

**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATIONS**

cc: 12C
Amend No. _____

Date prepared: May 1, 2009

Council Meeting Date: May 19, 2009

TO: Carl Swenson, City Manager
FROM: Susan J. Daluddung, Deputy City Manager *SJD*
PREPARED BY: Maria Laughner, Business Development Specialist *ML*
SUBJECT: Revised agreement with Mercedes-Benz of Arrowhead

RECOMMENDATION: City Council to authorize the Transfer Agreement reflecting the Phoenix Motor Company's name change to Peoria Motor Company.

SUMMARY: An Assignment, Assumption, and Transfer Agreement has been submitted to transfer the existing Development Agreement rights and obligations from Phoenix Motor Company to Peoria Motor Company. Title to the underlying real property is now held by Arrowhead Commercial Properties, LLC, and the automobile dealership is now operated by Peoria Motor Company, LLC, not Phoenix Motor Company. These changes have been made for tax purposes.

ATTACHMENT: Revised Assignment, Assumption, and Transfer Agreement

CITY CLERK USE ONLY:

- Consent Agenda
- Carry Over to Date: _____
- Approved
- Unfinished Business (Date heard previous: _____)
- New Business
- Public Hearing: No Action Taken

ORD. # _____ RES. # _____
LCON# 14401A LIC. # _____
Action Date: _____

When Recorded Return to:

City of Peoria, Arizona
Office of the City Clerk
8401 West Monroe Street
Peoria, Arizona 85345

ASSIGNMENT, ASSUMPTION AND TRANSFER AGREEMENT

This Assignment, Assumption, and Transfer Agreement ("Agreement") is made and entered into this ___ day of _____ 2009, by and among Phoenix Motor Company, an Arizona corporation ("Original Dealer"), Peoria Motor Company, L.L.C., an Arizona limited liability company ("Successor Dealer"), dba "Mercedes-Benz of Arrowhead," Arrowhead Commercial Properties, L.L.C., an Arizona limited liability company ("Property Owner") and the City of Peoria, Arizona, an Arizona municipal corporation (the "City").

RECITALS

Whereas, the City and the Original Dealer entered into that certain Development Agreement, recorded in the Maricopa County Recorder's Office on the 20th day of December 2004, as document number 2004-1492503 (the "Development Agreement");

Whereas, subsequent to the recordation of the Development Agreement, title to the approximately ten (10) acres of land located at 92nd Avenue and Bell Road within the boundaries of the City, as more particularly described in Exhibit "A" to the Development Agreement ("Property"), was vested in and is currently held by Arrowhead Commercial Properties, L.L.C., an Arizona limited liability company ("Property Owner"), pursuant to that certain Quitclaim Deed dated June 19, 2008, recorded in the Maricopa County Recorder's Office as document number 2008-0551184;

Whereas, the Successor Dealer, as tenant, remits certain monies to the Property Owner, as lessor, of the Property as rent and also remits transaction privilege taxes and *other fees* to the City arising from its operation of the business known as "Mercedes-Benz of Arrowhead," as contemplated by the *Development Agreement*;

Whereas, the Original Dealer wishes to assign and transfer the rights and obligations of the "Dealer" under the Development Agreement to the Successor Dealer, and the Successor Dealer wishes to assume such rights and obligations (all quoted terms not defined herein are defined by the Development Agreement) and more particularly wishes to transfer the right to receive all payments from the city under the Development Agreement to the Property Owner, Arrowhead Commercial Properties, L.L.C.;

LCON14404A

Whereas, § 5.6 of the Development Agreement provides that the Development Agreement may be assigned with the written consent of the City, subject to certain conditions; and

Whereas, the City is willing to consent to the assignment, subject to the terms hereof.

Now, therefore, in consideration of the mutual covenants and agreements of the parties and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. **Successor Dealer Warranties and Covenants.** The Successor Dealer represents, warrants, and covenants the following:

The Successor Dealer is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of Arizona qualified to do business in the State of Arizona and headquartered in Arizona.

The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been validly authorized by all necessary corporate action of the Successor Dealer.

The Successor Dealer does not believe that an amendment of the Development Agreement is required.

The Successor Dealer acknowledges that it has carefully considered the terms of the Development Agreement, is fully competent to analyze such terms, and voluntarily accepts the obligation to fully perform all of the terms of the Development Agreement for no more consideration from the City than is contained in the Development Agreement.

2. **Conditions Precedent to Assignment.** The City's consent to assignment is conditioned on and the assignment will not be accepted by the City until this Agreement has been fully executed and recorded, whereupon the City is deemed to have accepted the assignment of the Development Agreement.

3. **Estoppel.** All terms and conditions of the Development Agreement remain in full force and effect. Original Dealer and Successor Dealer agree that, as of the date of this Agreement, they each have received the equal protection of the laws, have received due process of all claims and requests, and have not suffered from a compensable regulatory taking (as those terms and their related claims are defined by the Arizona Revised Statutes, Arizona state law, and federal constitutional jurisprudence). As far as the City knows or should know, neither the Original Dealer, the Successor Dealer, nor the City has breached the Development Agreement, nor has any event occurred which, with the passage of time or giving of notice or both, would constitute a default by any party under the Development Agreement, and the City does not have any claim, counterclaim, defense or setoff against the Original Dealer or Successor Dealer as of the date this Agreement is executed. As far as the Original Dealer or Successor Dealer know or should know, neither the Original Dealer, the Successor Dealer, nor the City

has breached the Development Agreement, nor has any event occurred which, with the passage of time or giving of notice or both, would constitute a default by any party under the Development Agreement. Neither the Original Dealer nor Successor Dealer have any claim, counterclaim, defense or setoff against the City whatsoever as of the date this Agreement is executed.

4. Miscellaneous.

Notices. All notices of communication required or permitted hereunder shall be in writing and may be given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid and registered or certified with return receipt requested, or by delivering the same in person to an officer or agent of such party.

If to the City: City of Peoria, AZ
8401 West Monroe Street
Peoria, Arizona 85345
Attn: City Manager

With a copy to: City of Peoria, AZ
8401 West Monroe Street
Peoria, Arizona 85345
Attn: City Attorney

If to Original Dealer: Phoenix Motor Company
225 West Indian School Road
Phoenix, AZ 85013
Attn: Mr. Charles Theisen

If to Successor Dealer: Peoria Motor Co.
dba Mercedes Benz of Arrowhead
President's Office
225 W. Indian School Road
Phoenix, AZ 85013
Attn: Mr. Charles Theisen

If to Property Owner: Arrowhead Commercial Properties, L.L.C.
225 West Indian School Road
Phoenix, AZ 85013
Attn: Mr. Charles Theisen

Entire Agreement. This Agreement contains the entire agreement and understanding among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements, understandings, inducements and conditions, express or implied, oral or written, of any nature whatsoever with respect to the subject matter hereof.

Controlling Law. This Agreement and all questions relating to its validity, interpretation, performance and enforcement, shall be governed by and construed,

interpreted and enforced in accordance with the laws of the State of Arizona, notwithstanding any Arizona or other conflict-of-law provision to the contrary.

Effect of A.R.S. § 38-511. To the extent applicable by provision of law, all parties acknowledge that this Agreement is subject to cancellation pursuant to A.R.S. § 38-511, the provisions of which are incorporated herein.

[Signatures on following pages]

IN WITNESS WHEREOF, City has caused this Agreement to be duly executed in the name and behalf of its Mayor and attested by its City Clerk, and Original Dealer and Successor Dealer have signed the same, on or as of the day and year first written above.

City of Peoria, Arizona, an Arizona municipal corporation

Phoenix Motor Company, an Arizona corporation

Bob Barrett, Mayor

By: _____
Charles Theisen, President

Peoria Motor Company L.L.C., an Arizona limited liability company

By: _____

ATTEST:

Name: J. CHARLES THEISEN

Title: PRESIDENT

Mary Jo Kief, City Clerk

Arrowhead Commercial Properties, L.L.C., an Arizona limited liability company

By: _____

APPROVED AS TO FORM:

Stephen M. Kemp, City Attorney

Name: J. CHARLES THEISEN

Title: PRESIDENT

[Notarizations on following page]

State of Arizona)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____ 2009, by Bob Barrett, the Mayor of the City of Peoria, Arizona, an Arizona municipal corporation, on behalf of the City.

(Seal and Expiration Date)

Notary Public

State of Arizona)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 16 day of April 2009, by Charles Theisen, the President of Phoenix Motor Company, an Arizona corporation.

(Seal and Expiration Date)

Marilyn C. Allen
Notary Public 

State of Arizona)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 16 day of April 2009, by Charles Theisen, the Managing Member of Arrowhead Commercial Properties, L.L.C., an Arizona limited liability company.

(Seal and Expiration Date)

Marilyn C. Allen
Notary Public 

State of Arizona)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 16 day of April 2009, by Charles Theisen, the Managing Member of Peoria Motor Co., L.L.C., an Arizona limited liability company.

(Seal and Expiration Date)

Marilyn C. Allen
Notary Public  5 of 6