

C 74443
2011-0920

ECONOMIC DEVELOPMENT AGREEMENT

This **ECONOMIC DEVELOPMENT AGREEMENT** ("Agreement") by and between the **CITY OF HOUSTON, TEXAS**, a Texas home-rule municipal corporation ("City"), and **KROGER TEXAS L.P.**, an Ohio limited partnership ("Developer"), is entered into as of the Effective Date as defined herein.

WHEREAS, Developer owns certain tracts of land totaling approximately 8.5658 acres within the corporate limits of the City, as depicted on the site survey marked as **Exhibit "A"** attached hereto ("Land"), for the purpose of developing and constructing an approximately 79,000 square foot combination grocery and drug store and fuel station ("Project"); and

WHEREAS, Developer has entered into a Ground Lease Agreement dated July 26, 2011, granting a leasehold interest in the Land to its affiliate Kroger Management -- NMTC Houston I, LLC, an Ohio limited liability company ("Project Owner");

WHEREAS, Project Owner will construct and own real property improvements located on the Land ("Project Improvements") and will provide and own furniture, fixtures and equipment ("Project FFE") located thereon and necessary for the operation of the Project; and

WHEREAS, Project Owner will lease the Project Improvements and the Project FFE and will sublease the Land to its affiliate Kroger 017 Operator, Inc. ("Project Operator"), which will operate the Project, including ownership of inventory items and other personal property located at the Project ("Project Inventory"); and

WHEREAS, the City acknowledges and desires that the Developer shall provide valuable services to the City through the work described in this Agreement, including but not limited to the development of public works and improvements, including water, sewer, drainage, road and street improvements, traffic signals and other mobility improvements and public infrastructure to benefit the Project and to serve the City generally and the surrounding community specifically; and

WHEREAS, the City has established a program in accordance with Article III, Chapter 52-a of the Texas Constitution and Chapter 380 of the Texas Local Government Code ("Chapter 380") authorizing the City to use public funds for the public purposes of promoting local economic development and stimulating business and commercial activity within the City of Houston, including the authority to enter into sales and use tax rebate agreements such as this Agreement; and

WHEREAS, the City recognizes the positive economic impact that the Project will bring to the City through the timely development and diversification of the economy, elimination of unemployment and underemployment through the creation and retention

of new jobs, the attraction of new businesses, and the retention and growth of the ad valorem and sales and use tax revenues generated by the Project for the City; and

WHEREAS, the City and Developer desire to work together to advance the public purposes of developing and diversifying the economy of the state, eliminating unemployment or underemployment in the state, and developing or expanding transportation or commerce in the state; and

WHEREAS, in consideration of Developer causing the design, timely construction, development, financing, and operation of the Project and related public infrastructure improvements, in accordance with the performance standards described herein and including commercially reasonable efforts to hire local and disadvantaged businesses and buying local products in constructing the public infrastructure improvements, which will result in the creation of new jobs and additional sales and use tax and ad valorem tax revenues for the City, the City agrees to purchase the public infrastructure improvements from the Developer based on the costs of the improvements by granting to Developer, pursuant to Chapter 380 and other applicable law, a reimbursement of the incremental sales and use tax revenues and the increase above the base year ad valorem tax revenues generated by the Project, the terms and conditions of which are more fully described in this Agreement; and

WHEREAS, the City has concluded and hereby finds that this Agreement promotes economic development in the City of Houston and therefore meets the requirements of Chapter 380 and the City's established economic development program, and is in the City's best interests;

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises, agreements, services, obligations, covenants, and benefits set forth in this Agreement, the City and Developer agree and contract as follows:

ARTICLE I DEFINITIONS AND TERMS

A. Incorporation of Recitals and Exhibits. The recitals in this Agreement and the Exhibits attached to this Agreement are hereby incorporated for all purposes. In the event of any conflict between any of the provisions of the Exhibits and the provisions of this Agreement, the provisions of this Agreement shall prevail.

B. Singular and Plural. Words used herein in the singular, where the context so permits, also include the plural and vice versa. The definitions of words in the singular herein also apply to such words when used in the plural where the context so permits and vice versa.

C. Definitions and Terms. The terms "Agreement," "Chapter 380," "City," "Developer," "Land," "Project," "Project FFE," "Project Improvements," "Project Inventory," "Project Operator," and "Project Owner" shall have the meanings set forth above, and the terms defined below shall have the meanings set forth below.

"Base Property Tax" means the amount of ad valorem taxes levied and collected by the City on the Property based on the total taxable appraised value of the Property as of January 1st of the respective year in which Developer commences construction of the Project.

"Base Sales Tax" means the amount of Sales Tax Revenues received by the City for the calendar quarter preceding the Effective Date.

"Effective Date" means the date that the City Controller countersigns this Agreement, as shown on the execution page of this Agreement.

"Exhibit 'A'" refers to the attached survey/map of the Land.

"Exhibit 'B'" refers to the attached preliminary list of City Improvements.

"Exhibit 'C'" refers to the attached conceptual site plan for the Project.

"Exhibit 'D'" refers to the attached depiction of the landscaping to be performed on the esplanades/medians on Studemont Street.

"Exhibit 'E'" refers to the attached form of release necessary to allow the State Comptroller to provide the Sales Tax Disclosure.

"City Improvements" means certain public water, sewer, drainage, road, traffic signal, right-of-way, landscaping, irrigation, sidewalk and other related improvements located in the public right of way and necessary to serve the Project as and when needed. A preliminary list of City Improvements is attached hereto as **Exhibit "B."**

"City Improvements Cost" means all costs of acquisition, design, development, and construction of the City Improvements including, without limitation: (i) the acquisition cost of any land that is part of the City Improvements; (ii) all costs of design, engineering, materials, labor, construction, testing and inspection and other services, arising in connection with the design and construction of the City Improvements; (iii) all payments arising under any contracts entered into for the design or construction of the City Improvements; (iv) all costs incurred in connection with obtaining governmental approvals, certificates, and permits required in connection with the construction of the City Improvements; and (v) costs to acquire any rights-of-way.

"Interest" means interest (i) that accrues at a rate of 5.17% per annum, (ii) that is computed quarterly on the last day of each calendar quarter beginning with the first calendar quarter that includes the Reimbursement Date, and (iii) that is computed based on a principal amount equal to the amount by which the City Improvements Cost exceeds all payments that the City has made to the Developer pursuant to paragraph (B)(4) of Article VI of this Agreement as of the Interest computation date.

"Maximum Reimbursement Amount" means (A) the lesser of (i) \$2,500,000 or (ii) the City Improvements Cost plus (B) Interest.

"Party" or "Parties" means the City and Developer.

"Property" means the Land, the Project FFE, the Project Improvements, the Project Inventory, and any other real property improvements or personal property that is located on the Land and part of the Project.

"Reimbursement Amount" means the Sales Tax Revenues in excess of the Base Sales Tax and 100% of the City's portion of the amount of incremental increase in ad valorem taxes imposed on the Property above the Base Property Tax, with the total Reimbursement Amount not to exceed the Maximum Reimbursement Amount during the Term of this Agreement.

"Reimbursement Date" means the date on which the Developer receives from the City a certificate of occupancy for the Project for use and occupancy of the Project for its intended purpose as a combination grocery and drug store and fuel station.

"Reimbursement Fund" means the special fund created by the City as described in Article VI of this Agreement.

"Sales Tax Revenues" means the amount of sales and use tax received by the City pursuant to Chapter 321, Texas Tax Code, from the sale of Taxable Items at the Project, from the construction of the City Improvements or Project Improvements, or from purchases of Project FFE and Project Inventory.

"Taxable Items" has the meaning assigned by Chapter 151, Texas Tax Code, as it may be amended from time to time.

"Term" means the period of time beginning on the Effective Date and continuing until the earlier of either the payment to Developer of the Maximum Reimbursement Amount or the expiration of thirteen (13) years from the date on which the City issues a certificate of occupancy for the Project Improvements for use and occupancy of the Project Improvements for the Project's intended purpose as a grocery and drug store.

ARTICLE II THE PROJECT

Developer intends to cause the construction of the Project, an approximately 79,000 square foot combination grocery and drug store and fuel station located just south of Interstate 10 at the intersection of Studemont and Summer streets in

Houston, Texas. A Conceptual Site Plan for the Project is attached hereto as Exhibit "C."

ARTICLE III REPRESENTATIONS AND WARRANTIES

(1) The City hereby represents and warrants to Developer that the City has full constitutional and lawful right, power and authority, under current applicable law, to execute and deliver and perform the terms and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all necessary City proceedings, findings, and actions. Accordingly, this Agreement constitutes the legal, valid, and binding obligation of the City, is enforceable in accordance with its terms and provisions, and does not require the consent of any other governmental authority.

(2) Developer hereby represents and warrants to the City that Developer has full constitutional and lawful right, power, and authority, under current applicable law, to execute and deliver and perform the terms and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all actions necessary. Accordingly, this Agreement constitutes the legal, valid, and binding obligation of Developer, is enforceable in accordance with its terms and provisions, and does not require the consent of any other authority or entity.

ARTICLE IV DEVELOPER COMMITMENTS

A. Design of the Project. Developer agrees to design the Project in an architectural style that, in Developer's sole discretion, is harmonious with the general architectural style of the surrounding Heights neighborhoods. Developer shall satisfy all permitting requirements, including, but not limited to, Chapter 9 of the City's Department of Public Works and Engineering Infrastructure Design Manual and building permitting requirements. Prior to initiating construction of the City Improvements, Developer's engineer shall certify to the Chief Development Officer of the City that the Project complies with all applicable laws, ordinances, rules and regulations pertaining to the rate of storm water runoff from the Property.

B. Community Meetings. Prior to commencing construction of the Project, Developer agrees to conduct at least one public meeting to provide information to and answer questions from the public and to provide an opportunity for interested persons to speak for or against the Project.

C. City Improvements. Developer agrees to design and construct the City Improvements necessary to serve the Project as and when needed. The preliminary list of the City Improvements is set forth in Exhibit "B," which may be modified at any time by mutual agreement of the Mayor, or his or her designee, and Developer, to modify, add, or remove City Improvements if the Mayor or Developer

determines that the modification, addition, or removal is necessary to achieve the intent of this Agreement and if such modification, addition, or removal is not estimated to cause the City Improvements Cost to exceed \$2,500,000. The dollar amounts of the City Improvements listed in **Exhibit "B"** are estimates of probable costs; actual costs may be higher or lower. The City Improvements include certain off-site improvements such as sanitary sewer, sidewalk, and street and landscaping improvements. Acquisition of right-of-way is required for some City Improvements.

D. Standards and Approvals. Developer agrees that the plans and specifications for the City Improvements shall be subject to the review and approval of all governmental entities with jurisdiction, including, without limitation, the City. Developer agrees to comply with all applicable legal requirements from such jurisdictions. Before commencing construction of any City Improvements, Developer will submit to the City's Director of the Department of Public Works and Engineering, or his or her designee ("Director"), all plans and specifications for the construction of such City Improvements and obtain the Director's approval of such plans and specifications which approval shall not be unreasonably withheld and shall be decided upon expeditiously. In the event that the Director does not render a decision regarding approval of such plans and specifications within fifteen (15) days of receipt from Developer, such plans and specifications shall automatically be deemed approved. All water wells, water meters, flushing valves, valves, pipes, and appurtenances thereto, will conform exactly to the City's specifications. All water service lines, sewer service lines, lift stations, sewage treatment facilities, road facilities, and appurtenances thereto, will comply with the City's standard plans and specifications as amended from time to time. Prior to construction of any City Improvements, Developer or its engineer will give written notice by registered or certified mail to the Director stating the date that construction will be commenced. Construction of the City Improvements will be in accordance with the approved plans and specifications, and with the City's applicable standards and specifications, and during the progress of the construction and installation of the City Improvements, the Director may conduct periodic, on-the-ground inspections.

E. Summer Street. Developer agrees to rehabilitate Summer Street and its adjoining sidewalks from Studemont Street to Givens Street and to construct and extend a new segment of Summer Street from Givens Street to Diesel Street.

F. Esplanade/Median Landscaping. Developer agrees to develop or enhance the landscaping on the esplanades/medians on Studemont Street to beautify the surrounding community as depicted in attached **Exhibit "D."**

G. Job Creation. Developer's receipt of the Reimbursement Amount is subject to the following commitment ("Job Creation Condition"): Developer agrees to create at least 170 jobs at this Project, effective as of the date on which the Project commences operations as a combination grocery and drug store. As used herein, the term "jobs" shall mean persons employed by Developer, the Project Operator, or any

other affiliate of Developer on a full- or part-time basis to perform services at the Project in connection with the operation of the Project. Developer shall annually submit documentation as reasonably necessary to evidence that Developer has satisfied the Job Creation Condition.

If Developer does not satisfy the Job Creation Condition for any period during the Term of this Agreement, and if such failure continues for sixty (60) days after written notice to Developer, the City may, as its sole and exclusive remedy, beginning on the date which is sixty (60) days after such written notice until Developer has provided evidence that it has satisfied the Job Creation Condition, reduce the Reimbursement Amount to be paid to Developer by a percentage by which the Developer does not satisfy the Job Creation Condition.

H. Olivewood Cemetery. Developer agrees to donate forty thousand dollars (\$40,000) to Descendants of Olivewood, Inc. to be used for improvements to Olivewood Cemetery. Developer shall make such donation within a reasonable period of time following Developer's receipt of all necessary approvals, permits, and other authorizations necessary to commence construction of the Project.

I. Sidewalks and Trees. Developer agrees to work with the City to (1) design and construct sidewalks that are wider than the standard requirement of four (4) feet; and (2) plant trees along Studemont Street and Summer Street that are larger in caliper than the standard requirement of one and one-half (1.5) inches. The City agrees that such sidewalks or trees will be Improvements and shall be reimbursable to the Developer subject to the terms and conditions of this Agreement.

J. Payment of Project Costs. Developer agrees to pay (or cause to be paid) all costs of acquisition, design, development, and construction of the Project as such costs become due, including, without limitation: (i) all costs of design, engineering, materials, labor, construction, testing and inspection and legal or other consultant services, arising in connection with the design and construction of the Project; (ii) all payments arising under any contracts entered into for the design or construction of the Project; (iii) all costs incurred in connection with obtaining governmental approvals, certificates, and permits required in connection with the construction of the Project; (iv) Developer's share of costs to acquire any rights-of-way (recognizing that the City also will incur and be responsible for some costs of acquiring rights-of-way); and (v) costs in connection with the negotiation, preparation, and approval of this Agreement and all matters related thereto.

K. Competitive Bidding. Construction contracts for the City Improvements shall not be subject to the City's competitive procurement requirements. After preparation of final plans and specifications and their approvals as required herein, Developer shall advertise for or solicit bids for construction as described in the final plans and specifications.

L. Sales Tax Disclosure. The City agrees to request from the State Comptroller sales tax reports as provided in Section 321.3022, Texas Tax Code,

establishing the amount of Sales Tax Revenues for each calendar quarter during the Term ("Sales Tax Disclosure"). Developer agrees to provide any release or releases to the City necessary to allow the State Comptroller to provide the Sales Tax Disclosure. The City and Developer shall rely on the Sales Tax Disclosure as accurate and definitive for purposes of this Agreement. A form of release is attached hereto as **Exhibit E**. The City shall not be required to pay Developer the Reimbursement Amount until such time that Developer provides any required release and the State Comptroller provides the City the Sales Tax Disclosure; provided, however, the Developer may establish the amount of Sales Tax Revenues arising from the construction of the Project Improvements or the purchase of the Project FFE or Project Inventory using other documentation approved by the City, which approval shall not be unreasonably withheld.

M. Developer Affiliates. The Project Owner and the Project Operator may satisfy Developer's obligations under this Article IV.

ARTICLE V CONSTRUCTION SCHEDULE AND CRITERIA

A. Conditions of Grant. The 380 Grant and the City's reimbursement to Developer is conditioned upon and subject to Developer complying with the agreements stated above, as well as the conditions and Construction Schedule described in this Article V.

B. Commencement of Development. Developer agrees to commence the site work and construction of the Project no later than six (6) months after the Effective Date of this Agreement, subject to the *force majeure* provisions of Article VII herein.

C. Completion of Development. Developer agrees to substantially complete construction of the Project not later than eighteen (18) months following commencement of construction of the Project, subject to the *force majeure* provisions of Article VII herein.

D. Equal Business Opportunity Compliance. Developer shall demonstrate good faith efforts to comply with the City's MWDBE (Minority/Women/Disadvantaged Business Enterprise) program in the construction of the City Improvements.

E. Buy/Hire Local Compliance. In the construction of the City Improvements, Developer shall demonstrate good faith efforts, to the extent legally permissible, to comply with a "Buy Local" goal of not less than twenty-five percent (25%) local sourcing of services procured through vendors and/or service providers with offices within the United States Office of Management and Budget "metropolitan statistical area" of the City.

F. Easements and Rights-of-Way. All public water, sewer, and drainage facilities shall be constructed within City or public easements or rights-of-way. All public road improvements shall be constructed in City or public rights-of-way.

G. Joint Referral Committee Process. Concurrently with the negotiation of this Agreement, Developer and the City's Joint Referral Committee of its Public Works and Engineering Department have been cooperating to implement the abandonment, sale, and conveyance of the easements, rights-of-way and property necessary to complete the Project and the City Improvements. The Parties agree to use commercially reasonable efforts to complete the Joint Approval Committee process in a time and manner that allows the performance of this Agreement according to its terms.

H. Ownership, Operation, and Maintenance. As the acquisition and construction of each integral stage of the City Improvements is completed and each integral stage of the City Improvements becomes operational, Developer shall convey all such City Improvements to the City (including rights-of-way). As construction of each integral stage of the City Improvements is completed, City representatives shall inspect the same and, if the City finds that the same has been completed in accordance with the final plans and specifications, or any modifications thereof, and in accordance with all applicable laws, rules, and regulations, the City will accept the same, whereupon such portion of the City Improvements shall be operated and maintained by the City at its sole expense. The Parties intend this paragraph to constitute a conditional acceptance of the City Improvements by the City for purposes of qualifying the construction of the City Improvements for exemption from the imposition of sales and use taxes to the maximum extent possible.

I. Records and Audit. Developer shall be responsible for maintaining records of amounts paid to construct the City Improvements and evidence of such payments and shall make such records available to the City at the City's reasonable request. Developer agrees to provide to the City prior to the Reimbursement Date its computation of the City Improvements Cost incurred by Developer as of the Reimbursement Date; provided, Developer shall have the right after the Reimbursement Date to notify the City of any adjustments to the City Improvements Cost. The City may audit the calculation of the City Improvements Cost at its own expense.

ARTICLE VI CITY COMMITMENTS

A. Reimbursement Fund. The City hereby covenants and agrees upon the Effective Date of this Agreement to create a special fund ("Reimbursement Fund") for the benefit of Developer for the purpose of paying Developer the Maximum Reimbursement Amount. Following Developer's fulfilling the funding conditions in Article IV hereof, the City shall deposit the Reimbursement Amount into the Reimbursement Fund pursuant to this Agreement. The Reimbursement Fund shall always remain unencumbered by the City and segregated from all other funds of the City. Such funds are held in trust by the City for Developer to be used in accordance with the terms hereof as long as Developer is in compliance with this Agreement. To the fullest extent permitted by law, the City agrees that: (i) it will not pledge or apply the

Reimbursement Fund to any other purpose or payment of any obligation of the City except for the obligations arising under this Agreement; (ii) it will not commingle the Reimbursement Fund with any other funds of the City; (iii) it will not take any action or omit to take any action that will affect the continued existence of the Reimbursement Fund or the availability for deposit therein of the Reimbursement Amount; and (iv) it will direct the investment of the Reimbursement Fund in accordance with Texas law applicable to investment of funds by municipalities. The Reimbursement Fund shall be used only to pay the Reimbursement Amount to the Developer.

B. City Commitments.

1. Calculation of Reimbursement Amount; Deposit of Reimbursement Amount. For each calendar year during the Term of this Agreement, the City shall determine the Reimbursement Amount in cooperation with the Developer and the State Comptroller. The City shall calculate the Reimbursement Amount as: (i) the incremental increase above the Base Property Tax of the City's portion of the ad valorem taxes on the value of the Property, as certified by the Harris County Appraisal District and (ii) Sales Tax Revenues in excess of the Base Sales Tax received by the City each calendar quarter from the State Comptroller. The Parties acknowledge that the City may not receive sufficient information from the State Comptroller to determine the Sales Tax Revenues until fifteen (15) or more days into the subsequent month. Based upon the City's quarterly calculation of the sales and use taxes derived from the Project, the City agrees to deposit the sales and use tax portion of the Reimbursement Amount into the Reimbursement Fund within thirty (30) business days following receipt from the State Comptroller. Based upon the City's annual calculation of the ad valorem taxes derived from the Property, the City agrees to deposit the ad valorem tax portion of the Reimbursement Amount into the Reimbursement Fund within thirty (30) business days following certification by the Harris County Appraisal District.

2. Confidential Information. The City hereby designates this Agreement as a Revenue Sharing Agreement, thereby entitling the City to request sales tax information from the State Comptroller, pursuant to section 321.3022, Texas Tax Code, as amended. Unless determined otherwise by the Texas Attorney General, in writing, any information received relating to the sales tax shall be considered confidential proprietary financial information not subject to immediate release to the public. The City shall seek a written opinion from the Texas Attorney General, raising any applicable exception to release, prior to any release to a third-party under the Texas Public Information Act, and City shall provide Developer timely notice and an opportunity to review and comment on any such opinion request.

3. Maintenance of Records. The City shall maintain complete books and records showing deposits to and disbursements from the Reimbursement Fund, which books and records shall be deemed complete if kept in accordance with generally accepted accounting principles as applied to Texas municipalities. Such books and records shall be available for examination by the duly authorized officers or agents of Developer during normal business hours upon request made not less than five (5) business days prior to the date of such examination. The City shall maintain such

books and records throughout the Term of this Agreement and store the same for four (4) years thereafter. Developer shall, upon not less than five (5) business days prior written notice, have the right to review and audit such books and records at its own expense.

4. Payment of Reimbursement Amounts. Beginning on the Reimbursement Date and continuing each quarter throughout the Term of this Agreement, the City shall pay the Reimbursement Amount due to Developer within forty-five (45) days following the end of the month for which sales and use taxes and ad valorem taxes are received by the City and deposited into the Reimbursement Fund, pursuant to this Agreement ("City Commitment"). The City Commitment is an unconditional obligation of payment by the City (but solely from the Reimbursement Fund), if the Project and Property generates sales and use taxes and ad valorem taxes. Such payments are not subject to any reduction, whether offset or otherwise.

**ARTICLE VII
DEFAULT AND REMEDY; FORCE MAJEURE**

A. Developer Events of Default

Developer's failure to comply with and satisfy any of the conditions and obligations under this Agreement with which Developer must comply or satisfy to receive the Reimbursement Amount shall be deemed an event of default, whereupon the City shall deliver written notice to Developer detailing such event(s) of default. If such event(s) of default is not cured within sixty (60) days following the date of Developer's receipt of the City's written notice, then the City shall not be obligated to pay to Developer the amount of the Reimbursement Amount proportionate to the period of time during which the default(s) remains uncured as measured in, for sales and use taxes, each full fiscal quarter and for ad valorem taxes, each full month(s) of the calendar year during which the default remains uncured. Alternatively, the City may terminate this Agreement by written notice to Developer, and its obligation to make any payments to Developer shall be null and void as of the date of such written notice.

B. City Events of Default

The City's failure to perform any of its obligations in substantial compliance with this Agreement (except for its obligation to pay Developer, with which the City shall strictly comply) shall be deemed an event of default, whereupon Developer shall deliver written notice to the City detailing such event(s) of default. If such event(s) of default is not cured within sixty (60) days following the date of the City's receipt of Developer's written notice, then Developer shall have all rights and remedies to which it is entitled under this Agreement and under all applicable laws.

C. Remedies Cumulative

(1) In addition to the remedies provided for in paragraphs A and B of this Article VII, the non-defaulting Party may seek any remedy available under all applicable laws, in any court of competent jurisdiction, subject to paragraph G of Article VIII herein. Unless provided otherwise herein, no action taken pursuant to this Agreement shall constitute an election of remedies, and all remedies set forth in this Agreement shall be cumulative and non-exclusive of any other remedy either set forth herein or available at law or in equity. The non-defaulting Party shall have the affirmative obligation to mitigate its damages in the event of a default by the defaulting Party.

(2) Notwithstanding the foregoing, the City Attorney is hereby authorized to negotiate and enter into amendments and revisions to this Agreement in the event of default by either Party which has not been cured after notice and opportunity to cure.

(3) The Parties' right and authority to pursue any remedies for default under this Agreement shall survive the amendment, revision, expiration, or termination of this Agreement.

D. Waiver of Immunity

Notwithstanding anything to the contrary herein, the City and Developer hereby acknowledge and agree that this Agreement is subject to the provisions of Subchapter I of Chapter 271, Texas Local Government Code, as amended. The City agrees that its immunity from suit is waived for the purpose of adjudicating a claim for breach of this Agreement, which is subject to the terms and conditions of Subchapter I of Chapter 271, Texas Local Government Code, as amended.

E. Force Majeure

Notwithstanding anything in this Agreement which is or may appear to be to the contrary, if the performance by either Party of any covenant or obligation hereunder (specifically excluding any monetary obligations) is delayed as a result of circumstances which are beyond the reasonable control of such Party, the time for such performance shall be extended by the amount of time of such delay. Such circumstances include, without limitation, pending or threatened litigation; acts of God; war; acts of civil disobedience; fire or other casualty; shortage of materials; adverse weather conditions (such as, by way of illustration and not limitation, severe rain storms, below-freezing temperatures, hurricanes, or tornadoes); and labor actions, strikes or similar acts. The Party claiming delay of performance as a result of a *force majeure* event shall deliver written notice of the commencement of such delay not later than seven (7) days after the claiming Party becomes aware of the same, and if the claiming Party fails to so notify the other Party of delay caused by a *force majeure* event, the claiming Party shall not be entitled to extend the time for performance as provided herein.

**ARTICLE VIII
GENERAL PROVISIONS**

A. Time of the Essence. Time is of the essence in the performance of this Agreement.

B. Notices. Any notice sent under this Agreement (except as otherwise expressly required) shall be written and mailed by certified mail, return receipt requested, or sent by rapid transmission with written confirmation, or personally delivered to an officer of the receiving Party with written confirmation of acceptance, to the following:

If to Developer:

Kroger Southwest Real Estate
19245 David Memorial Drive
Shenandoah, TX 77385
Attention: David Koppenhafer
Telephone: (713) 507-4834
Facsimile: (936) 442-6703

With copies to:

Locke Lord Bissell & Liddell LLP
2200 Ross Ave., Suite 2200
Dallas, TX 75201
Attention: Geoffrey Polma
Telephone: (214) 740-8644
Facsimile: (214) 756-8644

If to the City:

Director, Finance Department
City of Houston
P.O. Box 1562
Houston, Texas 77002

Notice shall be deemed to have been received on the date such notice is personally delivered or three (3) days from the date such notice is mailed or sent by rapid transmission. Either Party may change its address by written notice as provided herein. Any communication addressed and mailed as provided herein shall be deemed to be given when so mailed, any notice so sent by rapid transmission shall be deemed to be given when receipt of such transmission is acknowledged, and any communication so delivered in person shall be deemed to be given when received signed for by an authorized officer, of Developer or the City, or his or her designee, as applicable.

C. Amendment and Waiver. A provision of this Agreement may be amended or waived if such amendment or waiver is in writing and is approved by Developer and the City. No course of dealing on the part of Developer or the City, nor any failure or delay by Developer or the City with respect to exercising any right, power or privilege pursuant to this Agreement, shall operate as a waiver thereof, except as otherwise provided herein.

D. Severability. Should any of the provisions contained in this Agreement be held unenforceable in any respect, such unenforceability shall not affect any other provisions of this Agreement, and all provisions, covenants, agreements or portions of this Agreement are declared to be severable.

E. Successors and Assigns. Developer may assign all or part of its rights (including the right to receive payments), duties, and obligations under this Agreement to any lender, investor, escrow agent, affiliate, subsidiary, or related party of Developer, or an owner or tenant of the Project.

F. Headings. All titles or headings in this Agreement are only for the convenience of the Parties and shall not be construed to have any effect or meaning as to the agreement between the Parties hereto. Any reference herein to an article, section, subsection, or paragraph shall be considered a reference to such article, section, subsection, or paragraph of this Agreement unless otherwise stated. Any reference herein to an exhibit shall be considered a reference to the applicable exhibit attached hereto unless otherwise stated.

G. Governing Law. This Agreement is a contract made under, and shall be construed in accordance with and governed by, the laws of the United States of America and the State of Texas, and any actions concerning this Agreement shall be brought in either the Texas State Courts of Harris County, Texas or the United States District Court for the Southern District of Texas.

H. Approval by the Parties. Whenever this Agreement requires or permits approval or consent to be given by either Party, the Parties agree that such approval or consent shall not be unreasonably withheld or delayed.

I. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute the same agreement.

J. Interpretation. This Agreement has been negotiated jointly by the Parties and shall not be construed against a Party because that Party may have assumed primary responsibility for the drafting of this Agreement.

K. Conflicts with Ordinances. The City and Developer agree that any City ordinance, or regulation by any other agency over which the City has control, whether heretofore or hereafter adopted, that addresses matters that are addressed by this

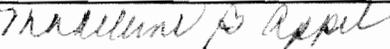
Agreement shall not be enforced by the City or the other regulatory agency within the Property, and that the provisions of this Agreement govern development of the Property.

[EXECUTION PAGES FOLLOW]

IN TESTIMONY OF WHICH this instrument has been executed in multiple counterparts, each of equal validity and effect, on behalf of the City and Developer effective as of the date of the countersignature of the City Controller below.

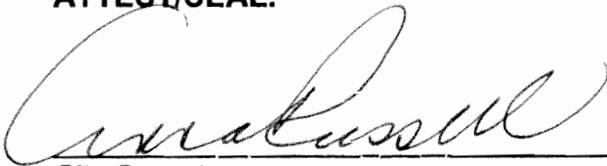
CITY OF HOUSTON:



Mayor 

Date: 11-1-11

ATTEST/SEAL:

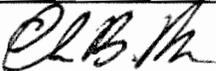


City Secretary

Date: 11-1-11

COUNTERSIGNED:



City Controller 

Date: 11-2-11

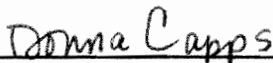
APPROVED:



Director, Finance Department

Date: 10/12/11

APPROVED AS TO FORM:



Assistant City Attorney

L.D. File No. 034100007001

Date: 10/12/11

IN TESTIMONY OF WHICH this instrument has been executed in multiple counterparts, each of equal validity and effect, on behalf of the City and Developer effective as of the date of the countersignature of the City Controller below.

CITY OF HOUSTON:

_____ Date: _____
Mayor

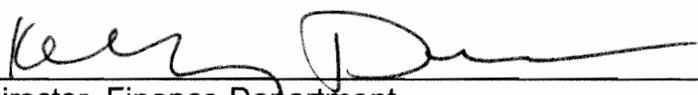
ATTEST/SEAL:

_____ Date: _____
City Secretary

COUNTERSIGNED:

_____ Date: _____
City Controller

APPROVED:

 _____ Date: 10/12/11
Director, Finance Department

APPROVED AS TO FORM:

_____ Date: _____
Assistant City Attorney

L.D. File No. 034100007001

G:\LAND\CHAP 380 ECON DEV\380 Agmt - Kroger\Kroger Ch380 Agreement Kroger Signed Only Final 10-3-11.docx

DEVELOPER:

KROGER TEXAS L.P.,
an Ohio limited partnership

By: KRGP Inc.,
an Ohio corporation

Its: General Partner

By: Patricia T. Ash
Patricia T. Ash
Vice President

Date: September 28, 2011



EXHIBIT A
Survey/Map of Land

EXHIBIT B

Preliminary List of City Improvements.

**Intended Infrastructure Improvements For 380 Agreement
Kroger Retail Center at NEC of Studemont and Summer Street**

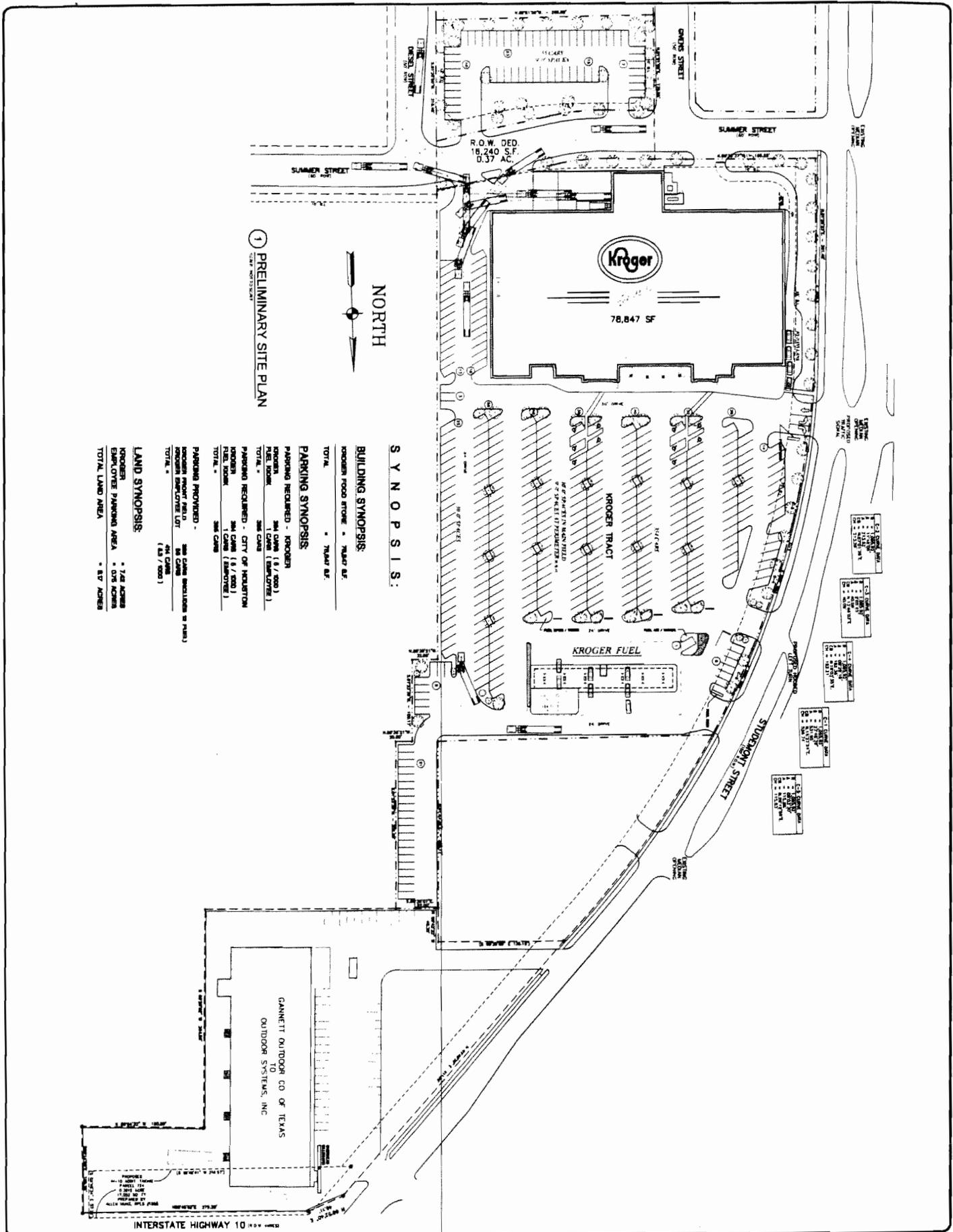
Date: September 19, 2011

ITEM	DESCRIPTION	UNIT	ESTIMATED QUANTITY	ESTIMATED UNIT COST	ESTIMATED TOTAL COST
1 Paving and Storm - Summer Street from Studemont to Givens					
1	STREET R-O-W PREPARATION	LS	1	\$ 5,000.00	\$ 5,000
2	PAVING AND SIDEWALK DEMOLITION	SY	975.00	\$ 5.00	\$ 4,875
3	PAVING SUBGRADE CUT, FILL, COMPACTION, DISPOSAL	SY	1,050	\$ 3.00	\$ 3,150
4	LIME FOR SUBGRADE STABILIZED 27 LBS./SY	TON	14	\$ 130.00	\$ 1,843
5	MANIPULATION OF LIME FOR SUBGRADE STABILIZATION	SY	1,050	\$ 1.00	\$ 1,050
6	7-INCH REINFORCED CONCRETE PAVING	SY	1,002	\$ 30.00	\$ 30,067
7	6-INCH REINFORCED CONCRETE CURB	LF	300	\$ 3.00	\$ 900
8	STREET SIGNS & STOP SIGNS	EA	3	\$ 150.00	\$ 450
9	PAVING TRAFFIC MARKINGS	LF	150	\$ 2.00	\$ 300
10	5-FOOT SIDEWALK (MINIMUM)	SF	660	\$ 5.00	\$ 3,300
11	HC RAMP FOR SIDEWALK	EA	4	\$ 2,500.00	\$ 10,000
12	TYPE BB STORM SEWER INLET	EA	2	\$ 1,500.00	\$ 3,000
13	24-INCH C76, CI III, RCP, STORM SEWER	LF	40	\$ 55.00	\$ 2,200
SUBTOTAL - PAVING & STORM ITEMS					\$ 66,134
2 Paving and Storm - Summer Street from Givens to Diesel					
14	STREET R-O-W Dedication (\$787,200 - \$32,520 = \$754,680)	SF	1	\$ 754,680.00	\$ 754,680
15	STREET R-O-W PREPARATION	LS	1	\$ 4,000.00	\$ 4,000
16	PAVING SUBGRADE CUT, FILL, COMPACTION, DISPOSAL	SY	1,450	\$ 3.00	\$ 4,350
17	LIME FOR SUBGRADE STABILIZED 27 LBS./SY	TON	20	\$ 130.00	\$ 2,545
18	MANIPULATION OF LIME FOR SUBGRADE STABILIZATION	SY	1,450	\$ 1.00	\$ 1,450
19	7-INCH REINFORCED CONCRETE PAVING	SY	1,375	\$ 30.00	\$ 41,250
20	6-INCH REINFORCED CONCRETE CURB	LF	220	\$ 3.00	\$ 660
21	STREET SIGNS & STOP SIGNS	EA	3	\$ 150.00	\$ 450
22	PAVING TRAFFIC MARKINGS	LF	300	\$ 2.00	\$ 600
23	5-FOOT SIDEWALK (MINIMUM), ON SUMMER ST, GIVENS, & DIESEL	SF	2886	\$ 5.00	\$ 14,430
24	HC RAMP FOR SIDEWALK	EA	12	\$ 2,500.00	\$ 30,000
25	TYPE BB STORM SEWER INLET	EA	2	\$ 1,500.00	\$ 3,000
26	TYPE C MANHOLE	EA	2	\$ 1,800.00	\$ 3,600
27	24-INCH C76, CI III, RCP, STORM SEWER	LF	300	\$ 55.00	\$ 16,500
28	PAVING TRANSITIONS, COMPLETE IN PLACE	EA	2	\$ 15,500.00	\$ 31,000
29	PAVING HEADER, COMPLETE IN PLACE	LF	124	\$ 12.00	\$ 1,488
SUBTOTAL - PAVING & STORM ITEMS					\$ 910,003
3 Left Turn Lane - Studemont at Fuel Station					
29	PAVING DEMOLITION	SY	65.00	\$ 12.00	\$ 780
30	PAVING SUBGRADE CUT, FILL, COMPACTION, DISPOSAL	SY	270	\$ 10.00	\$ 2,700
31	7-INCH REINFORCED CONCRETE PAVING	SY	270	\$ 50.00	\$ 13,500
32	6-INCH REINFORCED CONCRETE CURB	LF	300	\$ 5.00	\$ 1,500
33	5-FOOT (MINIMUM) SIDEWALK DOWN STUEMONT	LF	2990	\$ 5.00	\$ 14,950
34	HC RAMP FOR SIDEWALKS ON STUEMONT	EA	7	\$ 2,500.00	\$ 17,500
SUBTOTAL - LTL					\$ 50,930

4	Left Turn Lane - Studemont at Front Drive					
35	PAVING DEMOLITION	SY	340.00	\$	12.00	\$ 4,080
36	PAVING SUBGRADE CUT, FILL, COMPACTION, DISPOSAL	SY	475	\$	10.00	\$ 4,750
37	7-INCH REINFORCED CONCRETE PAVING	SY	475	\$	50.00	\$ 23,750
38	4-INCH REINFORCED MOUNTABLE CONCRETE CURB	LF	90	\$	7.00	\$ 630
39	6-INCH REINFORCED CONCRETE CURB	LF	450	\$	5.00	\$ 2,250
					SUBTOTAL - LTL	\$ 35,460
5	Left Turn Lane - Summer Street					
40	PAVING DEMOLITION	SY	19.00	\$	12.00	\$ 228
41	PAVING SUBGRADE CUT, FILL, COMPACTION, DISPOSAL	SY	97	\$	10.00	\$ 970
42	7-INCH REINFORCED CONCRETE PAVING	SY	97	\$	50.00	\$ 4,850
43	6-INCH REINFORCED CONCRETE CURB	LF	315	\$	5.00	\$ 1,575
44	RELOCATE EXISTING INLET	EA	1	\$	3,500.00	\$ 3,500
					SUBTOTAL - LTL	\$ 11,123
6	Signal at Studemont and Front Drive (or at Summer St)					
45	SIGNAL, INCLUDING DECORATIVE MAST ARM/POLE, LOOP DETECTORS, EMERGENCY OPTICOM DETECTORS, ETC.	LS	1	\$	160,000.00	\$ 160,000
					SUBTOTAL - SIGNAL	\$ 160,000
7	Joint Referral					
46	WATER LINE EASEMENT ABANDONMENT (JOINT REFERRAL PROCESS)	LS	1	\$	2,100.00	\$ 2,100
					SUBTOTAL - UTILITIES	\$ 2,100
8	Off Site Sanitary Sewer					
47	8-INCH, SDR 26, ASTM D 2241, PVC SAN. SEWER Open Cut	LF	311	\$	30.00	\$ 9,330
48	8-INCH, SDR 26, ASTM D 2241, PVC SAN. SEWER Bored	LF	597	\$	75.00	\$ 44,775
49	8-INCH, SDR 26, ASTM D 2241, PVC SAN. SEWER Pipe Bursting	LF	0	\$	200.00	\$ -
50	TYPE 4 SANITARY SEWER MANHOLE	EA	6	\$	2,100.00	\$ 12,600
51	SAN SEWER SERVICE LEADS RECONNECTS	EA	7	\$	800.00	\$ 5,600
52	PAVING REPLACEMENT	LS	1	\$	10,000.00	\$ 10,000
53	TRAFFIC CONTROL	LS	1	\$	6,000.00	\$ 6,000
					SUBTOTAL - Off SITE SANITARY SEWER	\$ 88,305
9	Upgrades to Landscape and Streetscape - Studemont					
64	LANDSCAPING - INCLUDING STUEMONT ROW	LS	1	\$	73,625.00	\$ 73,625
65	IRRIGATION - INCLUDING STUEMONT ROW	LS	1	\$	18,075.00	\$ 18,075
					SUBTOTAL - LANDSCAPING	\$ 91,700
10	Oilvewood Restoration	LS	1	\$	40,000.00	\$ 40,000
					SUBTOTAL - RESTORATION	\$ 40,000
					TOTAL ITEMS 1-10	\$ 1,455,755
11	Engineering/Legal/Consulting Fees		1		20%	\$ 291,151
12	Contingencies		1		10%	\$ 145,576
					TOTAL ESTIMATE ITEMS 1-12	\$ 1,892,482

EXHIBIT C

Conceptual Site Plan for Project.



① PRELIMINARY SITE PLAN
TOTAL ACRES: 27.00



S Y N O P S I S :

BUILDING SYNOPSIS:
 KROGER FOOD STORE - 78,847 SF
 TOTAL - 78,847 SF

PARKING SYNOPSIS:
 PARKING REQUIRED - KROGER
 KROGER (1.0 ACRE)
 200 CARS (1,000 SF)
 TOTAL - 200 CARS (1,000 SF)

PARKING REQUIRED - CITY OF HOUSTON
 KROGER (1.0 ACRE)
 200 CARS (1,000 SF)
 TOTAL - 200 CARS (1,000 SF)

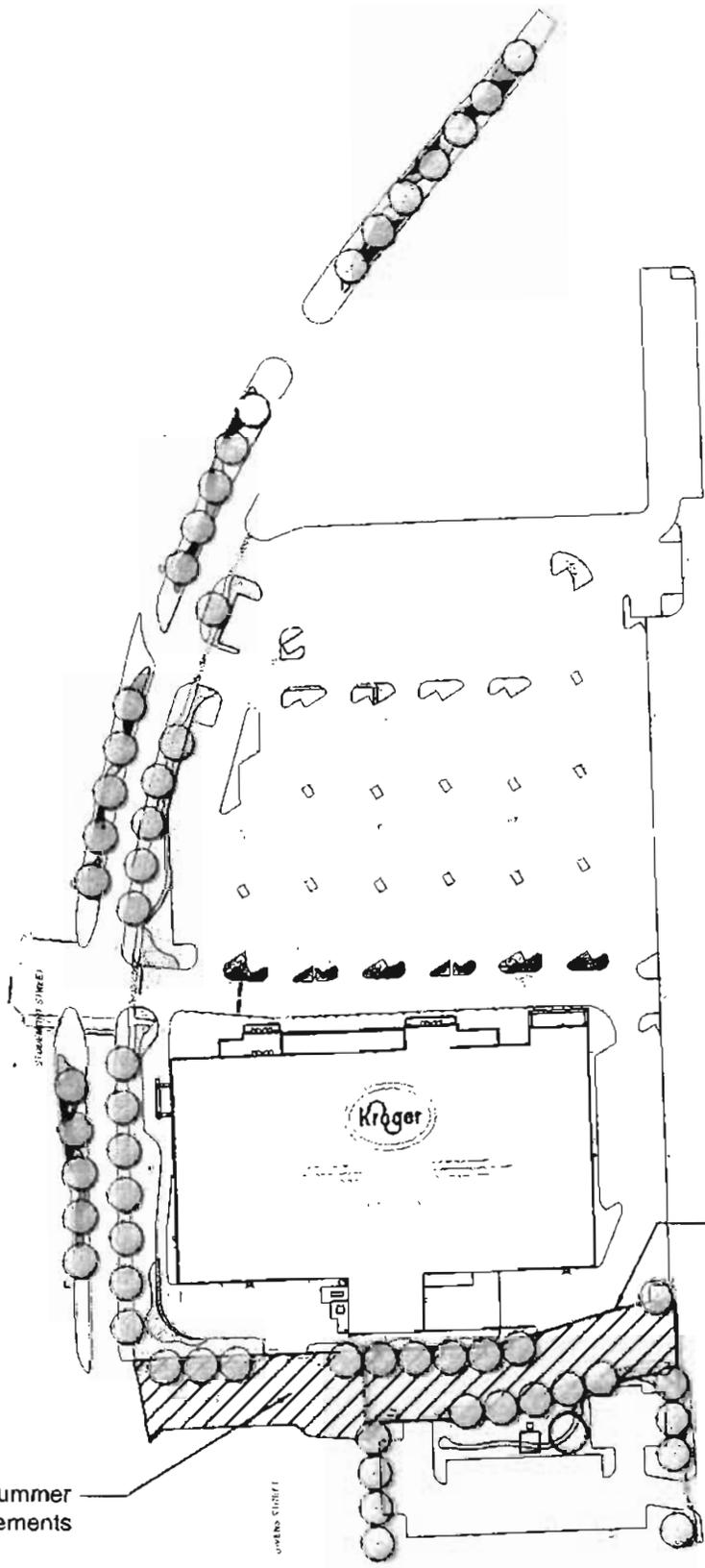
PARKING PROVIDED -
 KROGER FOOD STORE
 KROGER EMPLOYEE LOT
 TOTAL - 400 CARS (2,000 SF)

LAND SYNOPSIS:
 KROGER
 KROGER EMPLOYEE PARKING AREA
 TOTAL LAND AREA - 27 ACRES

GANNETT OUTDOOR CO OF TEXAS
 TO
 OUTDOOR SYSTEMS, INC

EXHIBIT D

Depiction of Project Landscaping



Hicks-Summer
Street Improvements

0.3765 Acre
ROW Dedication

EXHIBIT E

Form of Release for Sales Tax Area Report

AGREEMENT FOR DISCLOSURE OF CONFIDENTIAL
TAX INFORMATION

This agreement is entered into between the City of Houston (hereafter the "City") and _____ (hereinafter the "Taxpayer") for the purposes indicated herein.

I, _____, (title), the duly authorized agent of the Taxpayer, a vendor doing business at Kroger Store # _____, 1400 Studemont, Houston, Texas 77007 do hereby stipulate and agree as follows:

I hereby authorize the Texas Comptroller's Office to release and disclose any and all Sales and Use tax information relating to the operation of the above referenced taxpayer's business location to the City. I understand and agree that this release will be made by the Comptroller's Office to the City on an ongoing monthly basis beginning on the date this Agreement is executed. This Agreement waives any and all rights with respect to the parties regarding the confidentiality of tax information under Sections 111.006, 151.027, Tax Code, or other state law.

The City agrees that it will use the tax information disclosed by the Comptroller pursuant to this Agreement solely and exclusively for the purposes of an economic development agreement between the City and Taxpayer pursuant to Chapter 380, Texas Local Government Code.

This Agreement is entered into in the City of Houston, Harris County, Texas and Texas law will apply to its interpretation and enforcement.

SIGNED AND AGREED TO on this the _____ day of _____, 2011.

name
title

On Behalf of the "City"

name
title

On behalf of the "Taxpayer"
Texas Taxpayer Identification No. _____
Outlet No. _____