acts of the Indemnitor or any of his tenants, licensees, invitees, customers, agents or employees ("Claims").

11. **Property Insurance**

Each Party will at all times maintain or cause to be maintained with respect to its Parcel: (i) casualty insurance against loss or damage by fire, lightning and other risks customarily covered by an all-risks policy of property and casualty for the full replacement cost of the buildings and parking lot improvements located thereon and (ii) commercial general liability insurance (including contractual liability coverage) against claims for bodily injury, death or property damage occurring on, in or about such Party's Parcel combined single limit coverage of not less than TWO MILLION DOLLARS (\$2,000,000.00) with respect to any one

maintenance of the Declarant Parcel, property taxes and/or assessments against the Declarant Parcel, insurance, utilities, security and all other costs incurred by the Owner of the Declarant Parcel, Grantee and the Owner of the Grantee Parcel shall, on or before June 1, 2009, and each June 1<sup>st</sup> thereafter, pay to the Owner of the Declarant Parcel the sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), which sum shall be increased by two percent (2%) with the payment due June 1, 2010, and each year thereafter. The amounts payable pursuant to this Paragraph 13 are in lieu of any other fees, charges, reimbursements or compensation to which Declarant may be entitled or purport to be entitled at law or in equity from Grantee or the Owner of the Grantee Parcel.

14. **Notice.** Any notice, consent, approval or other communication provided for or required by this Declaration shall be in writing and shall be deemed to have been given (i) when delivered in person; or (ii) when deposited in the United States Mail, certified or registered, return receipt requested, postage prepaid; or (iii) when sent by nationally recognized overnight courier service which maintains evidence of receipt, properly addressed to the party to whom such notice is intended to be given.

Until notice of change of address is given to the other party in accordance with the provisions of this paragraph, notices shall be delivered, addressed or directed to the Parties hereto at the following addresses; provided, however, that if Declarant does not sell Grantee Parcel to Grantee within thirty (30) days of the recording of this Declaration, notices to the Owner of Grantee Parcel shall be addressed to the Owner of Declarant Parcel:

**Owner of Declarant Parcel:**

Strategic Assets LTD, LLC  
2398 Camelback Road, Ste. 550  
Phoenix, AZ 85016  
Attn: Douglas Fielding  
Telephone: (602) 952-9669  
Fax: (602) 952-9697  
[dfielding@marcusmillicap.com](mailto:dfielding@marcusmillicap.com)

**Owner of Grantee Parcel:**

COWABUNGA BAY LAND, LLC  
7100 Fun Center Way, Suite 110  
Tukwila, WA 98188  
Telephone: (801) 865-6294  
Fax: (801) 619-9919  
Email: [shanehuish@aol.com](mailto:shanehuish@aol.com)

Notices sent by United States Mail shall be deemed received three (3) Business Days (as hereinafter defined) from the date mailed. Notices sent by personal delivery or nationally recognized overnight courier service shall be deemed received when actually delivered. As used herein, the term "Business Day" shall mean any day except Saturday, Sunday or a legal holiday under the laws of the State of Utah.

15. **Miscellaneous.**

(a)**Grant and Declarations.** The parties hereby agree and declare that this Declaration, and all of the provisions contained herein and all of the rights, easements and obligations hereunder, shall be and constitute covenants running with the fee simple estate of the Parcels. The grants of easements, rights and privileges in this Declaration are independent of any contractual agreements undertaken by the parties in this Declaration and a breach by either party of any such contractual agreements shall not cause or result in a forfeiture or reversion of the easements, rights and privileges granted in this Declaration.

(b)**Recording and Filing.** A counterpart of this Declaration shall be recorded in the Office of the Recorder of the County of Salt Lake, State of Utah, or in such other office as may at the time be provided by law as the proper place for recordation thereof.

(c)**Waiver.** No consent or waiver, express or implied, by any party to or of any breach of default by any other party in the performance by such other party of the obligations thereof under this Declaration shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other Party of the same or any other obligations of such other Party under this Declaration. Failure on the part of any Party to complain of any act or failure to act of any other Party or to declare such other Party in default, irrespective of how long such failure continues, shall not constitute a waiver of such Party of the rights thereof under this Declaration.

(d)**Severability.** If any provision of this Declaration or the application thereof to any entity or circumstances shall be invalid or unenforceable to any extent, the remainder of this Declaration and the application of such provisions to any other entity or circumstance shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

(e)**Status Reports.** Recognizing that any party may find it necessary from time to time to establish to third parties such as accountants, banks, mortgagees or the like, the then current status of performance hereunder, the parties each agree, upon the written request of the other party, made from time to time by notice as provided in Paragraph 13 hereof, to furnish promptly a written statement (in recordable form, if requested) containing any reasonably requested information which pertains to (i) the status of this Declaration, or (ii) whether there are any defaults hereunder qualified to the best of the knowledge and belief of the party making such statement.

(f)**Terminology.** All personal pronouns used in this Declaration, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural; and the plural shall include the singular. Titles of paragraphs of this Declaration are for convenience only, and neither limit nor amplify the provisions of this Declaration, and all references in this Declaration to

paragraphs thereof shall refer to the corresponding paragraphs of this Declaration unless specific reference is made to the paragraphs of another document or instrument.

**(g)Counterparts.** This Declaration may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise but a single instrument.

**(h)Binding Declaration.** The provisions of this Declaration shall apply to, inure to the benefit of and bind the parties hereto and their respective heirs, transferees, successors and assigns thereof, including, without limitation, any mortgagee acquiring an interest in any portion of the respective Parcels thereon by reason of foreclosure, deed or assignment in lieu of foreclosure or purchase at foreclosure sale but any such mortgagee shall not incur or be required to assume any obligation under this Declaration unless and until such mortgagee has so acquired an interest in any portion of the respective Parcel thereon, and then only such as may arise by operation of law by reason or privity of estate as limited by the provisions of this Declaration. Subject to the above, whenever in this Declaration a reference to any party is made, such reference shall be deemed to include a reference to the heirs, transferees, executors, legal representatives, successors and assigns of such party.

**(i)Interpretation.** No provision of this Declaration shall be construed against or interpreted to the disadvantage of any party by any court or other governmental or judicial authority by reason of such party having or being deemed to have structured or dictated such provision.

**(j)Relationship of Parties.** No express or implied term, provision or condition of this Declaration shall be deemed to constitute the parties as partners or joint venturers nor shall anything herein create the relationship of landlord and tenant.

**(k)Non-Terminable Agreement.** No breach of the provisions of this Declaration shall entitle any Owner of a Parcel or other party to cancel, rescind or otherwise terminate this Declaration, but such limitation shall not affect, in any manner, any other rights or remedies which any party may have hereunder by reason of any breach of the provisions of this Declaration. Subject to the purchase right in Paragraph 7(a), no breach of the provisions of this Declaration shall defeat or render invalid the lien of any mortgage or deed to secure debt made in good faith for value covering any Parcel or any portion thereof or any improvements thereon.

**(l)Term.** This Declaration and the easements, rights, restrictions, obligations and liabilities created hereby shall be perpetual to the extent permitted by law. To the extent applicable law would limit the term of any of the foregoing, the term thereof shall be automatically renewed for a period equal to the lesser of twenty (20) years or the longest period permitted by applicable law unless both Owners agree to the contrary and file a notice to such effect with the Recorder of the

county in which the Parcels are located prior to the expiration of the then current term.

**(m)Governing Law.** This Declaration shall be governed by and construed in accordance with the laws of the State of Utah.

**(n)Modifications.** This Declaration maybe modified, amended or terminated in whole or in part, only by a written instrument executed and acknowledged by all of the then Owners (and their respective mortgagees, if any) of Declarant Parcel and Grantee Parcel.

**(o)Taxes.** The Parcel Owners shall be responsible for paying the real estate taxes assessed on their respective Parcels.

**(p)Non-Merger.** In the event that fee simple title to the Parcels is held by one Owner, the terms, covenants, easements and obligations set forth in this Declaration shall not automatically merge into said fee simple estate.

**(q)Limitation on Liability.** In the event that any Owner sells or otherwise transfers all such Owner's Parcel to an unrelated third party, such Owner shall automatically be relieved of any further obligation or liability hereunder with respect to such Parcel, and the rights and obligations of such Owner with respect to such Parcel shall automatically pass to and be assumed by such Owner's successor-in-title to such Parcel.

**(r)No Third Party Beneficiaries.** The rights and obligations under this Declaration are for the benefit of the Owner of Declarant Parcel and the Owner of Grantee Parcel and shall not be construed as conferring upon or giving to any



to such Parcel shall automatically pass to and be assumed by such Owner's successor-in-title to such Parcel.

(r) **No Third Party Beneficiaries.** The rights and obligations under this Declaration are for the benefit of the Owner of Declarant Parcel and the Owner of Grantee Parcel and shall not be construed as conferring upon or giving to any person other than the Owners (including, without limitation, their successors and assigns) any rights or benefits under or by reason of this Declaration.

**IN WITNESS WHEREOF**, the Declarant has signed and sealed this Declaration effective as of the day and year first above written.

<p>DRAPER LTD, LLC, an Arizona limited liability company</p> <p>By: <u>[Signature]</u> Its: <u>MANAGING member</u> Date: <u>11-19-08</u></p>	<p>SANCHEZ UTAH II, LLC, a Utah limited liability company</p> <p>By: <u>[Signature]</u> Its: <u>MANAGERS MANAGER</u> Date: <u>11/18/08 11/18/2008</u></p>
<p>STRATEGIC ASSETS LTD, LLC, an Arizona limited liability company</p> <p>By: <u>[Signature]</u> Its: <u>MANAGING member</u> Date: <u>11-19-08</u></p>	

State of Utah )

:SS

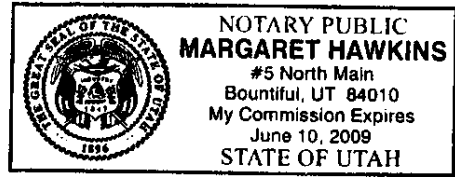
County of Davis )

On November 18, 2008, before me, Margaret Hawkins Notary Public, personally appeared Joshua and Augustus Sanchez, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Utah that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Margaret Hawkins (Seal)



State of Arizona )  
:SS  
County of Maricopa )

On November 19, 2008, before me, Sonia C Pedro, Notary Public, personally appeared Douglas K. Guelding, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Arizona that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Sonia C Pedro (Seal)



State of Arizona )  
:SS  
County of Maricopa )

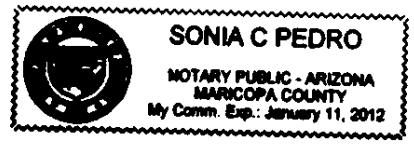
On November 19, 2008, before me, Sonia C Pedro, Notary Public, personally appeared Douglas K. Guelding, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Arizona that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature *Sonia C Pedro*

(Seal)



**EXHIBIT A**

**LEGAL DESCRIPTION OF GRANTEE PARCEL**

**Eastgate Subdivision  
Revised Lot 104**

**January 12, 2009**

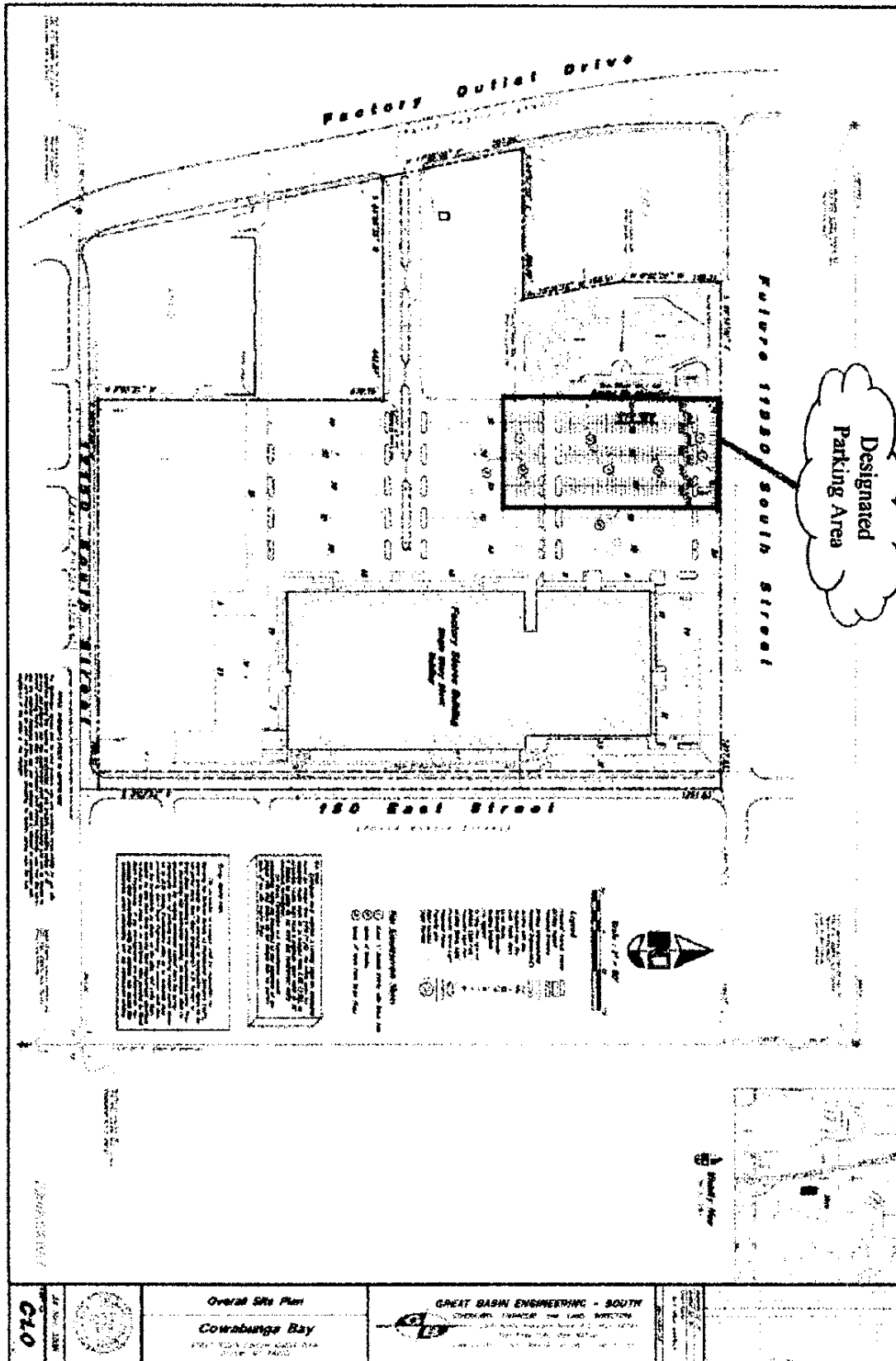
All of Lot 104 and a part of Lot 103 of the East Gate Subdivision within the Northwest Quarter of Section 30, Township 3 South, Range 1 East, Salt Lake Base and Meridian, U.S. Survey in Salt Lake County, Utah:

Beginning at the Northwest Corner of said Lot 103 on the South Line of 11950 South Street as it exists at 30.00 foot half-width located 1366.58 feet South  $0^{\circ}03'30''$  East along the Quarter Section Line; and 2110.10 feet North  $89^{\circ}57'50''$  West from the North Quarter Corner of said Section 30; and running thence South  $0^{\circ}02'10''$  West 125.22 feet along the West Line of said Lot 103; thence South  $89^{\circ}57'50''$  East 54.00 feet; thence South  $0^{\circ}02'10''$  West 87.00 feet; thence North  $89^{\circ}57'50''$  West 54.00 feet to said West Line of Lot 103; thence South  $0^{\circ}02'10''$  West 181.16 feet along said West Line to an angle point of said Lot 103; thence North  $89^{\circ}57'50''$  West 193.69 feet along said Lot 103 to the Southeast Corner of Lot 3 of the Factory Stores of America Subdivision; thence along the East Line of said Lot 3 the following two courses: North  $10^{\circ}39'34''$  West 198.51 feet; and North  $0^{\circ}02'25''$  West 198.31 feet to the Northeast Corner thereof being on the South Line of said 11950 South Street; thence South  $89^{\circ}57'50''$  East 230.80 feet along said South Line to the point of beginning.

**Contains 91,818 sq. ft.  
or 2.108 acres**

**EXHIBIT B**  
**DEPICTION OF DESIGNATED PARKING AREA**

[SEE ATTACHED]

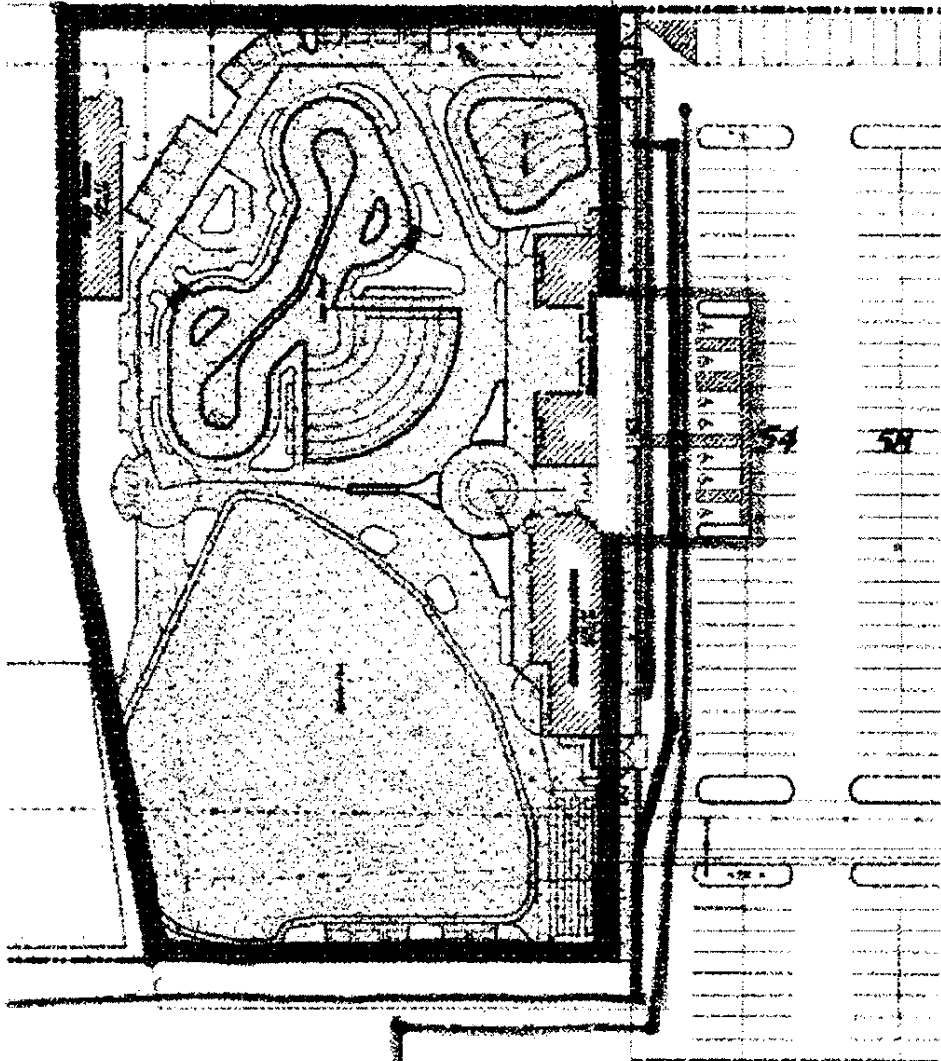


**EXHIBIT C**

**DEPICTION OF 3' STORM DRAIN EASEMENT, SEWER EASEMENT,  
AND SUBDRAIN EASEMENT**

[SEE ATTACHED]

PLATE 1980 SOUTH STREET



- Sewer
- Storm Drain
- Sub-Drain
- Property Lines

50 50



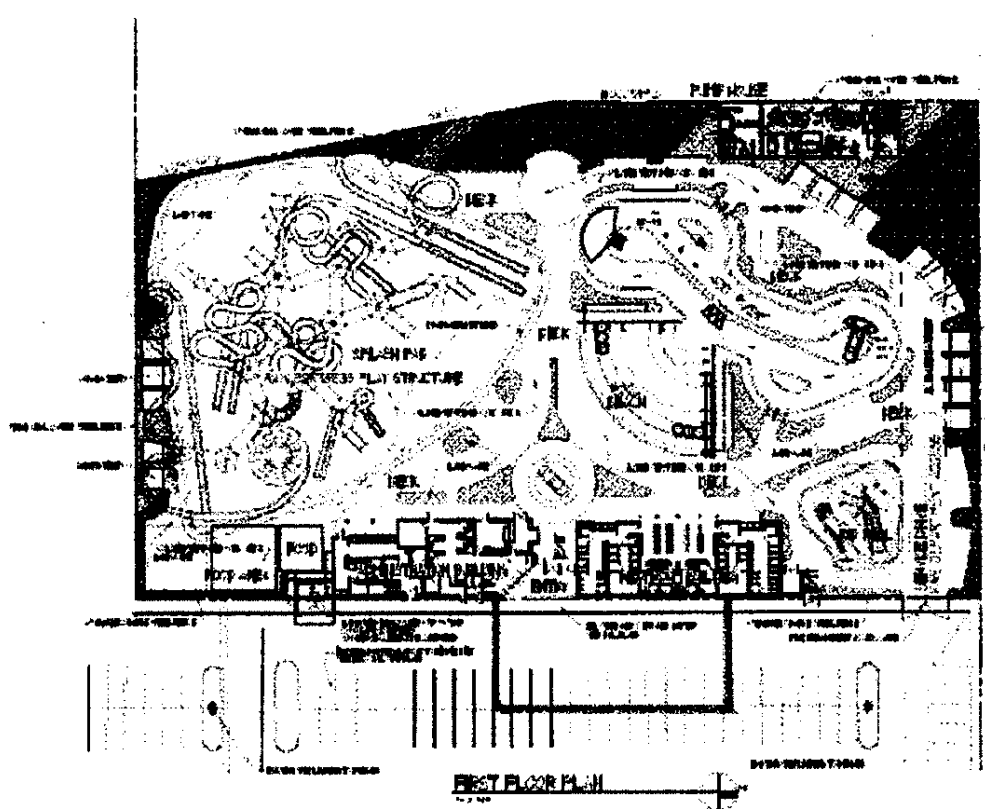
**EXHIBIT D**  
**PRELIMINARY PLANS AND SPECIFICATIONS**

[SEE ATTACHED]

**EXHIBIT D(1)**

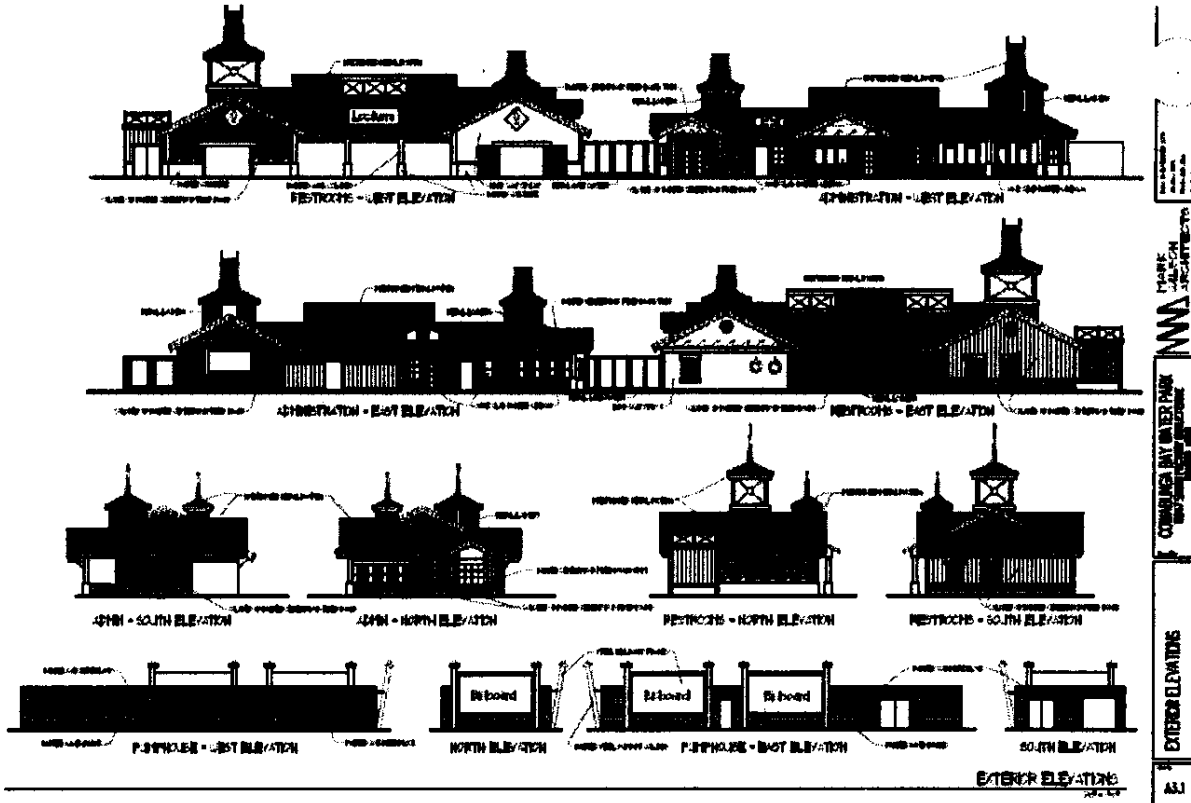
**GENERAL NOTES**

- 1. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
- 2. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
- 3. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.
- 4. ALL DIMENSIONS ARE TO FACE UNLESS OTHERWISE NOTED.



<p>DATE: 10/15/08                  DRAWN BY: [Name]                  CHECKED BY: [Name]</p>
<p>COMMERCIAL INTERIORS                  ARCHITECTURE</p>
<p>ARCHITECTURAL SITE PLAN</p>
<p>AS1</p>

**EXHIBIT D(2)**



**EXHIBIT E**  
**LOCATION OF GREASE TRAP EASEMENT**

[SEE ATTACHED]

