

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Jun 12, 2014

Action Requested By: Urban Development

Agenda Type: Resolution

Subject Matter:

City of Huntsville and Attitude, LLC.

Exact Wording for the Agenda:

Resolution authorizing the Mayor to execute an Agreement between the City of Huntsville and Attitude, LLC, for the purchase of right-of-way and green space related to Cabela's Drive.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: _____

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

[Empty box for providing details on why the action is required, why it is recommended, what council action will provide, allow and accomplish, and any other helpful information.]

Associated Cost: _____

Budgeted Item: _____

MAYOR RECOMMENDS OR CONCURS: _____

Department Head: Shane Davis

Date: 6-11-14

ROUTING SLIP CONTRACTS AND AGREEMENTS

Originating Department: Urban Development Council Meeting Date: 6/12/2014

Department Contact: Shane Davis Phone # 5310

Contract or Agreement: Agreement between the City of Huntsville and Attitude, LLC.

Document Name: Agreement between the City of Huntsville and Attitude, LLC.

City Obligation Amount:

Total Project Budget:

Uncommitted Account Balance:

Account Number:

Procurement Agreements

Not Applicable

Not Applicable

Grant-Funded Agreements

Select...

Grant Name:

Department	Signature	Date
1) Originating	<i>Shane Davis</i>	6-11-14
2) Legal	<i>[Signature]</i>	6-11-14
3) Finance		
4) Originating	<i>Shane Davis</i>	6-11-14
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		

RESOLUTION NO. 14-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and hereby authorized to enter into an Agreement between the City of Huntsville and Attitude, LLC on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Agreement between the City of Huntsville and Attitude, LLC," consisting of Thirteen (13) pages, and the date of June 12th, 2014, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 12th day of June, 2014.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 12th day of June, 2014.

Mayor of the City of
Huntsville, Alabama

REAL ESTATE PURCHASE AGREEMENT

This Real Estate Purchase Agreement (this "Agreement") is made and entered into by and between **THE CITY OF HUNTSVILLE, an Alabama municipal corporation** (hereinafter referred to as either "Purchaser" or the "City") which agrees to purchase the real properties and existing road improvements described in Paragraph One (1) of this Agreement from **ATTITUDE, LLC, an Alabama limited liability company** (hereinafter referred to as either "Seller", or "Attitude"), which agrees to sell the Properties.

IT IS THEREFORE UNDERSTOOD AND AGREED THAT:

1. Sale and Purchase:

Seller hereby agrees to grant, bargain, sell and convey to Purchaser those certain real properties and existing road improvements lying and being situated in Madison County, Alabama, and being more specifically described in Exhibit "A" and Exhibit "B", and the Purchaser hereby agrees to grant, bargain, sell and convey to Seller that certain real property lying and being in Madison County, Alabama and being more specifically described in Exhibit "C"; said Exhibits being attached hereto and made a part hereof by reference (hereinafter collectively referred to as "the Properties" or individually as the appropriate "Exhibit"). **A map reflecting the location of the Properties described in Exhibit "A", Exhibit "B" and Exhibit "C" is attached hereto as Exhibit "D" and made a part hereof by reference. The legal descriptions of all Properties shall be adjusted by survey or recording of subdivision plats as required by this Agreement.**

2. Purchase Price:

The Purchase Price for the Properties shall be **THREE MILLION FIVE HUNDRED EIGHTY FOUR THOUSAND TWO HUNDRED AND NO/100 (\$3,584,200.00) DOLLARS**, which shall be payable at Closing by Purchaser at Closing, less a credit for Earnest Money remitted by Purchaser and less a credit in the amount of **SIX HUNDRED FIFTY THOUSAND AND NO/100 (\$650,000.00) DOLLARS**, for the real property described in Exhibit "C" to be conveyed by Purchaser to Seller pursuant to the terms of this Agreement as hereinafter set out. The total net amount due by the Purchaser for the Purchase Price at Closing shall be **TWO MILLION NINE HUNDRED THIRTY FOUR THOUSAND TWO HUNDRED AND NO/100 (\$2,933,200.00) DOLLARS**.

3. Earnest Money:

A total of **\$1,000.00** in Earnest Money (the "Earnest Money") shall be held by **Title Services, Inc., as an Agent for Stewart Title Guaranty Company** (the "Escrow Agent") payable by Purchaser to Escrow Agent within five (5) days from the date of Seller's execution of this Agreement. In the event of Closing, the Earnest Money shall be credited toward the balance of the Purchase Price due by Purchaser to Seller at Closing. The Earnest Money shall be refunded to Purchaser upon Purchaser's request to Escrow Agent in the event that (a) Seller is

unable to convey good and merchantable title or fails to cure a title defect or title objection as set out in this Agreement and/or (b) if any of the Contingencies of this Agreement are not met or fulfilled.

4. Contingencies for Closing:

(i) Purchaser obtaining the approval of the Huntsville City Council for its acquisition of the Properties and existing road improvements described in Exhibit "A" and Exhibit "B" and the conveyance to Seller of the real property described in Exhibit "C" as more particularly hereinafter set out.

(ii) Purchaser's written approval of an owner's title commitment issued by Title Services, Inc., which also be referred to as the "Title Agent". Within fifteen (15) days of the deposit of the Earnest Money, Seller shall cause a written commitment of title insurance in the amount of the Purchase Price to be issued by **Title Services, Inc., (the "Title Agent"), an Agent for Stewart Title Guaranty Company, or other Title Company acceptable to Purchaser.** The premium for an owner's title policy to be delivered upon completion of the anticipated Closing shall be paid by Purchaser. If Seller has an existing owner's title policy for the subject Properties, Seller shall furnish a copy of such policy to Title Agent and a re-issue credit for the owner's title policy to be issued as a part of this transaction shall be given to the extent of the amount of Seller's existing title policy.

If within ten (10) days of the title commitment being delivered to Purchaser, the Purchaser finds title to the Properties to (i) include exceptions that would negatively affect the proposed use of the Properties, or (ii) be defective, Purchaser shall notify Seller in writing specifying the title defect(s) ("Initial Title Defects"). Seller shall have five (5) days to agree to either (i) correct such Initial Title Defects or (ii) void this Agreement and return the Earnest Money to Purchaser unless such Initial Title Defects are waived. Any existing matters of title reflected on the title commitment that are not properly objected to by Purchaser within the time period set forth herein shall be deemed Permitted Exceptions. If Seller does not notify Purchaser of its willingness to correct the Initial Title Defects within the said five (5) day period, then, the Purchaser may either (i) void this Agreement and the Earnest Money shall be refunded to Purchaser, or (ii) waive such Initial Title Defects and proceed with Closing. Seller shall correct such agreed to Initial Title Defects as set out in this Paragraph prior to the Closing Date.

(iii) Resubdivision of the appropriate Properties to satisfy all governmental regulations which must be approved by all applicable governmental entities, including applicable utility companies.

(iv) As to the real property and existing road improvements described in Exhibit "B", Attitude obtaining title to the balance of the real property and existing road improvements as follows: (a) approximately 0.22+- acres of the Permanent Access Drive/Easement and Utility and Drainage Easement as shown on the Plat of Resource Center of Research Park, A Condominium (Lot 1 of Research Park Lake 5 Phase 3 of Document Number 20091110000707840) recorded as Document No. 20100917000531190" in the Office of the

Judge of Probate for Madison County, Alabama which is the portion of said Access Drive/Easement within Unit 2 of said Condominium and (b) approximately 0.72+- acres of the Permanent Access Drive/Easement and Utility and Drainage Easement as shown on the Plat of A Resubdivision of Unit One of Resource Center of Research Park, A Condominium as recorded in Document Number 20100917000531190 and being recorded as Document Number 20111017000552090 in the Office of the Judge of Probate for Madison County, Alabama which is the portion of said Access Drive/Easement within Unit 3 of said Condominium.

(v) As to the real property and existing road improvements described in Exhibit "B", Attitude obtaining the Termination of the Resource Center of Research Park, A Condominium. The City agrees to cooperate with Seller in the replat of the Condominium property to create "legal lots" with the same Unit boundaries.

(vi) As to the real property described in Exhibit "C", the City filling and compacting the approximate 2+- acres of the southern projection of Lake 5 (retention lake) to a 653.5 elevation as a part of the City's lake drainage improvement project, or as may be required by a flood study, whichever is higher and to Attitude's satisfaction. The City shall obtain all approvals and studies and shall perform all work necessary.

(vii) The City shall have access to other Property owned by Seller adjacent to Lake 5 for the purpose of grading to begin work on Lake 5 as set out in subparagraph (vi) and access to the portion of land being filled as described in Exhibit "C" across Seller's property as is reasonably required.

(viii) This Agreement is contingent upon the execution of the Agreement for Development between Attitude and the City regarding Cabela's Wholesale, Inc. submitted simultaneously herewith.

5. Title:

The Properties shall be conveyed by Attitude and the City by Statutory Warranty Deed, in a form sufficient to transfer and convey title to the receiving party free from any and all encumbrances, except the current (2014) ad valorem taxes, easements, matters reflected on subdivision plat, rights of way and restrictions of record in the Probate Office of Madison County, Alabama, and applicable zoning ordinances. The City and Attitude shall also execute an appropriate owner's affidavit and lien waiver, and any and all affidavits, certificates or other documentation required by the Title Agent in form and condition required by this Agreement and as may reasonably be requested to Title Agent's satisfaction to effectuate the anticipated transactions.

6. Date and Place of Closing:

The Closing shall occur on or before Attitude's Closing with Cabela's Wholesale, Inc. (the "Closing Date") at the offices of Harrison, Gammons & Rawlinson, P.C., in Huntsville, Alabama.

7. Costs and Fees of Closing:

At Closing, Seller and Purchaser shall be responsible for the fees and costs of the transaction as follows:

- (a) Real Property Taxes for the current year (2014) if any, shall be paid by Seller when due for the Properties described in Exhibit "A" and Exhibit "B". Purchaser represents that it is exempt from Real Property Taxes for the Property described in Exhibit "C".
- (b) Seller shall be responsible for the payment of any amounts required to convey the Properties described in Exhibit "A" and Exhibit "B", free and clear of any existing liens on such Properties.
- (c) **Seller and Purchaser shall share equally all costs in connection with the Closing, including but not limited to the preparation of the Statutory Warranty Deeds, deed recording fee and tax, attorney's fee for closing, and title examination fees, but specifically excluding the premium for an owner's title policy. At this time, neither party anticipates obtaining an owner's title policy on the Property it is acquiring. If either party determines in the future to obtain an owner's title policy on the Property it is acquiring, it shall be at the expense of such party.**
- (d) Seller shall be responsible for the payment of all amounts required in the resubdivision of the appropriate Properties.

8. Attorney's Fees, Expenses, or Broker' Fees:

Each party to this Agreement shall be responsible for its own attorney's fees and other expenses incurred by them. Seller and Purchaser acknowledge that no broker and/or finder arranged the sale of the Properties on the terms and conditions contained herein. Seller and Purchaser do hereby agree to indemnify each other from all loss, damage, cost or expense, including attorney's fees, that they may suffer as a result of any claim or action brought by any other broker, acting on behalf of Seller or Purchaser, respectively.

9. Time of the Essence:

Time is of the essence of this Agreement.

10. Default:

In the event Purchaser fails to carry out the terms of this Agreement, the Earnest Money as herein shown shall be forfeited as liquidated damages at the option of Seller; provided that, Seller agrees to the cancellation of this Agreement; such Earnest Money so forfeited shall be retained by Seller, or Seller may proceed for specific performance.

In the event the sale is not consummated through no fault of the Purchaser, all Earnest Money shall be refunded to Purchaser, or Purchaser may proceed for specific performance.

In the event of a dispute between the parties pursuant to the terms of this Agreement, the prevailing party shall be entitled to collect reasonable attorney's fees.

11. Environmental: To the best of the parties' actual knowledge, no Hazardous Materials or underground storage tanks have been or are contained in, treated, stored, handled or located on, discharged from, or disposed of on, or constitute a part of, the Properties. As used herein, the term "Hazardous Materials" includes without limitation, any asbestos, urea formaldehyde foam insulation, flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous or toxic substances, or related or unrelated substances or materials defined, regulated, controlled, limited or prohibited in the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), as amended (42 U.S.C. Sections 9601, *et seq.*), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 1801, *et seq.*), the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. Sections 6901, *et seq.*), the Clean Water Act, as amended (33 U.S.C. Sections 1251, *et seq.*), the Clean Air Act, as amended (42 U.S.C. Sections 7401, *et seq.*), the Toxic Substances Control Act, as amended (15 U.S.C. Sections 2601, *et seq.*), and in the rules and regulations adopted and publications promulgated pursuant thereto, and in the rules and regulations of the Occupational Safety and Health Administration (OSHA) pertaining to occupational exposure to asbestos, as amended, or in any other federal, state or local environmental statute, regulation or other law now in effect.

12. Condition of Properties described in Exhibit "A" and Exhibit "B":

Purchaser accepts the Properties described in Exhibit "A" and Exhibit "B" in "AS-IS" condition at the time of Closing, including any hidden defects, known or unknown. Purchaser acknowledges that neither the Seller, its officers, employees nor its agents have made any warranties, implied or expressed, relating to the condition of these Properties. Purchaser agrees that Seller shall have no liability for any claim or losses Purchaser or Purchaser's successors or assigns may incur as a result of any condition or other defect which may now or hereafter exist with respect to these Properties.

Purchaser acknowledges that Purchaser shall not be entitled to, and should not rely on, Seller, or its agents as to (1) the quality, nature, adequacy or physical condition of the Properties, including but not limited to the structural elements, foundation, roof, appurtenances, access, landscaping, electrical, mechanical, plumbing, sewage or utility systems, facilities or appliances at these Properties, if any; (2) the quality, nature, adequacy or physical conditions of soils or the existence of ground water at these Properties; (3) the existence, quality, nature, adequacy or physical condition of any utilities serving these Properties; (4) the development potential of the Properties, its habitability, merchantability or fitness, suitability or adequacy of the Properties for any particular purpose; (5) the zoning or other legal status of the Properties; (6) the Properties' compliance with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions or restrictions of any governmental or quasi-governmental entity or of any labor or materials relating in any way to the Properties; or (7) the condition of title to these Properties or

the nature, status and extent of any right of way, lease, right of redemption, possession, lien, encumbrance, license, reservation, covenant, condition, restriction or any other matter affecting title to these Properties.

Purchaser further acknowledges and agrees with Seller that with respect to these Properties, Seller has not, does not and will not make any warranties or representations, express or implied, or arising by operation of law, including but not limited to, any warranty of condition, merchantability, habitability or fitness for a particular use, or with respect to value, profitability or marketability of these Properties.

Purchaser further specifically acknowledges and agrees that Purchaser hereby waives, releases, and discharges any claim Purchaser may have, might have had or may have against Seller and its officers, agents or employees with respect to the condition of these Properties, either patent or latent, the real estate taxes or assessments now or hereafter payable thereon, the compliance with any environmental protection, pollution, land use laws, rules, regulations or requirements, and any other state of facts which exist with respect to these Properties.

13. Survival:

All rights and obligations of Seller and Purchaser under this Agreement shall inure to the benefit of and be binding upon their successors and assigns.

14. Amendment:

No modification or amendment of this Agreement shall be of any force or effect unless the same shall be made in writing and executed by each party hereto. To the extent that escrow, closing, or settlement instructions and/or documents are inconsistent with the terms and conditions of this Agreement, this Agreement shall control and shall further survive recordation of the deed.

15. Entire Agreement:

This Agreement contains the entire agreement between the parties. No promise, representation, warranty or covenant not included in this Agreement has been relied upon by either party. Each party has had a full opportunity to examine this Agreement and/or has had an opportunity to have its counsel review said Agreement on its behalf.

16. Interpretation:

This Agreement shall be interpreted in accordance with Alabama law. Unless otherwise provided, all terms shall have the meaning given them in ordinary and customary English usage. Words in the masculine gender include feminine and neuter. The paragraph headings and titles of this Agreement do not form a part of this Agreement, are inserted for convenience of reference only, and shall have no effect upon the construction or interpretation of any part of this Agreement.

17. Email or Facsimile Signatures:

The parties agree that this document may be executed and the signatures transmitted to the other parties by facsimile, email or similar electronic transmission. Upon transmission and receipt by another party, such signature shall be effective as an original. Notwithstanding the preceding sentence, the parties agree that they will transmit original signature pages to the other parties and Counsel promptly after execution.

18. Execution by Counterpart Originals:

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19. Escrow Agent:

The parties acknowledge that the Earnest Money of **\$1,000.00** shall be held by Title Services, Inc., as Escrow Agent hereunder, in a non-interest bearing account. If Escrow Agent be made a party to any suit filed by either party to this Agreement, or by any third party regarding the subject Property, then, all costs incurred by it, including reasonable attorney's fees shall be paid by the defaulting party. The undersigned parties acknowledge that the obligations of Escrow Agent hereunder shall be to hold the Earnest Money until closing of the transaction, and the undersigned do hereby indemnify and hold harmless Escrow Agent from any and all costs, including reasonable attorney's fees incurred by it in its performance of its duties hereunder.

If the Escrow Agent is in doubt as to its duties or liabilities under this Agreement, the Escrow Agent may, at its option continue to hold the Earnest Money until the parties mutually agree as to its disbursement or until a court of competent jurisdiction shall determine the rights of the parties thereto in which event Escrow Agent shall deposit the Earnest Money with the Clerk of the Circuit Court of Madison County, Alabama. Upon notifying all parties concerned of such action, all liability on the part of Escrow Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. Any suit between the Purchaser and the Seller where Escrow Agent is made a part because of acting as Escrow Agent hereunder, or in any suit wherein Escrow Agent interpleads the subject matter of the escrow, Escrow Agent shall recover reasonable attorney's fees and costs incurred with the fees and costs to be charged and assessed as court costs against the losing party. The parties agree that Escrow Agent may charge a reasonable attorney's fee as well as the amount of filing fees from the funds to be interpled prior to depositing the balance with the Court. The parties agree that Escrow Agent shall not be liable to any party or person for misdelivery to Purchaser or Seller of items subject to this escrow, unless such misdelivery is due to willful breach of agreement or gross negligence of Escrow Agent.

20. Counsel Acknowledgment:

The parties all acknowledge that Seller's counsel, JAMES G. HARRISON, and the law

firm of Harrison, Gammons & Rawlinson, P.C. (collectively "Counsel") prepared this Agreement on behalf of and in the course of his representation of Seller. All conflicts of interest due to Counsel's representation of Seller and unrelated representation of Purchaser, if any, are hereby waived.

[SIGNATURES ON FOLLOWING PAGE(S)]

IN WITNESS WHEREOF, the parties have caused this Real Estate Purchase Agreement to be executed on the respective dates set forth below.

PURCHASER:

THE CITY OF HUNTSVILLE,
ALABAMA

By: _____
Tommy Battle, Mayor

Attest:

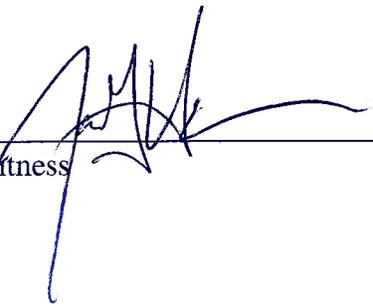
By: _____
Charles E. Hagood, Clerk Treasurer

Date: _____

SELLER:

ATTITUDE, LLC, an Alabama limited
liability company

By:  _____
James B. Packard, Its Manager

Witness  _____

Date: 6/12/14 _____

EXHIBIT "A"

The western portion of the following described property containing approximately 3.0+- acres, less and except that portion conveyed by Seller to Cabela's Wholesale, Inc.:

Lot 1 of a Resubdivision of Lot 6 of the Resubdivision of Lot 5, Thornton Research Park, a Resubdivision of Lots 3 and 4 of the Resubdivision of Parcels A, B and C of Norfolk Southern Industrial Park as the same appears of record in the Office of the Judge of Probate of Madison County, Alabama, in Plat Book 41, Page 84.

EXHIBIT "B"

Approximately 2.86+- acres being the real property on which the existing road improvements are located.

The existing Road Improvements shall include:

All of the Permanent Access Drive/Easement and Utility and Drainage Easement as shown on the Plat of Resource Center of Research Park, A Condominium (Lot 1 of Research Park Lake 5 Phase 3 of Document Number 20091110000707840) recorded as Document No. 20100917000531190" in the Office of the Judge of Probate for Madison County, Alabama which is the portion of said Access Drive/Easement within Unit 2 of said Condominium.

And,

All of the Permanent Access Drive/Easement and Utility and Drainage Easement as shown on the Plat of A Resubdivision of Unit One of Resource Center of Research Park, A Condominium as recorded in Document Number 20100917000531190 and being recorded as Document Number 20111017000552090 in the Office of the Judge of Probate for Madison County, Alabama which is the portion of said Access Drive/Easement within Unit 3 and Unit 4 of said Condominium.

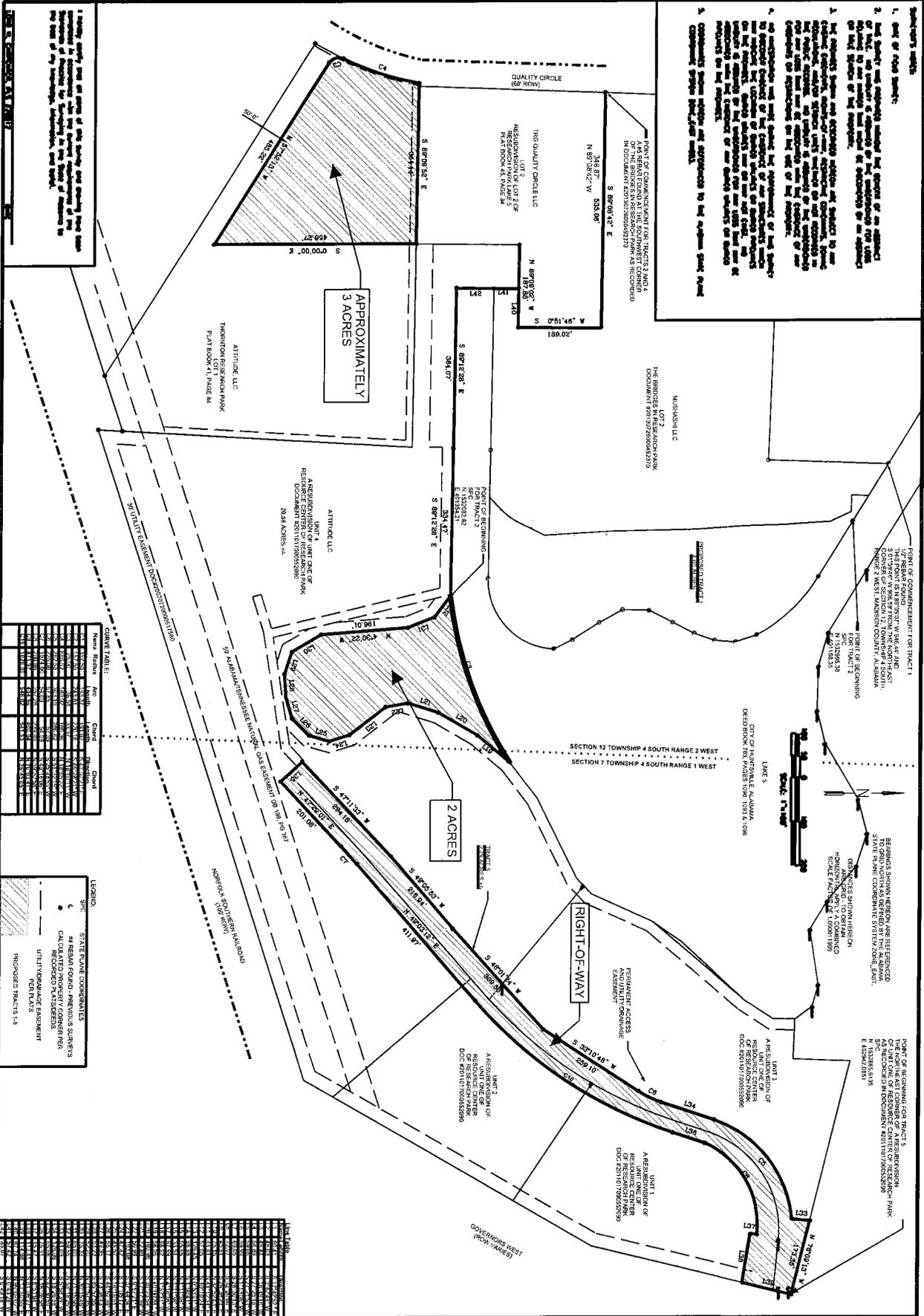
SUBJECT TO any required area for a sign to be constructed by Seller for its development as required by Cabela's Wholesale, Inc.

EXHIBIT "C"

Not Less than 2.00+- acres of the Southern projection of Lake 5 which is described as Tract J in those certain deeds recorded in Deed Book 703, Page 1090, in Deed Book 703, Page 1093 and in Deed Book 703, Page 1096, in the Office of the Judge of Probate of Madison County, Alabama.

EXHIBIT "D"

LWCarpenter 6/12/2014 1:13:40 PM
 WORKSPACE:Garver_2014
 LC201414568110 - Lake 5 Research Park Survey/Survey/Lake5_EXHIBIT_MIKE.dgn



- Surveyor's notes:**
1. Part of Right-of-Way:
 2. The quality was surveyed under the request of an adjacent property owner and was not intended for recording or as evidence of that portion of the survey.
 3. The adjacent owner and applicant advised that subject to any applicable laws, rules, regulations, codes, ordinances, laws and public records, any transfer of property to the adjacent owner is subject to the approval of the appropriate authority and is not subject to the survey.
 4. The adjacent owner and applicant advised that subject to any applicable laws, rules, regulations, codes, ordinances, laws and public records, any transfer of property to the adjacent owner is subject to the approval of the appropriate authority and is not subject to the survey.
 5. Consistent with applicable laws and regulations, the adjacent owner and applicant advise that subject to any applicable laws, rules, regulations, codes, ordinances, laws and public records, any transfer of property to the adjacent owner is subject to the approval of the appropriate authority and is not subject to the survey.

EXHIBIT SHEET NUMBER 1 of 1	CITY OF HUNTSVILLE HUNTSVILLE, ALABAMA LAKE 5 IMPROVEMENTS PROJECT DOLPHIN AT RESEARCH PARK	REV. DATE DESCRIPTION BY 	JOB NO.: 14058110 DATE: 6/4/2014 CHECKED BY: JLM DRAWN BY: JWC	 5125 Research Drive Huntsville, AL 35895 (256) 835-1000 www.garver.com
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