

Entry 2017003916
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31-May-17 03:46
BRENDA MCDONALD
RECORDER, UINTAH COUNTY, UTAH
COTTONWOOD TITLE INSURANCE AGENCY, INC.
1996 EAST 6400 SOUTH SUITE 120, SALT LAKE CITY, UTAH 8412
Rec By: April McRae, Deputy Recorder
Electronic Recording

WHEN RECORDED MAIL TO:

Parr Brown Gee & Loveless
101 South 200 East, Suite 700
Salt Lake City, Utah 84111

File No.: 83376-AM

Ent 2017003916
Book 1521 Pg 621

OPTION AND ASSUMPTION AGREEMENT

In Reference to Tax ID Number(s):

05-078-0026, 05-078-0038, 05-078-0046, 05-081-0028 and 05-080-0037

**AFTER RECORDING,
PLEASE RETURN TO:**

Parr Brown Gee & Loveless
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Attention: Lamont R. Richardson

OPTION AND ASSUMPTION AGREEMENT

THIS OPTION AND ASSUMPTION AGREEMENT (this “**Agreement**”) is entered into as of May 30, 2017, between **GARDNER TOWNE CENTER, LLC**, a Utah limited liability company (“**Gardner**”), and **REGENCY VERNAL LLC**, a Delaware limited liability company (“**Regency**”). (Gardner and Regency are referred to in this Agreement individually as a “**Party**,” and collectively as the “**Parties**”).

RECITALS

A. Gardner is the owner of certain real property located in the City of Vernal, County of Uintah, State of Utah, in a development commonly known as “Vernal Towne Center,” as more particularly described on Exhibit “A” attached hereto and made a part hereof (the “**Gardner Property**”).

B. Gardner, as seller, and Regency as successor in interest to Regency Commercial Associates LLC, as buyer, have entered into that certain Agreement for Purchase of Real Estate, dated February 3, 2017, (as amended, the “**Purchase Agreement**”), for the purchase and sale of certain real property located in the Vernal Towne Center and adjacent to the Gardner Property, as more particularly described on Exhibit “B” attached hereto and made a part hereof (the “**Regency Property**”).

C. This Agreement is made pursuant to, and is required by, the Purchase Agreement for the purpose of (a) granting Regency a right of first refusal as to the Gardner Property, (b) memorializing Regency’s assumptions of certain obligations of Gardner under that certain Participation Agreement dated June 6, 2013 (as amended, restated, supplemented or otherwise modified from time to time, the “**Participation Agreement**”), by and between Gardner and the Vernal City Community Development and Renewal Agency (the “**CDA**”), subject to the terms and conditions set forth below, and (c) memorializing Gardner’s covenants regarding the use of the Gardner Property.

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Right of First Refusal.

(a) After the date hereof, if (i) Gardner shall receive a bona fide offer from any third party for the purchase of the Gardner Property or any portion thereof which offer Gardner desires to accept, or (ii) if Gardner desires to sell or make a bona fide offer to sell the Gardner Property or any portion thereof to a third party, then Gardner shall deliver to Regency a written notice setting forth the economic terms and conditions of the proposed transaction, and if available, a copy of such offer (the "**Written Notice of Proposed Sale**"). Regency may, within ten (10) business days after Gardner's delivery of the Written Notice of Proposed Sale, elect, by delivering written notice to Gardner within such ten (10) business day period ("**Regency's Acceptance Notice**"), to purchase the Gardner Property on the same terms and conditions as those set forth in the Written Notice of Proposed Sale ("**Right of First Refusal**" or "**ROFR**"). In the event Regency timely delivers Regency's Acceptance Notice, Gardner and Regency shall, within thirty (30) days of Regency's delivery of Regency's Acceptance Notice, enter into a purchase contract for the Gardner Property setting forth the terms of the Written Notice of Proposed Sale, but otherwise on terms substantially similar to the Purchase Agreement (the "**ROFR Purchase Agreement**"). If Regency does not deliver Regency's Acceptance Notice within such ten (10) business day period, Regency shall be deemed to have elected to not purchase the Gardner Property. In the event Regency does not desire to purchase the Gardner Property on the terms set forth in the Written Notice of Proposed Sale, Regency agrees to deliver to Gardner a written notice indicating that Regency is not exercising its rights as provided in this Section 1, provided, Regency's failure to deliver such notice shall not in any way extend such five (5) business day period. If Regency fails to deliver Regency's Acceptance Notice and Gardner thereafter conveys the Gardner Property to a third party, or if Regency delivers Regency's Acceptance Notice but thereafter fails to enter into the ROFR Purchase Agreement within such thirty (30) day period or thereafter terminates the ROFR Purchase Agreement for any reason (other than a default by Gardner), Regency's rights under this Section 1 shall be forever terminated, provided, however, in the event that any proposed sale as to which Regency did not exercise its right of first refusal as above provided, is not consummated by Gardner within 270 days after notice thereof was given to Regency, or if prior to the closing of such transaction the purchase price is reduced (or credits are granted reducing the purchase price, other than for customary prorations) by more than five percent (5%) of the purchase price set forth in the Written Notice of Proposed Sale, then Regency's rights under this Section 1 shall not terminate and the Gardner Property must be reoffered to Regency in the same manner provided above. Notwithstanding the foregoing, the rights granted to Regency in this Section 1 shall not apply to a sale of Lot "F" of the Gardner Property ("**Lot F**"), as described on Exhibit "A", to Native Grill & Wings or Chili's Grill & Bar. Upon a sale of Lot F to either such party, Regency's rights under this Section 1 shall be forever terminated as to Lot F.

(b) If the consideration to be paid pursuant to any acceptable third party offer to purchase the Gardner Property or otherwise acquire the same from Gardner, or any other

transaction subject to this right of first refusal, shall include consideration other than cash, Regency may exercise its right of first refusal with respect to such transaction and shall pay as consideration therefor the same amount of cash and like kind consideration as set forth in the proposed offer, or an all cash purchase price in an amount equal to the sum of the cash portion of the consideration, plus cash equal to the fair market value of the other consideration which the offeror proposed to exchange for the Gardner Property. If any acceptable third party offer to Gardner shall include other property owned by Gardner, Regency's rights under this Section 1 shall apply only to the Gardner Property for the purchase price allocated to the Gardner Property by Gardner and such third party; provided, however, that such purchase price allocation shall be substantially based on the then current fair market value of the Gardner Property.

(c) The rights granted to Regency in this Section 1 shall not apply to a granting of a Mortgage or to the foreclosure, delivery of a deed in lieu of foreclosure or similar action of a Mortgagee, nor shall such rights apply to the granting of a lease, license, or easement related to the Gardner Property or any portion thereof. Notwithstanding the foregoing, the granting of a Mortgage or the foreclosure, delivery of a deed in lieu of foreclosure or similar action of a Mortgagee shall not terminate the covenants and restrictions set forth in Section 1(e).

(d) Notwithstanding anything contained herein to the contrary, the rights granted to Regency herein are personal to Regency. The rights of Regency under this Agreement may not be assigned, sold, pledged, encumbered, conveyed or otherwise transferred (whether directly, indirectly or as security) to any party without the prior written consent of Gardner in each instance, which approval may be withheld at Gardner's sole and absolute discretion; provided, however, the Right of First Refusal of Regency under this Agreement may be freely assigned to any wholly owned subsidiary of Regency's parent company, Regency Commercial Associates LLC, upon notice to, but without the prior written consent of, Gardner. Any assignment that is not permitted by this Agreement is and shall be null and void for all purposes.

(e) Covenants of Gardner. Gardner covenants as follows:

(i) The businesses operated on the Gardner Property shall be consistent with the type of businesses typically found in a first class shopping center and shall not violate any exclusives or prohibited uses applicable to the Regency Property, or operate the Gardner Property in violation of the leases of the Regency Property, as such leases are in effect as of the date hereof ("**Existing Leases**"). Gardner hereby represents and warrants that Gardner is familiar with and aware of all terms and conditions of the Existing Leases. The covenants set forth in this section 1(e)(i) relating to leases of the Regency Property shall not apply to leases entered into after the date hereof nor to any amendments or modifications to such leases after the dates hereof but shall include and apply to any renewals or extensions of Existing Leases to the extent pursuant to a right set forth in an Existing Lease and any amendments or modifications that do not amend or modify the obligations of Gardner hereunder or which are consented to by Gardner. Regency shall have the right, but not the obligation, to submit any proposed amendment or modification of an Existing Lease to Gardner for approval which approval shall not be unreasonably withheld, conditioned or delayed. It shall be reasonable for Gardner to withhold consent if such amendment or modification of an Existing Lease imposes additional liability or obligation on Gardner.

(ii) Gardner shall not lease any space within any improvements constructed on the Gardner Property to any person or entity or an affiliate of such person or entity that is, or was in the prior (6) month period, a tenant of the Regency Property.

(iii) All improvements constructed on the Gardner Property shall be constructed with the same quality and with the same architectural character as the improvements located on the Regency Property as of the date hereof.

(iv) In the event of destruction to the improvements on the Gardner Property, such improvements shall either be razed or restored with the same quality and with the same architectural character as the improvements located on the Regency Property as of the date hereof.

(f) Right of First Refusal and Covenants to Run with the Land. Regency's rights under Section 1 and the covenants of Gardner under Section 1(e) shall run with the title to the Gardner Property and shall be binding on Gardner's successors and assigns.

2. Assumption of Obligations.

(a) Assumption. Upon and subject to the terms and conditions of this Agreement, Regency hereby assumes and agrees to perform all of the obligations, terms and covenants of Gardner with respect to the Regency Property under each of Sections 2.4, 4.4, 5.1, 5.3, 5.7 and 5.9 of the Participation Agreement (collectively, the "**Assumed Obligations**") to the extent such Assumed Obligations arise subsequent to the date hereof.

(b) Reimbursement Rights. Notwithstanding anything to the contrary herein, Gardner has not transferred and has fully retained the entire right, title and interest of Gardner in and to any tax increment reimbursement or other amounts payable to Gardner under the Participation Agreement (the "**Reimbursement Rights**") and shall be entitled to receive all such Reimbursement Rights. In the event Regency receives any payments constituting the Reimbursement Rights, Regency shall hold such payments in trust and shall pay such amounts to Gardner within five (5) business days of Regency's receipt of such funds.

3. Consenting Owner. Pursuant to the provisions of document entitled Easements, Covenants, Conditions and Restrictions dated May 2, 2007, by and between Vernal Town Center Partners, LLC, a Nevada limited liability company (the predecessor in interest to Gardner), and Lowe's HIW Inc., a Washington corporation (as amended, the "**Lowe's Declaration**"), Gardner is a Consenting Owner, as such term is defined in the Lowes Declaration, and, pursuant to the Lowes Declaration, Gardner shall remain as a Consenting Owner while Gardner is the owner of the Gardner Property. If any action under the Lowes Declaration requires the consent of the Consenting Owner, prior to granting such consent, Gardner shall first obtain the consent of Regency to such action, which consent of Regency shall not be unreasonably withheld, conditioned or delayed and shall be deemed granted, if not denied, within ten (10) business days of Gardner's delivery to Regency of a request for such consent. In the event Regency elects not to give Regency's consent, Regency shall deliver written notice to Gardner within such ten (10)

business day period, which notice shall include a reasonably detailed explanation of the reasons Regency will not provide its consent and what changes, if made, would cause Regency to give its consent. Notwithstanding the foregoing to the contrary, Regency's consent shall not be required with respect to any action taken by the Consenting Owner to enforce the provision of the Lowes Declaration against Regency or the Regency Property. At such time as Gardner is no longer an owner of the Gardner Property, the rights of the Consenting Owner shall, without any further action on the part of Gardner or Regency, be automatically vested in the Owner of Parcel K of the Regency Property.

4. Subordination. This Agreement is and shall remain subject and subordinate to any Mortgage now or hereafter encumbering the Gardner Property; provided, however, the covenants and restrictions set forth in Section 1(e) are applicable to holder of such mortgage, deed of trust or such other security instrument. Regency agrees to execute a subordination or such other document, in form and substance acceptable to Regency, which acceptance shall not be unreasonably withheld, conditioned or delayed, for the sole purpose of confirming the provisions of this Section as may be required by the holder of such mortgage, deed of trust or other security interest.

5. Default. If either Party fails to perform or delays performance of any term or provision of this Agreement or any representation, warranty or covenant made herein proves to be false or misleading in any material respect, such conduct shall constitute default hereunder. In the event of a default, the non-defaulting Party shall be entitled to pursue all rights and remedies available at law or in equity; provided, however, that the non-defaulting Party shall have no right to exercise a right or remedy unless the subject default continues uncured, in the case of a monetary default, for a period of five (5) days after written notice, and in the case of a nonmonetary default, for a period of thirty (30) days after written notice (or, where such nonmonetary default is of a nature which cannot be cured within such thirty (30) day period, the defaulting party fails to commence such cure within thirty (30) days and to diligently proceed to complete the same).

6. Binding Effect. This Agreement shall inure to the benefit of, and be binding on, the Parties and their respective successors and assigns. The obligations of the Parties under this Agreement shall run with and be binding on the Land until terminated as provided herein.

7. Entire Agreement. This Agreement, including the exhibits attached hereto, constitute the entire agreement between the Parties with respect to the matters set forth herein. All exhibits mentioned in this Agreement are incorporated herein by reference. No subsequent amendment to this Agreement shall be binding upon Gardner or Regency unless reduced to writing and signed by the Party against whom such enforcement is sought. Submission of this Agreement for examination does not constitute an option for the Gardner Property and becomes effective only upon execution and delivery hereof by the Parties. There are no representations or promises by either Party to the other except as are specifically set forth herein. This Agreement supersedes and revokes all previous conversations, negotiations, arrangements, letters of intent, writings, brochures, understandings, and information conveyed, whether oral or in writing, between the Parties and their respective affiliates. The captions and section numbers appearing

herein are inserted only as a matter of convenience and are not intended to define, limit, construe, or describe the scope or intent of any section or paragraph.

8. Attorneys' Fees. If Gardner or Regency is the prevailing party in any legal proceeding brought under or with relation to this Agreement, such prevailing party shall be additionally entitled to recover court costs and reasonable attorney fees, and all other litigation expenses, including deposition costs, travel, and expert witness fees, from the non-prevailing party.

9. Notices. Any notices, requests, elections or other communications required or permitted to be given hereunder shall be in writing and shall be delivered by either courier (including Federal Express or other such courier services) or deposited with the United States Postal Service for delivery by registered or certified mail, return receipt requested, postage fully prepaid and properly addressed to the Party to whom the communication is directed at its address set forth below:

To Gardner: Gardner Towne Center, LLC
201 South Main Street, Suite 2000
Salt Lake City, UT 84111
Attn: Rulon C. Gardner
Telephone: 801-456-1280

With Copy To: Lamont R. Richardson, Esq.
Parr Brown Gee & Loveless
101 South 200 East, Suite 700
Salt Lake City, UT 84111
Telephone: 801-532-7840

To Regency: Regency Vernal LLC
330 Cross Pointe Boulevard
Evansville, IN 47715-4027
Attn: Kevin L. Hammett
Telephone: 812-424-9200

With Copy To: Christopher L. Lucas, Esq.
Jackson Kelly, PLLC
221 N.W. Fifth Street
P.O. Box 1507
Evansville, IN 47706
Telephone: 812-422-9444

Any such notice, request, election or other communication shall be considered given on the date of such hand or courier delivery or deposit with the United States Postal Service, and shall be considered received on the date of hand or courier delivery or on the third (3rd) day following deposit with the United States Postal Service in the manner provided above. Rejection or other refusal to accept or inability to deliver because of a changed address as to which no notice was

given shall nevertheless be deemed to have been received by the addressee. Either Party may by like notice at any time, and from time to time, designate a different address to which communications shall be sent.

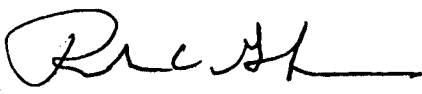
10. General Provisions. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws (excluding the choice of laws rules) of the state of Utah. This Agreement may be executed in any number of duplicate originals or counterparts, each of which when so executed shall constitute in the aggregate but one and the same document.

[Signature page immediately follows]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.


“GARDNER”

GARDNER TOWNE CENTER, LLC,
a Utah limited liability company

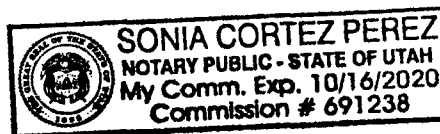
By: 
Printed Name: Rulon C. Gardner
Title: Manager

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

On this 30 day of MAY, 2017, personally appeared before me Rulon C. Gardner, the Manager of Gardner Towne Center, LLC, a Utah limited liability company, on behalf of said company.


NOTARY PUBLIC
Residing at: DAVIS COUNTY, UT

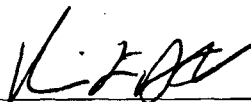
My Commission Expires: 10.16.20



SIGNATURE PAGE TO OPTION AND ASSUMPTION AGREEMENT

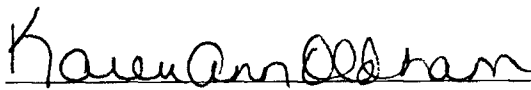
“REGENCY”

REGENCY VERNAL LLC,
a Delaware limited liability company
by: Regency Commercial Associates LLC,
its Manager

By: 
Printed Name: Kevin L. Hammett
Title: President and CEO

STATE OF INDIANA)
 : ss.
COUNTY OF VANDERBURGH)

On this 26 day of May, 2017, personally appeared before me Kevin L. Hammett, the President and CEO of Regency Commercial Associates LLC, the Manager of Regency Vernal LLC, a Delaware limited liability company, on behalf of said company.


NOTARY PUBLIC
Residing at: _

My Commission Expires:

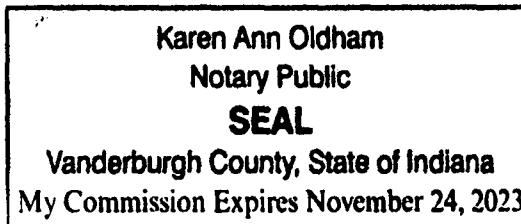


Exhibit "A"

Legal Description of Gardner Property

LOT F AMENDED: 05:078:0046 SESW 05:078:0040 SESW

Beginning at a point that is 987.65 feet North 30°31'10" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 44°00'10" East parallel with the Southeast right-of-way line of U.S. Highway 40, 180.91 feet; thence North 38°06'04" East 36.14 feet; thence South 46°01'35" East 223.33 feet; thence South 43°58'25" West 19.26 feet; thence South 46°01'35" East 175.29 feet; thence South 87°36'58" West 392.89 feet; thence North 02°23'02" West 36.16 feet to the point of tangency of a curve concave to the Southwest having an internal angle of 43°36'47" and a radius of 115.00 feet and an arc length of 87.54 feet, and a chord direction of North 24°12'30" West, chord length of 85.44 feet; thence along curve 87.54 feet; thence North 45°59'50" West perpendicular to the said right-of-way line 217.60 feet; thence North 44°00'10" East along said highway right-of-way line 30.00 feet; thence South 45°59'50" East perpendicular with said highway right-of-way line 199.20 feet to the point of beginning.

LOT G AMENDED: 05:078:0041 SESW 05:078:0042 SESW

Beginning at a point that is 1069.52 feet North 19°18'19" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 38°06'04" East 238.22 feet; thence North 45°59'50" West perpendicular to the Southeast right-of-way line of U.S. Highway 40, 170.99 feet; thence North 44°00'10" East along said highway right-of-way line 24.00 feet; thence South 45°59'50" East perpendicular with said highway right-of-way line 376.22 feet; thence South 43°58'25" West 115.72 feet; thence South 46°01'35" East 42.46 feet; thence South 43°58'25" West 145.14 feet; thence North 46°01'35" West 223.33 feet to the point of beginning.

Exhibit "B"

Legal Description of Regency Property

PARCEL 1:

LOT A AMENDED: 05:078:0026 SESW

Beginning at a point that is 1214.54 feet North 09°47'37" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 45°59'50" West perpendicular to the Southeast right-of-way line of U.S. Highway 40, 170.99 feet; thence South 44°00'10" West along the said highway right-of-way line 302.23 feet; thence South 45°59'50" East perpendicular to the said highway right-of-way line 199.20 feet; thence North 44°00'10" East parallel with said highway right-of-way line 29.33 feet; thence North 38°06'04" East 274.35 feet to the point of beginning.

LOT C AMENDED: 05:078:0038 SESW

Beginning at a point that is 810.27 feet North 55°18'44" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 45°59'50" West perpendicular to the Southeast right-of-way line of U.S. Highway 40, 351.45 feet; thence North 44°00'10" East along the said highway right-of-way line 173.21 feet; thence South 45°59'50" East perpendicular with said highway right-of-way line 199.57 feet; thence South 44°00'10" West parallel with said highway right-of-way line 28.51 feet; thence South 02°23'02" East 209.77 feet to the point of beginning.

LOT D AMENDED: 05:078:0046 SESW

Beginning at a point that is 952.39 feet North 43°27'58" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 45°59'50" West perpendicular to the Southeast right-of-way line of U.S. Highway 40, 199.57 feet; thence North 44°00'10" East along the said highway right-of-way line 161.51 feet; thence South 45°59'50" East perpendicular to said highway right-of-way line 199.57 feet; thence South 44°00'10" West parallel with said highway right-of-way line 161.51 feet to the point of beginning.

EXCEPTING THEREFROM the following:

A parcel of land being part of an entire tract located in the Southeast quarter of the Southwest quarter of Section 28, Township 4 South, Range 21 East, Salt Lake Meridian, the boundary lines of said parcel are described as follows: Beginning at a point situated on the Northwest line of said entire tract, said point also being situated on the Southeasterly right of way line of U.S. Highway 40, as it presently exists, said point also being South 88°01'08" West 679.19 feet and North 02°23'15" West 938.09 feet from the South quarter corner of said Section 28, said point also being located at the Engineers Station 45+25.00, 51.00 feet right of the control line for U.S. Highway 40 for the Utah Department of Transportation Project S-0040(138)114; thence North

44°00'18" East 45.00 feet along said right of way line of U.S. Highway 40 to the Northerly corner of said entire tract; thence South 45°59'47" East 18.31 feet along the Northeasterly line of said entire tract; thence North 77°02'01" West 5.82 feet; thence South 44°00'18" West 15.16 feet; thence South 70°24'54" West 29.97 feet to the point of beginning as shown on the official map of said project on file in the office of the Utah Department of Transportation.

LOT K AMENDED: 05:081:0028 SWSE 05:080:0037 NWSE

Beginning at a point on the quarter section line that is 220.00 feet North 02°23'02" West from the South quarter corner of Section 28, Township 4 South, Range 21 East, Salt Lake Base and Meridian; thence North 88°00'48" East parallel with the South line of the Southeast quarter of said section, 254.00 feet; thence North 02°23'02" West parallel with the South line of said quarter section, 441.62 feet, thence North 88°04'33" East along the aliquot part line 410.68 feet; thence North 02°12'24" West along the aliquot part line 661.17 feet; thence South 88°08'17" West along the aliquot part line 266.02 feet; thence North 00°46'58" West 184.88 feet; thence South 89°26'11" West 114.06 feet; thence North 45°54'35" West 91.61 feet; thence South 44°00'10" West parallel to the Southeast right-of-way line of U.S. Highway 40, 235.67 feet; thence North 45°59'50" West perpendicular to the said highway right-of-way line 145.50 feet; thence North 44°00'10" East parallel to said highway right-of-way line, 7.00 feet; thence North 45°59'50" West perpendicular to the said highway right-of-way line 23.00 feet; thence South 44°00'10" West along the said highway right-of-way line 67.00 feet; thence South 45°59'50" East perpendicular to the said highway right-of-way line 168.50 feet; thence South 44°00'10" West parallel with said highway right-of-way line 215.00 feet; thence South 45°59'50" East perpendicular to the said highway right-of-way line 207.72 feet; thence South 43°58'25" West 115.72 feet; thence South 46°01'35" East 42.46 feet; thence South 43°58'25" West 164.40 feet; thence South 46°01'35" East 175.29 feet; thence North 87°37'11" East 50.12 feet; thence South 02°23'02" East along the quarter section line 501.46 feet to the point of beginning.

PARCEL 1A:

A non-exclusive right-of-way and easement for vehicular and pedestrian ingress and egress as established in the Declaration of Easements, Covenants and Restrictions for Vernal Towne Center and recorded as Entry No. 2013000530 in Book 1313 at Page 730.