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Murray, Utah 84107-5335

ENT8839:2021 PG 1 of 72  
**Andrea Allen**  
**Utah County Recorder**  
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ELECTRONICALLY RECORDED

Utah County Tax Parcel Nos.: 65:601:0101, 65:601:0102, 65:601:0104, 65:601:0105, 65:601:0106, 65:601:0107, 65:601:0108

## **DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, AND EASEMENTS**

### **CANYON GATE SHOPPING CENTER**

**THIS DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS (“Declaration”)** is made as of this 15 day of JANUARY 2021, by **CANYON GATE LLC**, a Utah limited liability company (“**Declarant**”). Capitalized terms in this Declaration have the meanings either defined herein or as provided in Section 1.1 hereinbelow.

#### RECITALS

**A. Commercial Center.** Declarant is the owner of the real property located in the City of Spanish Fork, Utah County, State of Utah, which is legally described on **Schedule “A”** attached hereto and incorporated herein by reference (the “**Commercial Center Land**”). Declarant plans to develop and build the Commercial Center, as defined and described herein, on the Commercial Center Land. All of the Commercial Center Land, Buildings, and uses located thereon shall be subject to the terms and conditions of this Declaration, including binding against any assignors, assignees, assigns, and so forth of any land or interests associated with the Commercial Center. This Declaration, including any present or future amendments, shall run with the Commercial Center Land.

**B. Intent.** Declarant desires to restrict the Commercial Center and its uses in accordance with the terms and provisions of this Declaration in order to provide for (i) the orderly development, operation, and maintenance of the Commercial Center, (ii) the construction of compatible improvements in the Commercial Center, (iii) common easements for ingress and egress of pedestrian and vehicular traffic, (iv) reciprocal parking rights, (v) procedures for the maintenance of the Commercial Center, and (vi) such other matters as are provided herein.

**NOW THEREFORE**, the Declarant does hereby make and consent to this Declaration as

follows:

## 1. PRELIMINARY

### 1.1 **Definitions.** The following terms as used in this Declaration shall have the meanings set forth below.

1.1.1 **“Applicable Laws”**: The statutes, laws, ordinances, rules, regulations, orders, ordinances and provisions of the State of Utah, the City and other governmental agencies having jurisdiction over the Commercial Center or the use thereof.

1.1.2 **“Approving Person”**: As defined in **Section 15.7**.

1.1.3 **“Association”**: The association of Owners known as Canyon Gate Spanish Fork, Inc., a Utah nonprofit corporation.

1.1.4 **“Association Documents”**: This Declaration, Articles of Incorporation of the Association, Bylaws of the Association, and Rules and Regulations as may be amended from time to time.

1.1.5 **“Authorized Occupant”**: In the singular, any tenant, subtenant, licensee or similar party who is entitled by written agreement to occupy any Floor Area of any Building located within the Commercial Center, or in the plural all or some portion of the same as the context requires.

1.1.6 **“Benefitted Parties”**: Owners of the Commercial Center, their Authorized Occupants, contractors, employees, agents, customers, licensees and invitees and the subtenants, contractors, employees, agents, customers, licensees and invitees of such Authorized Occupants.

1.1.7 **“Building(s)”**: Buildings, offices, and commercial structures located upon the Commercial Center Land, including but not limited to each such building’s appurtenant improvements known as Canopy Areas and/or Service Facilities.

1.1.8 **“Canopy Areas”**: Areas located under canopies or roof extensions which extend from a Building, together with any columns or posts supporting the same, all of which shall be constructed, owned, operated and maintained by the Owner of the Building to which the same are attached.

1.1.9 **“Center Sign(s)”**: Monument and/or pylon signs, if any, which will be located in areas allowed by the City and approved by the Consent of the Owners.

1.1.10 **“City”**: The City of Spanish Fork, Utah County, State of Utah.

1.1.11 **“Collection Costs”**: As defined in **Section 11.1**.

1.1.12 **“Commercial Center”**: The Commercial Center Land, together with all Buildings and other improvements located thereon and all thereunto pertaining.

1.1.13 **“Commercial Center Land”**: The real property described on **Schedule “A”**, and consisting of the Parcels.

1.1.14 **“Common Facilities”**: All those areas located upon each Parcel, excluding the Buildings, but including, without limitation, the following: sidewalks (excluding store front sidewalks and those adjacent and contiguous to Buildings located within the Commercial Center which are the responsibility of their Parcel Owner) and trails (except where maintained by the City); walkways; aisles and driveways providing ingress and egress to the Buildings and parking areas located within the Commercial Center to and from adjacent public streets and highways; all parking areas; any and all storm water systems (excluding all retention and detention basins or facilities located on each Parcel for the exclusive use of such Parcel), and including compliance with the requirements of any applicable storm water agreements, as well as any additional applicable recorded documents; any and all land drains (excluding those installed for the exclusive benefit of a particular Building or Parcel); unloading areas (except for Service Facilities which are for the exclusive use of a particular Building or Parcel); shrubbery; plantings and other landscaping; the illuminating and mechanical equipment used exclusively in connection with any of the foregoing (but excluding any illumination and mechanical equipment use or operated for a Building; all utility lines and facilities, including but not limited to all sewer lines and water lines, servicing the Parcels to the perimeter walls of any Building in the Commercial Center (but excluding any utility lines and/or facilities which exclusively service only one Parcel and the improvements located thereon); Center Signs; Pad Monument Signs; and all other portions of the Commercial Center designated by the Consent of the Owners from time to time as Common Facilities.

1.1.15 **“Common Facilities Budget”**: As defined in **Section 7.1.1**.

1.1.16 **“Common Facilities Charge”**: As defined in **Section 7.4.1.3** and sometimes referred to as a “periodic assessment” or a “common area maintenance fee”.

1.1.17 **“Common Facilities Lien”**: As defined in **Section 11.1**.

1.1.18 **“Common Facilities Maintenance”**: As defined in **Section 6.1**.

1.1.19 **“Common Lighting”**: Lighting to be provided for the Common Facilities initially as the Declarant shall deem appropriate during the initial development and operation of the Commercial Center through the Declarant Control Period, and thereafter as determined by the Consent of the Owners.

1.1.20 **“Condemnation Award”**: As defined in **Article 14**.

1.1.21 **“Consent of Owners”**: The approval of the Owners holding at least fifty percent (50%) of the Proportionate Shares and of the Consenting Party.

1.1.22 **“Consenting Party”**: The Declarant as long as it is the Owner of at least one Parcel or has any ownership interest in any of the Parcels, according to the official plat thereof on file with the Recorder’s Office.

1.1.23 **“Contracting Party”**: As defined in **Section 2.6.1.2**.

1.1.24 **“Declarant”**: As defined above, as well as any Owner to whom the Declarant or a successor thereto assigns all of its rights to be the Declarant hereunder.

1.1.25 **“Declarant Control Period”**: As defined in **Section 12.1.2**.

1.1.26 **“Declaration”**: This Declaration of Covenants, Conditions, Restrictions, and Easements for Canyon Gate Shopping Center.

1.1.27 **“Default Rate”**: A rate of interest equal to the greater of (i) the Prime Rate plus ten percent (10%) per annum, compounded annually, or (ii) eighteen percent (18%) per annum, compounded annually.

1.1.28 **“Defaulting Party”**: As defined in **Section 11.1**.

1.1.29 **“Deficiencies”**: As defined in **Section 11.2**.

1.1.30 **“ECR”**: Those EASEMENTS WITH COVENANTS AND RESTRICTIONS AFFECTING LAND recorded on February 7, 2017 as entry no. 13238:2017 in the office of the Utah County Recorder. Said ECR is referenced and incorporated herein as **Schedule “E”**.

1.1.31 **“Employee Parking Areas”**: Those areas designated as “Employee Parking Areas” pursuant to the provisions of **Section 5.2**.

1.1.32 **“Environmental Laws”**: As defined in **Section 13.3.2**.

1.1.33 **“Floor Area”**: With respect to a Parcel within the Commercial Center upon which a Building (excluding Canopy Areas and Service Facilities) has been erected, Floor Area shall mean the total number of square feet of floor space on all levels or stories in a fully constructed Building and approved for occupancy by the City, whether or not actually occupied, excluding basement, subterranean, and balcony space, unless that space is used as selling area. Floor Area shall be measured from the exterior line of the building exterior walls and from the center line of any party or common interior walls without deduction for columns, walls or other structural or nonstructural components. With respect to a Parcel within the Commercial Center upon which an office building has been erected, Floor Area shall mean the total number of rentable square feet located in each such office building as determined using the latest BOMA standards. With respect to a Parcel within the Commercial Center which is vacant (i.e., on which no Building has been erected), Floor Area shall mean the Floor Area Ceiling assigned to such Parcel as shown on **Schedule “C”** attached hereto, until such time as a Building is erected upon such Parcel, at which time the Floor Area assigned to such Parcel shall be the Floor Area of the Building as provided for in this Section.

1.1.34 [Intentionally Omitted.]

1.1.35 **“Hazardous Substance”**: As defined in **Section 13.3.2**.

1.1.36 **“Immediately Adjacent Building”**: A Building that shares a common wall with another Building or a Building whose exterior wall has no material separation from the exterior wall of an adjacent Building.

1.1.37 **“Lienholder”**: Any mortgagee under a mortgage or a trustee or beneficiary under a deed of trust constituting a lien on any Parcel.

1.1.38 **“Management Fee”**: As defined in Section 7.4.1.

1.1.39 **“Manager”**: As defined in Section 6.2.

1.1.40 **“Minimum Parking Count”**: As defined in Section 2.3.

1.1.41 **“Non-defaulting Party”**: As defined in Section 11.1.

1.1.42 [Intentionally Omitted.]

1.1.43 **“Office Building”** is herein defined as a single-story building in which business, clerical, or professional activities are conducted.

1.1.44 **“Operating Costs”**: As defined in Section 7.2.

1.1.45 **“Owner”**: The Person or Persons holding record fee title to a Parcel, as reflected in the records of the Recorder and their respective heirs, successors and assigns. If there are more than one record title to a Parcel, each record holder shall be an Owner. The term “Owner” includes the Declarant to the extent that the Declarant is the record holder of title to a Parcel. Notwithstanding any applicable theory relating to a mortgage deed of trust, or like instrument, the term “Owner” shall not mean or include a mortgagee or beneficiary or trustee under a deed of trust, unless and until such person has acquired title pursuant to foreclosure or any arrangement or proceeding in lieu thereof.

1.1.46 **“Pad(s)”**: **“Pad”** shall mean any of Lots 101 through 108, as shown on the Plat, and **“Pads”** shall mean any two or more thereof where the context requires. These Pads are sometimes also referred to herein as Parcels, depending on context.

1.1.47 **“Pad Monument Sign”**: Monument signs, to be located on a Pad which are intended to be utilized by the Authorized Occupants (which may be for the benefit of Authorized Occupants of more than one Pad) in locations approved by the City, and during the Declarant Control Period, the Declarant, and thereafter with the Consent of Owners.

1.1.48 **“Parcel(s)”**: In the singular, any of the Lots 101 through 108, as shown on the Plat, and in the plural, any two or more of such Lots.

1.1.49 **“Parcel Area”**: The size of each Parcel, measured in square feet or acres, as shown of the Plat, as the same may be amended from time to time.

1.1.50 **“Person”**: Individuals, partnerships, limited liability companies, firms, associations, corporations, trusts, governmental agencies, administrative tribunals, or any other form of business or legal entity.

1.1.51 **“Plat”**: The Subdivision plat of Canyon Gate Shopping Center as recorded in the official records of the Recorder on \_\_\_\_\_, 2020, as Entry No. \_\_\_\_\_, in Book \_\_\_\_\_, beginning at Page \_\_\_\_\_, as the same may be amended.

1.1.52 **“Prime Rate”**: The rate of interest which shall be the rate of interest reported from time to time on the financial page of *The Wall Street Journal*. Should, for any reason, *The Wall Street Journal* cease to publish such prime rate, the Prime Rate shall be the prime rate or other reference rate charged from time to time to corporate borrowers of the highest credit standing by Zions First National Bank, N.A.

1.1.53 **“Proportionate Share”**: A percentage derived by dividing the Parcel Area of a given Parcel by the total Parcel Area of all Parcels in the Commercial Center (as set forth in **“Schedule C”**).

1.1.54 **“Real Estate Taxes”**: As defined in **Section 9.1**.

1.1.55 **“Receipt”**: As defined in **Section 15.10.2**.

1.1.56 **“Recorder”**: The Recorder of Utah County, State of Utah.

1.1.57 **“Reimbursement Assessment”**: As defined in **Section 12.3.4**.

1.1.58 **“Requesting Person”**: As defined in **Section 14.7**.

1.1.59 **“Restrictions”**: The covenants, conditions, restrictions, easements, liens, and encumbrances contained in this Declaration.

1.1.60 **“Seasonal Sales Area”**: As shown on the Site Plan, if any such area is designated, or as designated by the Association.

1.1.61 **“Service Facilities”**: Loading docks, trash enclosures, bottle storage areas, drive-up and drive-through lanes, and other similar service facilities.

1.1.62 **“Site Plan”**: The site plan attached hereto as **Schedule “B”** and incorporated herein by this reference, as the same may be amended from time to time in accordance with the provisions of Section 2.2.3 of this Declaration.

1.1.63 **“Training or Educational Facility”**: As defined in **Section 3.3.1**.

1.1.64 **“Trustee”**: As defined in **Section 11.6**.

1.1.65 **“Utility Facilities”**: As defined in **Section 4.2.1**.

## 2. BUILDING AND COMMON FACILITIES DEVELOPMENT

2.1 **Standard.** All Buildings and other structures shall be constructed and maintained in accordance with all Applicable Laws.

2.2 **Building Location.** The specific placement and dimensions of all Buildings within the Commercial Center (including those resulting from any remodeling, renovation, replacement, or other re-construction) shall be consistent and subject to the following:

2.2.1 [Intentionally Omitted.]

2.2.2 Buildings constructed on Parcels may be constructed in such locations thereon as the then Owner shall request in advance of obtaining City approvals and Declarant shall approve in writing, Declarant’s prior approval not to be unreasonably withheld, delayed or conditioned, provided that such location: (a) does not result in (i) the unreasonable impairment of the visibility of the Commercial Center, (ii) a material impairment of access to the Commercial Center from the public street and/or parking in the Commercial Center as shown on the Site Plan, or (iii) a reduction in the number of parking spaces in the Commercial Center below the Minimum Parking Count.

2.2.3 **Site Plan Amendment:** Provided all applicable approvals are obtained and until the expiration of the Declarant Control Period, the Declarant may alter the Site Plan, including but not limited to a change in location or orientation of a Building, parking stalls, and ingress and egress to and from a Pad without the approval of the Owners. Thereafter material modifications of the Site Plan shall require the Consent of the Owners, together with the approval of applicable governmental agencies as the same may be required.

2.3 **Parking.** Each Owner of a Parcel located in the Commercial Center shall maintain at all times on each of the Parcels owned by it, a parking ratio equal to or higher than shown on the Site Plan as required by the City as a condition to occupancy of Building upon such Parcel (herein the “**Minimum Parking Count**”). The size and configuration of the parking spaces must satisfy the requirements of the City (which includes a requirement that the parking stalls be at least ten [10] feet in width) and must be approved by the Declarant during the Declarant Control Period and thereafter with the Consent of the Owners.

2.3.1 **Governmental Parking Tax:** If any governmental entity imposes a parking tax upon the use of the parking facilities, then each Owner shall be responsible for the payment of the parking tax imposed on the parking spaces located on such Owner’s Parcel.

2.3.2 **Miscellaneous Parking Provisions:**

2.3.2.1 The parking facilities shall be used for the parking of only standard sized motor vehicles or motorcycles, and shall not be used for the parking or storage of recreational or other oversize vehicles.

2.3.2.2 No parking facilities located on the Commercial Center Land shall be used or licensed for parking for any off-site property or business.

2.3.2.3 No Owner shall have the right to install gates or other entry control equipment, curbing, bollards, or other obstructions to the drive aisles and parking

facilities located on its Parcel.

2.4 **Common Facilities.** Except as may be provided for in any applicable easement agreement or recorded document, the Common Facilities are hereby reserved for the use of the Benefitted Parties. The Common Facilities may be used for vehicular driving, parking (except that there shall be no multi-level parking), pedestrian traffic, directional signs, permitted signage, sidewalks, walkways, landscaping, perimeter walls and fences, lighting for Common Facilities (herein “**Common Lighting**”), utilities, and Service Facilities designated for common use, if any, and for no other purpose unless otherwise specifically provided in this Declaration. The Common Facilities shall be constructed in accordance with the material provisions of the Site Plan and shall be kept and maintained as provided for herein. The sizes and arrangements of the Common Facilities improvements, including, without limitation, service drives and parking areas, striping, traffic directional arrows and signs, concrete bumpers, Common Lighting, perimeter walls and fences, and landscaped areas together with necessary planting may not be materially changed after initial construction as approved by the Declarant without the prior written Consent of the Owners.

## 2.5 **Type and Design of Building.**

2.5.1 **Quality and Compatibility.** Each Building to be constructed in the Commercial Center shall be constructed to accommodate Permitted Uses as specified in Article 3, as well as referenced in the ECR attached as **Schedule “E”**, and shall be of first quality construction and architecturally designed so that its exterior elevations (including, without limitation, signs and color) will be architecturally and aesthetically compatible and harmonious with all other Buildings located in the Commercial Center as reasonably determined by the Owners, subject to the following:

2.5.1.1 Subsequent to the Declarant Control Period, no Building may be constructed nor the exterior of any existing Building changed in any way (including, without limitation, signs and color) without the prior, written Consent of the Owners as to the exterior elevations (including, without limitation, signs and color) of the Building to be constructed or modified, which approval shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing: (a) the standard signs and logos of a national franchise or business, as such logos and signs may exist from time to time, shall not require approval; (b) the opening, closing or relocation of any door shall not require approval; and (c) subject to all other restrictions contained herein and except as otherwise required herein, the standard building elevations of national businesses located on Parcels shall not require the Consent of the Owners.

2.5.1.2 Subsequent to the Declarant Control Period, before construction is commenced of any proposed Building or any modification of an existing Building which requires approval as specified in **Section 2.5.1.1**, sufficient information shall be sent to the Owners to enable them to make a reasonable determination as to the architectural and aesthetic compatibility of said Building or modification with all other Buildings in the Commercial Center. No Owner may arbitrarily or unreasonably withhold its approval of the proposed Building or modification if it is architecturally and aesthetically compatible and harmonious with all other Buildings in the Commercial Center and otherwise complies with the requirements of this Declaration. Each Owner must approve or disapprove a proposal submitted to it within thirty (30) days after the



receipt of the proposal, and, if such Owner disapproves the proposal, it shall provide a written explanation in reasonable detail of its reasons for disapproval. If an Owner (even though it rejects or disapproves the proposal) fails to provide such explanation within the thirty (30) day period, such Owner shall be deemed to have approved the proposal provided that with the submission of such approval, the party seeking the approval has stated in writing to the Owner whose approval is sought, that if a disapproval with supportive explanation is not delivered to the party seeking the approval within the thirty (30) day period after receipt of the proposal, approval shall then be deemed to have been given. If the proposal is disapproved as provided herein, then an alternative proposal may be submitted, which alternative proposal shall be submitted and considered in the same manner and according to the same procedures as the initial proposal. No approval or deemed approval of the architectural and aesthetic compatibility of any Building or modification of a Building shall waive any requirement that all Buildings be built of first quality construction or any other requirement applicable under this Declaration. If a dispute arises regarding whether a Building or modification to a Building is architecturally and/or aesthetically compatible and harmonious with other Buildings in the Commercial Center, the parties shall attempt to resolve the dispute informally and in an amicable manner. If the parties cannot resolve the dispute among themselves, the parties shall then attempt to resolve the dispute through a review of the proposed plans and specifications by a mutually approved and qualified architect. If the dispute still remains unresolved, the parties shall submit the dispute to arbitration as provided in **Section 15.4** herein.

- 2.5.2 **Sprinkler Systems.** Every Building either shall be equipped with automatic sprinkler systems or similar systems which meet or exceed applicable building codes and do not adversely affect the fire rating (for insurance purposes) of any Building built upon any adjacent Parcel.
- 2.5.3 **Structural Integrity.** No Building shall be built in a manner that shall adversely affect the structural integrity of any other Building in the Commercial Center.
- 2.5.4 **Height.** All Buildings in the Commercial Center shall be multi-level and/or height restrictions as laid out in the ECR and shall comply with all applicable laws, rules, ordinances, and regulations of any governmental body having jurisdiction over the Commercial Center, including the height of mechanical fixtures and equipment and screening of the same, excluding incidental architectural embellishments and peaks, measured from the finished grade at the center point of the front side of the Buildings (i.e., the side of the Building facing the customer parking lot, or if more than one customer parking lot abuts the Building, the side of the Building containing the main entrance). Any variance from the restrictions set forth above shall require the prior written approval of the Declarant during the Declarant Control Period and thereafter the Consent of the Owners.
- 2.5.5 **Basements and Mezzanine Restrictions.** No mezzanine or basement area constructed as part of a building shall be used for the sale or display of merchandise unless the same is first approved in writing by the Consent of the Owners.
- 2.5.6 **Building Maintenance.** Each Owner, at its sole cost and expense, shall maintain or cause to be maintained the exterior and interior of any Building, including any Canopy Areas and

Service Facilities (unless designated as part of the Common Facilities) located on such Owner's Parcel(s) in a quality and condition comparable to that of first-class Commercial Centers of comparable size and nature located in the same geographic area as the Commercial Center. All Service Facilities shall be attractively screened from view from the parking areas in a manner initially approved by the Declarant or, after the Declarant Control Period, approved with the Consent of the Owners.

## 2.6 Construction Requirements.

2.6.1 **Timing and Manner of Work.** All work performed in the construction, maintenance, repair, replacement, alteration or expansion of any Building, sign or Common Facilities improvements located in the Commercial Center shall be effectuated as expeditiously as possible and in such a manner as not to unreasonably interfere, obstruct or delay (i) access to or from the Commercial Center, or any part thereof, and any public right-of-way, (ii) customer vehicular parking designated in that portion of the improved Common Facilities located in front of any Building constructed in the Commercial Center, or (iii) the receiving of merchandise by any business in the Commercial Center including, without limitation, access to Service Facilities. All Common Facilities shown on the Site Plan for a Parcel shall be constructed and installed in advance of or in connection with the construction of the Building(s) on the Parcel.

2.6.1.1 Staging for the construction, replacement, alteration or expansion of any Building, sign or Common Facilities improvements located in the Commercial Center including, without limitation, the location of any temporary buildings or construction sheds, the storage of building materials, and the parking of construction vehicles and equipment shall be limited to that portion of the Commercial Center approved in writing by the Declarant during the Declarant Control Period and thereafter with the Consent of the Owners; however, to the extent possible, the staging area must be self-contained on the Parcel where construction activity is to occur.

2.6.1.2 Unless otherwise specifically stated herein, the Person contracting for the performance of such work ("**Contracting Party**") shall, at its sole cost and expense, promptly repair and restore or cause promptly to be repaired and restored to its prior condition all Buildings, signs and Common Facilities improvements damaged or destroyed in the performance of such work.

2.6.2 **Liens.** The Contracting Party shall not permit any liens to remain effective against any Parcel for any work done or materials furnished in connection with the performance of the work described in **Section 2.6.1** above; subject to the following:

2.6.2.1 The Contracting Party may contest the validity of any such lien, but upon a final determination of the validity thereof, the Contracting Party shall cause the lien to be satisfied and released of record.

2.6.2.2 The Contracting Party shall, within thirty (30) days after receipt of written notice from an Owner or Authorized Occupant, cause any such outstanding lien or claim of lien to be released of record or transferred to a bond in accordance with Applicable Laws, in a manner

reasonably satisfactory to the Person giving notice, failing which such Owner or Authorized Occupant shall have the right, at the Contracting Party's expense, to transfer said lien to a bond.

- 2.6.2.3 The Contracting Party shall indemnify, defend and hold harmless the Owners and Authorized Occupants of the Commercial Center from any and all liability, claims, damages, expenses (including reasonable attorneys' fees incurred in or before any action, at trial, on appeal or in bankruptcy court), liens, claims of liens, judgments, proceedings and causes of action, arising out of or in any way connected with the performance of such work, unless caused by the negligent or willful act or omission of the otherwise indemnified Person, its tenants, subtenants, agents, contractors or employees.
- 2.6.3 **Incidental Encroachments.** The Owners acknowledge and agree that incidental encroachments upon the Common Facilities and Buildings may occur as a result of the use of ladders, scaffolds, store front barricades and similar facilities in connection with the construction, maintenance, repair, replacement, alteration or expansion of Buildings, signs and Common Facilities improvements located in the Commercial Center, all of which are permitted hereunder so long as all activities requiring the use of such facilities are expeditiously pursued to completion and are performed in such a manner as to minimize any interference with use of the improved Common Facilities or with the normal operation of any business in the Commercial Center.
- 2.6.4 **Insurance.** During the course of any construction or repair as to any Building on a Parcel, the Person responsible for such construction or repair shall obtain and maintain:
- 2.6.4.1 Commercial general liability insurance (as to which all the Owners and Authorized Occupants shall be additional insureds) on an "occurrence basis" against claims for bodily injury, personal injury, death, or property damage occurring on, in or about the Commercial Center and the adjoining streets, sidewalks and passageways, with such insurance to be in single limit coverage in the minimum amount of Two Million and 00/100 Dollars (\$2,000,000.00);
- 2.6.4.2 Workers' compensation insurance for all employees of the entity conducting such construction who are engaged in such construction, in the amounts established by law; and
- 2.6.4.3 "Builder's completed value all risk" insurance against "all risks of physical loss" including collapse and transit coverage, during construction or repair, with deductibles not to exceed Five Thousand and 00/100 Dollars (\$5,000.00), covering the Building under construction while in the course of construction, fixtures, machinery, construction equipment, and building materials and supplies with limits covering the cost of such building, materials and supplies.
- 2.6.5 **Condition Pending Construction.** Except as provided in Section 6.1.12 below, each Owner of any Parcel in the Commercial Center, at its expense, shall maintain the undeveloped portion thereof in a clean condition, free from weeds, and either landscaped and/or covered with gravel base prior to commencement of construction of Buildings; provided, however, that on or before the date which will be three (3) years after the date that a business first opens on one of the Parcels, each Owner, at its expense, shall either: (i) install an asphalt cap on such unimproved Parcel according to the requirements of Applicable Law; (ii) install

landscaping and a sprinkling system on such unimproved Parcel; or (iii) commence or cause to be commenced construction of one or more Buildings upon such Parcel and thereafter diligently pursue such construction to completion. Except as provided in **Section 6.1.12** below, each owner of any unimproved Parcel shall maintain its Parcel in a clean condition, free from weeds, pending construction of and Building thereon and shall use reasonable efforts to minimize the creation and distribution of dust that may detrimentally affect the Commercial Center.

- 2.7 **Casualty and Condemnation.** In the event all or any portion of any Building located within the Commercial Center is (i) damaged or destroyed by fire or other casualty, or (ii) taken or damaged as a result of the exercise of the power of eminent domain or any transfer in lieu thereof, the Owner of such Building shall promptly restore or cause to be restored the remaining portion of such Building or, in lieu thereof, shall remove or cause to be removed the damaged portion of such Building together with all rubble and debris related thereto. All portions of Parcels on which a restoration or replacement of a Building has not commenced within ninety (90) days following a casualty or condemnation shall be graded or caused to be graded by the Owner thereof to the level of the adjoining Commercial Center Land and in such a manner as to not adversely affect the drainage of the Commercial Center or any portion thereof, and shall be covered by a one inch asphalt dust cap (or a compacted gravel base) or landscaped (including a sprinkling system). In the event any Common Facilities are damaged or destroyed by fire or other casualty or taken or damaged as a result of the exercise of the power of eminent domain or any transfer in lieu thereof, any insurance or condemnation proceeds or awards and any needed additional funds of the Owner shall be used by the Owner to restore the remaining portion of the Common Facilities so that they are in operative condition.

### 3. PERMITTED USES AND RESTRICTIONS ON USE

- 3.1 **Permitted Uses.** Permitted uses of any portion of the Commercial Center and any Floor Area located therein, shall be limited to those uses permitted or not otherwise prohibited by this Declaration and as otherwise permitted by Applicable Laws of the City.
- 3.2 **Exclusive Uses.** Each Parcel may be subject to its own exclusive uses or rights as stated in written lease agreements by or between Owners and Authorized Occupants, and subject to written approval from Declarant. Initial exclusive uses are detailed in **Schedule "D"** to this Declaration.

3.3 **Prohibited Uses.** The restrictions and uses referenced and memorialized in the ECR, attached herein as **Schedule "E"** including but not limited to **Sections 2 and 3** therein, are incorporated into this **Section 3.3**.

3.4 **Enforcement.** If the provisions of this Article shall be breached or shall be threatened to be breached, the Association, any Owner, or Authorized Occupant shall be entitled to injunctive relief or any other appropriate remedy at law or in equity whether provided by statute or otherwise, as such elect.

### 4. EASEMENTS

4.1 **Ingress, Egress, and Parking.** Each Owner, as grantor, hereby reserves to itself and grants to each other Owner, for the benefit of the Benefitted Parties and each Parcel, a non-exclusive easement for ingress and egress by vehicular and pedestrian traffic and vehicular parking upon, over and across that portion of the Common Facilities located on each Owner's Parcel(s), except for those areas devoted to Service Facilities and not designated as part of the Common Facilities reserved for the use of all Authorized Occupants. The rights of ingress, egress and parking set forth in this Section shall apply to the Common Facilities for each Parcel.

4.2 **Utility Lines and Facilities.**

4.2.1 **Grant.** Each Owner, as grantor, hereby reserves to itself and grants to each other Owner, for the benefit of the Benefitted Parties and each Parcel, as grantees, a non-exclusive easement under, through and across the portion of the Common Facilities located on each Owner's Parcel(s) which are not usable for building locations under Applicable Laws of the City for the installation, operation, maintenance, repair and replacement of storm water drainage systems or structures, water mains, storm and sanitary sewers, water sprinkler system lines, telephones, electrical conduits or systems, gas mains and other public or private utilities (the improvements, structures, mains, pipes, lines, conduits and components collectively referred to as the "Utility Facilities").

4.2.1.1 All Utility Facilities shall be installed and maintained below ground level or surface of such easements except for ground-mounted electrical transformers and such other components as are required to be above ground by the utility providing such service (including temporary service required during the construction, maintenance, repair, replacement, alteration, or expansion of any Buildings or improvements located in the Commercial Center).

4.2.1.2 The installation, operation, maintenance, repair, and replacement of such Utility Facilities shall not unreasonably interfere with the use of the improved Common Facilities or with the normal operation of any business in the Commercial Center. The grantee shall bear all costs related to the installation, operation, maintenance, repair, and replacement of such Utility Facilities, shall repair to the original specifications any damage to the Common Facilities resulting from such use, and shall provide as-built plans for all such Utility Facilities to the Association and the Owner of all Parcels upon which such Utility Facilities are located, within thirty (30) days after the date of completion of construction of the same.

4.2.2 **Relocation.** At any time and from time to time, the Owner of a Parcel shall have the right to relocate on its Parcel any Utility Facilities installed pursuant to the foregoing grant of easement which is then located upon the Parcel of such Owner, provided that any such relocation (i) shall be performed only after sixty (60) days' notice of the Owner's intention to undertake the relocation shall have been given to the Association, to the Declarant, and to the Owner of each Parcel served by the Utility Facilities to be relocated, (ii) shall not unreasonably interfere with or diminish utility service to the Parcels serviced by the Utility Facilities, (iii) shall not reduce or unreasonably impair the usefulness or function of the Utility Facilities, (iv) shall be performed without cost or expense to the Owner, the Association, or Authorized Occupant of any other Parcel (unless otherwise agree in writing in advance by the parties), and (v) shall provide for the original and relocated area to be restored to the original

specifications. The Owner performing such relocation shall provide as-built plans for all such relocated Utility Facilities to the Association and the Owners of all Parcels served by all such Utility Facilities within thirty (30) days after the date of completion of such relocation.

- 4.2.3 **Additional Grants.** Each Owner agrees to grant such additional easements as are reasonably required by the Association or any public or private utility for the purpose of providing utility services and installing Utility Facilities described herein provided such easements are not otherwise inconsistent with the provisions of this Declaration, and provided that such easements do not unreasonably interfere with or limit the use of the subject Parcels.

4.3 **Signs.** Each Owner, as grantor, hereby grants to the other Owners and to the Association, as grantees, for the benefit of each Parcel belonging to the other Owners and the Authorized Occupants of a Building located upon each such Parcel, an easement under, through and across the Common Facilities of each Owner's Parcel(s) for the installation, operation, maintenance, repair and replacement of the free-standing signs, and all utility lines and facilities appurtenant thereto, referred to in Section 5.3 of this Declaration. Except where otherwise specifically stated herein to the contrary, the grantee(s) shall bear all costs related to the installation, maintenance, repair and replacement of its free-standing sign and appurtenant facilities, shall repair to the original specifications any damage to the Common Facilities resulting from such use and shall provide as-built plans for all such facilities to the Association, to the Declarant and to the Owners of all Parcels upon which such facilities are located within thirty (30) days after the date of completion of construction of the same.

4.4 **Building Encroachments.** Each Owner, as grantor, hereby grants to the other Owners, as grantees, for the benefit of each Parcel belonging to the other Owners and its Authorized Occupants, as applicable: (i) an easement for any portion or component of any Building Improvement located on any such Parcel which may unintentionally encroach into or over the adjoining Parcel(s) by not more than six (6) inches; (ii) an easement for any footings, foundations, piers, piles, or grade beams of any Building Improvement located on any such Parcel which may intentionally or unintentionally encroach into or over the adjoining Parcel(s) provided the easement for footings, foundations, piers, piles, grade beams does not exceed three (3) feet; provided that the encroachments specified in (i) and (ii) above do not diminish the buildable area of the servient parcel. The easements granted in this Section shall survive the termination of this Declaration and shall last so long as the encroaching Building is standing following its initial construction or following its reconstruction where such Building is substantially restored to its prior condition following a casualty or condemnation.

## 5. OPERATION OF COMMON FACILITIES

### 5.1 Parking.

5.1.1 **Charges.** There shall be no charge for parking in the Common Facilities without the prior written Consent of the Owners, or unless otherwise required by law.

5.1.2 **Parking Spaces.** Each Parcel located within the Commercial Center shall at all times contain the Minimum Parking Count.

5.2 **Employee Parking.** The employees, contractors, agents, officers, and partners of all Owners and Authorized Occupants of the Commercial Center shall use only the Employee Parking Areas for parking as shall be designated as such by the Owners from time to time. With the Consent of the Owners, an Owner may from time to time designate, expand and/or relocate the Employee Parking Areas in the Commercial Center by written notice to all Owners and Authorized Occupants within the Commercial Center. The authority herein granted shall be exercised in such manner as not to discriminate against or create any unreasonable burden upon any Owner or Authorized Occupant of the Commercial Center.

5.3 **Signs.**

5.3.1 **Location, Design, Content, and Costs.** Subject to compliance with Applicable Law, the approval of the Declarant during the Declarant Control Period and thereafter the Consent of the Owners with respect to location, size and design, which consent shall not be unreasonably withheld, conditioned or delayed: (i) Center Signs shall be erected and maintained in the Commercial Center for the benefit of all of the Owners and Authorized Occupants, and (ii) Pad Monument Signs for the benefit of Authorized Occupants, may be placed on each of the Pads, subject to the following terms and conditions:

5.3.1.1 The cost of constructing, maintaining, repairing, and replacing the Center Signs (excluding electrical hookup to the Common Facilities meter) shall be paid by the Owners or Authorized Occupants entitled to display designations (other than the Commercial Center designation) thereon in the proportion that the total square footage of each occupant designation or designations on such Center Signs bears to the total square footage of all designations entitled to be displayed on such Center Signs. The cost of constructing, maintaining, repairing and replacing the Pad Monument Signs shall be paid by the Owner of the Pad on which the sign is located or if a Pad Monument Sign is utilized by the Owners of more than one Pad, then by the Owners of such Pads as they shall agree; provided, however, that nothing contained herein shall prevent the Owner of a Pad from shifting such expense to the Authorized Occupants of the Pad. Notwithstanding, Declarant shall have the unrestricted right to place directional signs throughout the Commercial Center.

5.3.1.2 Each Person displaying a designation on the Center Signs shall supply and maintain its own sign fascia and can. The design of the Center Sign structure(s) shall be consistent with the fascia used and selected by the Owners.

5.3.1.3 The Center Signs shall be maintained in a customary and first-class Commercial Center standard in the area of the Commercial Center.

5.3.1.4 Each Pad Monument Sign may advertise only the business of the Authorized Occupants located upon such Pad or Pads for which Pad Monument Sign was installed.

5.3.2 **Restrictions and Types.** Other than as set forth in this Section 5.3, there shall be no other signs, except directional signs and signs on Buildings, in the Commercial Center. All exterior Building signs on all Buildings in the Commercial Center shall be restricted to identification of the business or service/product located or provided therein. No exterior Building sign shall be placed on penthouse walls, extend above the Building silhouette line or be painted on the

exterior Building surface, without the approval of the Declarant during the Declarant Control Period and thereafter without the Consent of the Owners. No exterior Building or free-standing sign shall utilize flashing, moving or audible lights or appurtenances, or LED signs and displays with scrolling messages and changing images, unless approved by the Consent of the Owners.

- 5.4 **Protection of Common Facilities.** Each Owner and Authorized Occupant shall have the right to take such reasonable steps as it deems necessary to prevent those Persons not authorized by this Declaration or other easements or similar rights of record in the offices of the Recorder from using the Common Facilities for ingress, egress and parking, provided such steps do not deprive any Owner or Authorized Occupant of the substantial benefit and enjoyment of the Commercial Center and further provided that each Owner and Authorized Occupant shall be given thirty (30) days' prior written notice of such steps. Such steps may include, without limitation, the construction of fences, walls or barricades along the perimeter boundary lines of any portion of the Commercial Center excluding areas adjacent to public streets and further excluding any common boundary line between of any Parcels located within the Commercial Center
- 5.5 **Exterior Sales.** No portion of the Common Facilities may be used by an Authorized Occupant of a Parcel for the display and/or sale of merchandise and services, except as follows:
- 5.5.1 **Sidewalks.** An Owner or Authorized Occupant of a Parcel may use the sidewalks directly in front of the Building erected on such Parcel for the sale of merchandise and services, provided that all such merchandise and services exhibited for sale (and the sidewalk, during periods in which such merchandise or services are being displayed) must be kept in a safe, neat, clean and attractive manner, including sweeping and removal of snow, ice or other debris, and a reasonable pedestrian passage corridor must at all times be maintained through such area.
- 5.5.2 **Seasonal Sales Area.** An Owner or Authorized Occupant of a Parcel shall be permitted to use the Seasonal Sales Area approved for Parcel for seasonal sales of merchandise from time to time, but not continuously, provided that (i) such sales shall be permitted by Applicable Laws and shall not interfere with the free movement of vehicular traffic within the Commercial Center or with access to or from the Commercial Center, or any part thereof, to or from any public right-of-way; (ii) such Owner or Authorized Occupant maintains the Seasonal Sales Area in a safe, neat and clean condition including sweeping and removal of snow, ice or other debris, to the extent such maintenance is required during periods in which such Owner or Authorized Occupant is making use of the Seasonal Sales Area or to the extent such use by the Authorized Occupant prohibits the Association from fulfilling Common Facilities Maintenance; (iii) sales within the Seasonal Sales Area shall be limited to not more than one hundred twenty (120) days duration in each calendar year; (iv) all booths, stands, displays and other structures erected in connection with such sales shall be promptly removed by the Owner or Authorized Occupant of a Parcel upon termination of said sales activities; and (v) the Common Facilities shall be promptly repaired to their condition immediately prior to their use for seasonal sales at the sole cost and expense of the Owner or Authorized Occupant of such Parcel.



- 5.5.3 **Obligation for Compliance.** For purposes of this **Section 5.5**, the Owner and the Authorized Occupant of a Parcel shall remain responsible and liable to see that any external sales conducted pursuant to this **Section 5.5** comply with the requirements set forth herein.
- 5.6 **Common Lighting.** If deemed advisable by the Declarant during the Declarant Control Period and thereafter upon the Consent of the Owners, Common Lighting shall be provided during those dawn, dusk and nighttime hours that fall between one-half hour before and one-half hour after the hours of standard operation of the Commercial Center (“**Common Lighting Hours**”). During all other dawn, dusk and nighttime hours, the Common Lighting may be reduced to three (3) foot candles. However, Common Lighting need not be maintained in the event of failure of power, restrictive governmental law or regulations, riots, insurrection, war, act of God, or other reason of a like nature not the fault of the party responsible for Common Lighting, in which instance performance of the foregoing covenant shall be excused. Notwithstanding the foregoing, the Owner of any Parcel may require the Association to light the Common Facilities on its Parcel (and other Common Facilities on adjacent Parcels which may not be operated separately from those on the Parcel of the requesting Owner) beyond Common Lighting Hours, provided such Owner shall pay the cost thereof, as reasonably determined by the Association; provided that, in the alternative, such Owner may, at its sole option and cost, cause the Common Lighting on its Parcel to be separately metered and billed to the Owner or Authorized Occupant of such Parcel.
- 5.7 **Flag.** The Association shall have the exclusive right in the Commercial Center, subject to compliance with all Applicable Laws, to erect and maintain, at its sole expense, a permanent, exterior flagpole within the Commercial Center, and as approved by Declarant, and, without limitation, to display the USA national flag, Utah state flag, and/or City flag, thereon as it deems appropriate. Nothing herein shall preclude any other Owner or Authorized Occupant from displaying the USA national, Utah state, or City flags in any other manner other than a permanent exterior flagpole.

## 6. MAINTENANCE AND REPAIR OF COMMON FACILITIES.

- 6.1 **Operation of the Common Facilities.** The Common Facilities shall be operated and maintained in compliance with all Applicable Laws, the provisions of this Declaration, and any applicable easement agreement or recorded document, in a safe, sound and clean condition, free of rubbish, debris, or other hazards to Persons using the same. Except as set forth herein, the Association shall be responsible to operate and maintain all Common Facilities improvements and to repair and replace the same with materials at least equal to the original quality of the materials being repaired or replaced, so as to maintain the architectural and aesthetic harmony of the Commercial Center as a whole. This operation, maintenance and repair (i) shall be performed and carried out promptly by the Association (through its Manager if one is retained), or contractors retained for such purposes and in a first class and workmanlike manner, quality and condition comparable to that of first class Commercial Centers of comparable size and nature located in the same geographic area as the Commercial Center and in an equitable and non-discriminatory manner among the various Parcels; (ii) shall be referred to herein as the “**Common Facilities Maintenance**”; and (iii) shall include but not be limited to the following:

- 6.1.1 **Drive and Parking Areas.** Maintaining, repairing, cleaning, and replacing all blacktop, paved surfaces, and curbs (excluding the drive-through portions) in a smooth and evenly covered condition, and such work shall include, without limitation, sweeping, restriping, resealing, and resurfacing. For the purpose of this Section, an overlay of the drive and parking areas shall be considered a maintenance item.
- 6.1.2 **Debris, Refuse, and Trash Removal.** Periodic removal of all litter, filth, refuse, ice, and snow, including sweeping to the extent necessary to keep the Common Facilities in a first-class, clean and orderly condition. All sweeping shall be done at appropriate intervals during such times as shall not unreasonably interfere with the conduct of business or use of the Common Facilities by Persons intending to conduct business with Authorized Occupants of the Commercial Center. The Owner or Authorized Occupant, as such parties shall agree, of each Parcel, shall be responsible for removal of the trash generated from the use of such Parcel at its/their own expense, and shall do so in such manner as shall keep all Parcels in a first-class, clean, and orderly condition.
- 6.1.3 **Signs and Markers.** Placing, cleaning, keeping in repair, replacing, and repainting any appropriate directional signs or markers, including any handicapped parking signs, and also the Center Signs, except as otherwise provided in this Declaration with regard to sign fascia and cans which shall be supplied and maintained by the businesses designated thereon. The Owner(s) of each Pad shall pay the cost of so maintaining the Pad Monument Signs located on or used for the benefit of the Owner's Pad.
- 6.1.4 **Common Lighting.** Maintaining, cleaning and replacing Common Lighting facilities, including lamps, ballasts and lenses.
- 6.1.5 **Landscaped Areas.** Maintaining all landscaped areas, including landscaping and planters adjacent to exterior walls of Buildings, in an attractive and thriving condition, and replacing shrubs and other landscaping as necessary; provided, however, that if any Authorized Occupant requires "special" landscaping (i.e., beyond the type of landscaping originally installed, if any, by the Declarant), the cost of installation, replacement and maintenance of such special landscaping shall be borne solely by such Owner or Authorized Occupant and shall not be included in Operating Costs.
- 6.1.6 **Common Utilities.** Maintaining, cleaning, replacing, and repairing any and all common utility lines, including any sprinkling systems and Common Facilities water lines; and payment of all electrical, water and other utility charges or fees for service furnished to such Common Facilities, including lighting for the Center Signs and Common Lighting.
- 6.1.7 **Obstructions.** Keeping the Common Facilities free from any obstructions including those caused by the sale or display of merchandise, unless such obstruction is permitted under the provisions of this Declaration.
- 6.1.8 **Sidewalks.** Maintaining, cleaning, and replacing of all non-store front sidewalks, excluding those adjacent and contiguous to Buildings located within the Commercial Center. Sidewalks shall be cleaned and swept at appropriate intervals during such time as shall not interfere with the conduct of business or use of the Common Facilities.

- 6.1.9 **Traffic.** Regulation of traffic at entrances and exits to the Commercial Center and within the Commercial Center as conditions reasonably require in order to maintain an orderly and proper traffic flow. Notwithstanding anything to the contrary, each Owner in the first instance and each Authorized Occupant, if required by written agreement with the Owner, shall maintain and repair, at its sole cost, in a clean, sightly, and safe condition any Service Area intended to service a Building located upon such Owner's Parcel.
- 6.1.10 **Insurance.** Obtaining and paying premiums for insurance coverage on the Common Facilities as provided in **Section 7.5.**
- 6.1.11 [Intentionally Omitted.]
- 6.1.12 **Undeveloped Parcel Maintenance.** At its expense, each Owner of an undeveloped Parcel shall maintain its Parcel in accordance with the provisions of **Section 2.6.5** and the Association shall have no obligation to maintain the same; provided, however, that if an asphalt cap or landscaping is installed thereon pursuant to **Section 2.6.5**, then thereafter the Association shall perform Common Facilities Maintenance thereon suspended for periods of construction of a Building and related improvements.
- 6.2 **Manager.** Any Person retained by the Association and charged with the obligation for the operation and maintenance of the Common Facilities or some portion thereof from time to time, as an agent of the Association, shall be referred to herein as the "**Manager**" and shall be selected and operate according to the following terms and conditions:
- 6.2.1 **Initial Manager.** Initially, Declarant or its affiliate shall act as the Manager. If the Declarant declines to act as the Manager, the Association shall enter into a contract with a qualified Manager.
- 6.2.2 **Replacement of the Manager.** During the Declarant Control Period, Declarant shall have the right to replace and appoint the Manager. After the Declarant Control Period, the Association shall have the right to appoint and replace the Manager. All agreements between the Association and the Manager shall provide that the Manager may be terminated for cause or upon such other terms as the parties shall agree.
- 6.2.3 **Cure of Manager's Default.** Notwithstanding any other provision of this **Section 6.2**, and in the absence of notice and cure provisions within an agreement between the Association and the Manager, any Owner may require that the Association give the Manager notice of termination for cause resulting from (a) the Manager's failure to do or cause to be done the Common Facilities Maintenance promptly and in a first-class and workmanlike manner, or (b) the Manager's failure to perform any other obligation under the terms of its agreement. Unless a cure period is required by the terms and conditions of the agreement between the Association and the Manager, the Association, with the may provide the Manager with a period of ten (10) days after the date of the written notice in which to cure such default (or, if such default is not reasonably capable of cure within a ten (10) day period, then within a reasonable period of time provided the Manager gives notice of its intent to cure and thereafter diligently pursues such cure to completion). In the event of continued failure to maintain Common Facilities and if the Association is not able to obtain services from others

necessary to resolve any emergency maintenance item, if an Owner is required to perform any emergency maintenance after first notifying the Association, the Association shall reimburse the such Owner for the reasonable amounts expended by it or them in performing or having others perform such emergency Common Facilities Maintenance not performed by the Association or its Manager as specified herein above.

6.2.4 **Resignation.** A Manager may resign only according to the terms of its agreement with the Association, or if the initial Manager is the Declarant, upon at least sixty (60) days' advance written notice to the Owners. A replacement Manager shall be replaced as provided in Section 6.2.2 above. The replacement Manager may, but need not be, an Owner or its Affiliate.

6.2.5 **Minimizing Operating Costs.** The Association shall use their best efforts to retain a qualified Manager at a competitive price. Each Manager shall be charged with the responsibility of performing the Common Facilities Maintenance on behalf of the Association in such a manner as shall keep Operating Costs at a reasonable minimum while at the same time achieving the level of maintenance as required by this Declaration. Nothing herein shall preclude a Manager from employing its own personnel to perform parking lot sweeping, snow removal, refuse removal or other like actions for which a Manager incurs Operating Costs, and the Manager shall be entitled to collect for such services its agreed upon compensation as specified in the agreement between the Association and the Manager.

6.3 **License to Carry Out Intent of this Declaration.** Each Owner hereby grants to the Association, its agents and employees, a license to enter upon its Parcel to discharge the duties imposed upon the Association as specified in the Declaration, to perform the Common Facilities Maintenance and to otherwise carryout the obligations and directives of the Owners as specified in this Declaration.

6.4 **Exclusion.** Declarant shall have the right but not the obligation to allow Owners of the Parcels to maintain their own Parcels independently as long as Declarant, the Association, and such Owners enter into supplementary recorded agreements obligating such Owners to (a) comply with the maintenance standards hereof, and (b) pay a reasonable contribution towards the maintenance of the Common Facilities on the rest of the Commercial Center (such as access drives) used by such Owners. In such cases, the Owners shall not be required to otherwise share in costs of the Common Facilities except as may otherwise be agreed between the same and Declarant.

## 7. COMMON FACILITIES OPERATING COSTS

7.1 **Common Facilities Budget.** A budget for Common Facilities Operating Costs shall be formulated and made effective in the following manner, as applicable:

7.1.1 **Submission for Review.** For calendar year 2021, Declarant shall establish a budget for the balance of the year for which each present Owner will be proportionately responsible. At least sixty (60) days prior to the beginning of each succeeding calendar year, the Association shall submit to the Owners an estimated budget ("**Common Facilities Budget**") for the projected Operating Costs, Management Fee and Common Facilities Operating Costs for the

ensuing calendar year (or, in the case of an initial partial calendar year, that ensuing partial year). The Common Facilities Budget shall identify separate cost estimates for major categories in accordance with good Commercial Center management practices.

- 7.1.2 **Bids.** In determining the Common Facilities Budget, the Association shall submit major items of Common Facilities maintenance work for competitive bid to responsible bidders. Major items shall be deemed single maintenance or repair items that cost Fifteen Thousand and 00/100 Dollars (\$15,000.00) or more in the aggregate for any calendar year. Upon an Owner's request, the names of the bidders and their respective bids shall be furnished to such Owner together with the Common Facilities Budget, and the contract shall be awarded to the low bidder unless the Association shall otherwise reasonably determine.
- 7.1.3 **Approval by Owners.** Beginning in calendar year 2022, the Owners shall give written notice to Association of their approval or disapproval of the Common Facilities Budget before the later of December 10th or thirty (30) days after receipt of such Budget, which approval shall not be unreasonably withheld. Failure to give notice of approval or disapproval shall be deemed to be approval. If an Owner timely objects to the Common Facilities Budget or any element thereof by specifying such objection and the reason therefor, the Common Facilities Budget shall not be deemed approved until such objection is resolved. The Association and the objecting Owner shall seek to resolve such objection between them. If the objection relates to any bid(s) and the Owner requests that such item(s) be re-bid, the Association shall do so, and the lowest responsible bid (as determined by the Association) in each category of the previous and new bids shall be accepted. If the objecting Owner and the Association cannot agree, the matter shall be referred to all Owners for vote and if Consent of Owners is obtained, the Common Facilities Budget shall be deemed approved. If the Consent of Owners cannot be obtained, the matter shall be referred to binding arbitration in accordance with the provisions of Section 15.4 of this Declaration. Until a new Common Facilities Budget is approved, the last approved Common Facilities Budget shall be binding upon the Owners and shall be utilized for next calendar year until a new Common Facilities Budget is approved.
- 7.1.4 **Implementing Budget.** After the Common Facilities Budget is approved, the Association shall contract with the approved bidders, pay all of the Operating Costs, and use its reasonable efforts to perform the Common Facilities Maintenance in accordance with the Common Facilities Budget.
- 7.1.5 **Emergency Repairs.** Notwithstanding the foregoing, the Association shall have the right to make emergency repairs to the Common Facilities to prevent injury or damage to Person or property or to prevent disruption in the use of the Common Facilities, provided that the Association shall nevertheless advise the Owners and Authorized Occupants of such emergency condition as soon as reasonably possible, including any corrective measure(s) taken and the cost thereof. If the cost of said emergency action exceeds Five Thousand and 00/100 Dollars (\$5,000.00), the Manager may charge a special assessment to the Owners, together with evidence supporting such, and the parties responsible for payment of Operating Costs shall pay their Proportionate Share thereof within thirty (30) days. If the emergency cost is less than the amount collected, the excess shall be refunded to the parties making the payment in proportion to their original obligations or credited to future obligations, as is deemed reasonably appropriate by the Owners.

- 7.1.6 **Unforeseen Items.** The Association shall be entitled to reimbursement of actual expenses for any unforeseen non-emergency items not included in the Common Facilities Budget without first obtaining each Owner's approval so long as the cumulative amount of such items does not exceed Twenty Thousand and 00/100 Dollars (\$20,000.00) in any calendar year.
- 7.1.7 **Disagreement over Unbudgeted Items.** In the event of a good faith disagreement between the Association and any Owner over the amount of or validity of any unbudgeted Common Facilities Charge billed to such Owner by the Association, such Owner shall pay such amount under protest, and such Owner's sole remedy shall be to refer such disagreement to arbitration in accordance with **Section 15.4** of this Declaration.
- 7.1.8 **Amendment to Common Facilities Budget.** Nothing herein shall preclude and amendment to a previously approved Common Facilities Budget provided that such amendment is adopted according the procedures of this **Section 7.1**.
- 7.2 **Operating Costs.** The following expenses shall be referred to as "**Operating Costs**":
- 7.2.1 **General.** Costs for performing Common Facilities Maintenance, as described in **Section 7.1**, and Common Lighting costs as described in **Section 5.6** above;
- 7.2.2 **Employees.** The expenses (including without limitation hourly compensation paid to or on behalf of employees, and based upon competitive hourly rates) of the Manager as specified in the Manager's Agreement for work done at the Commercial Center in performing the Common Facilities Maintenance;
- 7.2.3 **Third Parties.** The expenses incurred to unrelated third parties in performing the Common Facilities Maintenance;
- 7.2.4 **Liability Insurance.** Commercial general liability insurance premiums associated with the operation and maintenance of the Common Facilities in an amount of not less than Two Million and 00/100 Dollars (\$2,000,000.00) as provided in **Section 7.5** below and casualty insurance on the Common Facilities;
- 7.2.5 **Real Estate Taxes.** Real Estate Taxes on the Commercial Center, unless assessed against each Parcel and paid separately pursuant to **Article 9** below;
- 7.2.6 **Management Fees.** Management fees incurred pursuant to the provisions of **Section 7.4.1**.
- 7.2.7 **Reserves.** Reserves for capital expenses as provided in **Section 7.3.2** below.
- 7.3 **Adjustment to Operating Costs.** The Operating Costs shall not include or shall be adjusted to not include the following:
- 7.3.1 **Exclusions.** There shall not be included in the Operating Costs the following: (i) costs of original construction (as distinguished from maintenance and repair) of the Common Facilities or any additions or expansion thereof; (ii) the costs of correcting defects in the design or construction of the Common Facilities, or repair and/or replacement of any of the original materials or equipment required as a result of such defects; (iii) repairs or other work

made necessary by fire or insurable risk or the exercise of the right of eminent domain of Common Facilities, to the extent compensated thereunder; (iv) expenses incurred associated with the build-out, renovation, or redecoration of any portion of Common Facilities; (v) any items for which the Association, Manager, Owners or Declarant is/are reimbursed or compensated (excluding assessments), including, without limitation, contractors' warranty or right of reimbursement for Common Facilities; (vi) expenses in connection with services or other benefits of a type which are not provided to all the Owners or for the benefit of all Parcels, but which are provided only to or for one or a few Owners, or fewer than all of the Authorized Occupants of the Commercial Center but nothing herein precludes the Association from allocating such items to such Owners and including such Owners' share thereof with the other obligation of such Owners; (vii) costs, fines, penalties, or fees assessed due to a violation of any federal, state or local law, statute or ordinance, or any rule, regulation, judgment or decree of any governmental rule or authority, including without limitation any Environmental Laws or the remediation of any Hazardous Substances unless the same is attributable to the Association; (viii) [Intentionally Omitted]; (ix) any service, administration, management, or overhead costs or charges in addition to the actual cost of maintenance (except that the Management Fee or other charges due a Manager pursuant to executed management agreement, may be charged to Owners in accordance with the provisions of **Sections 7.2 and 7.4**); (x) the costs associated with the Manager's employees, such as wages, salaries, bonuses, benefits, or employment taxes, except to the extent such employees actually perform Common Facilities Maintenance and other services specified in an executed management agreement, in the Commercial Center as documented by the Manager; (xi) interest or payments on any of Declarant's or an Owners' construction or permanent financing for any Parcel located in the Commercial Center or ground lease payments; (xii) legal and leasing fees or commissions related to the development of, or the leasing or enforcement of leases or other similar agreements in the Commercial Center; or (xiii) costs required to be paid by individual Owners, as described in **Section 2.6.5, Section 6.1.12 and Section 13**.

**7.3.2 Capital Expense Reserve.** In the event the Association anticipates that any single item of future Common Facilities Maintenance of a capital improvement is expected to cost in excess of Fifty Thousand and 00/100 Dollars (\$50,000.00) as reasonably estimated (including but not limited to asphalt resurfacing/repaving, slurry sealing, patching and crack sealing, and maintenance and repair to curb, gutter, sidewalk or adjoining streets required by a municipal authority or assessment district); and has a useful life exceeding three (3) years, the Association is authorized to include within the Operating Costs and the Annual Common Facilities Budget, a proportionate share of such estimated future cost of such capital improvement, such proportion equal to the future estimated cost divided by the remaining estimated useful years of the existing capital improvement.

**7.3.3 Operating Reserve.** The Association may also include as an Operating Cost a reasonable assessment to create an operating reserve not to exceed ten percent (10%) of all other Operating Costs.

**7.4 Common Facilities Charge.**

**7.4.1 Determination.** Each Owner shall pay to the Association its Proportionate Share of the Operating Costs (as calculated pursuant to **Section 7.4.2**) which Operating Costs shall include

a management fee equal to the amount required by the terms of the management agreement between the Association and the Manager (the “**Management Fee**”) not to be less than \$2,000.00 monthly subject to the following terms and conditions:

7.4.1.1 [Intentionally Omitted.]

7.4.1.2 There shall be no Management Fee payable to Declarant or an Owner acting as the Manager during any period of time during which such Manager delegates or contracts out substantially all of the management of the Common Facilities Maintenance; provided, however, that notwithstanding the foregoing, if the Declarant or Owner acting as the Manager engages one of its affiliates to manage the Common Facilities Maintenance, then either such Manager or the affiliate, but not both, may collect the Management Fee.

7.4.1.3 The amount due from each Owner pursuant to this Section is referred to as the “**Common Facilities Charge.**”

7.4.1.4 In the event of a disagreement between Association, and an Owner over the amount of or validity of any Common Facilities Charge billed to such Owner by the Association, the Owner shall have the right to protest said amount in controversy and to refer such matter to arbitration in accordance with **Section 15.4** of this Declaration. If not included within an approved Common Facilities Budget, no single non-budgeted item of Common Facilities Maintenance in excess of Twenty Thousand and 00/100 Dollars (\$20,000.00) other than an emergency repair shall be made without the prior Consent of Owners.

7.4.2 **Payment.** Based upon the Common Facilities Budget approved as provided in Section 7.1, the Association shall notify each Owner in writing of the amount of its monthly installment of the Common Facilities Charge for the applicable fiscal period. Each Owner shall pay, or cause its Authorized Occupants to pay, the Owner’s Common Facilities Charge as specified in such notice monthly in advance (on or before the first day of each month). Within sixty (60) days following the close of each calendar year, the Association will furnish to each Owner and where applicable its Authorized Occupants, a statement of the actual amount of Operating Costs, the calculation of each Owner’s Proportionate Share, and such Owner’s Common Facilities Charge based on actual expenditures for the previous calendar year. If the actual amount of an Owner’s Common Facilities Charge is less than the total amount paid by such Owner (or others for such Owner’s benefit) for such period, and such amount is more than one month’s budgeted Common Facilities Charge to such Owner, the excess shall be refunded to such Owner (and Owner shall refund it to the party entitled thereto) together with said annual statement; otherwise the amount will be applied to the next month’s Common Facilities Charge. If the actual amount of an Owner’s Common Facilities Charge exceeds the amount paid by such Owner (or for its benefit) for such period, the Owner shall pay, or cause the party obligated therefore to pay, to the Association the amount shown as due thereon within thirty (30) days following the receipt of the Association’s statement. If at any time or times, it reasonably appears to the Association that the amount of such Owner’s Common Facilities Charge for the current calendar year will vary from the amount set forth in the Association’s initial notice, the Association may, by written notice to the Owner, revise the monthly installment for such fiscal period, and subsequent monthly payments by the Owner (or its Authorized Occupant) for such year will be based upon the revised estimate.



- 7.4.3 **Audit.** The annual statement of Common Facilities Charges shall include reasonable detail as to each Operating Cost incurred throughout the year. Upon request by any Owner, the Manager shall provide such requesting Owner reasonable additional documentation requested by such requesting party supporting the annual statement. Each Owner shall, at its sole cost and expense, have the right to audit the Association's records relating to Operating Costs (including Management Fees) and Common Facilities Charges within two (2) years after receipt of the annual statement upon ten (10) days' written notice to the Association. If such audit should reveal an overstatement of actual expenses by five percent (5%) or more, the Association shall pay for the reasonable cost and expenses of such audit and refund any excess amount paid by the Owner within thirty (30) days after written notice thereof. Any understatement or overstatement discovered by such audit shall be adjusted as provided in Section 7.4.2. The cost of any such Audit imposed upon the Association shall be deemed an Operating Cost.
- 7.4.4 **Commencement of Charges.** Each Owner of a Parcel shall become obligated to pay and shall pay all its Proportionate Share of Operating Costs commencing at such time as the date of the transfer of ownership to the Owner. All payments of an Owner's Proportionate Share shall be made in accordance with the terms and conditions of this Declaration and shall be effective the date of recording of this Declaration, and shall not be retroactive.
- 7.5 **Common Facilities Liability Insurance.** The Association shall obtain and maintain for the benefit of the Owners and other parties identified herein, a policy of commercial general liability on an "occurrence basis" against claims for bodily injury, personal injury and property damage occurring on, in or about the Commercial Center and the adjoining streets, sidewalks and passageways, with a combined single limit coverage in the minimum amount of Two Million and 00/100 Dollars (\$2,000,000.00) and with broad form contractual liability coverage. Such policy is intended to provide secondary coverage to the liability policy that each Owner is required to obtain pursuant to Section 8.1. In the event such a policy is not available in such coverage amount, such policy may be supplemented with an "umbrella" policy to achieve such coverage amount. The policy shall endorse the Association, the Declarant, the Owners, the Manager, and Authorized Occupants and their respective officers, directors, managers, agents, and any buyer as additional insureds. Each Owner or Authorized Occupant which maintains a primary liability insurance coverage, shall cause its insurance carrier to waive any rights of subrogation against the Association and its managers and agents. The Association's policy of liability insurance shall be issued by an insurance company with an AM Best rating of at least A- authorized to do business in the State of Utah and shall contain an endorsement requiring thirty (30) days' written notice to any additional insured before cancellation or change in the coverage, scope or amount of the policy. The Association agrees to furnish the Owners, the Declarant, and Authorized Occupants certificates evidencing the insurance coverage required under this Declaration, upon written request referencing this Section. If the limits of the Association's liability insurance and/or deductibles become inadequate due to the changes in overall price level or the size of claims being experienced, the Association and the Owners shall agree upon new limits and deductibles based on Commercial Center industry practices for similarly situated and comparable Commercial Centers.

## 8. INSURANCE FOR THE RETAIL CENTER

- 8.1 **Liability Insurance.** Each Owner, at its sole cost and expense, shall obtain and maintain, or cause its Authorized Occupant to obtain and maintain, from the time development of its respective Parcel occurs, a policy of commercial general liability on an “occurrence basis” against claims for bodily injury, personal injury and property damage occurring on, in or about the Commercial Center (including but not limited to the Buildings, the Common Facilities, and the adjoining streets, sidewalks and passageways, with such insurance to be in single limit coverage in the minimum amount of Two Million and 00/100 Dollars (\$2,000,000.00) and with a deductible not in excess of Ten Thousand and 00/100 Dollars (\$10,000.00). In the event such a policy is not available in such coverage amount, such policy may be supplemented with an “umbrella” policy to achieve such coverage amount. The liability insurance maintained by each Owner and/or Authorized Occupant shall be primary coverage and non-contributing to the liability insurance maintained by the Association as provided in **Section 7.5**. All such policies of insurance shall be issued by companies with an AM Best rating of at least A- authorized to do business in the State of Utah. Upon request, each Owner agrees to furnish Association certificates evidencing the insurance coverage required under this Section or elsewhere in this Declaration.
- 8.2 **Commercial Property Insurance.** Each Owner, at its sole cost and expense, shall obtain and maintain a commercial property insurance policy with “causes of loss - special form” covering all of the Building and Common Facilities located on its Parcel, in an amount equal to no less than the full replacement cost thereof, reduced by items such as footings, foundations and other concrete improvements.
- 8.3 **Release/Waiver of Subrogation.** Whenever (i) any loss, cost, damage or expense resulting, directly or indirectly, from fire, explosion or any other casualty, accident or occurrence is incurred by an Owner or Authorized Occupant, and (ii) at the time such Owner or Authorized Occupant is required to be covered in whole or in part by insurance with respect to such loss, cost, damage or expense, then such Owner or Authorized Occupant hereby releases each other Owner, the Association, and Authorized Occupant from any liability such Owner and Authorized Occupant may have on account of such loss, cost, damage or expense, other than acts constituting gross negligence and/or willful misconduct, and shall cause its commercial property insurance carrier to waive any rights of subrogation under such policy.

## 9. TAXES

- 9.1 **Real Estate Taxes.** “Real Estate Taxes” shall mean, with regard to any Parcel: (a) all ad valorem real estate taxes and assessments on the land and Building and Common Area Facilities comprising the Parcel (adjusted after protest or litigation), exclusive of penalties and interest; and (b) the expense of protesting, negotiating or contesting the amount or validity of any real estate taxes, charges or assessments, such expenses to be applicable to the tax calendar year of the Real Estate Taxes contested, protested or negotiated; provided, however, that the following shall not be regarded as “Real Estate Taxes”: (i) any franchise, corporate, estate, inheritance, succession, capital levy, or transfer tax of an Owner, (ii) any income, profits, sales or revenue tax, (iii) any other tax, charge, or levy upon the Commercial Center unless it is imposed in lieu of Real Estate Taxes, (iv) any assessments against the Commercial Center or any Parcel therein, for the initial costs of development of the Commercial Center, which Declarant elects to be placed against the Commercial Center in the

form of an assessment or tax payable over a term of years; i.e., sewers initially installed, connection of utilities or fees for connecting to utilities, installation of required traffic control devices, off-site street work, etc., or (v) any tax or assessment on rent or other charges payable by any occupant of the Commercial Center under any lease and imposed by state, federal, local or any other regulatory agency except (other than a sales tax on rent if imposed) if imposed in lieu of Real Estate Taxes.

- 9.2 **Tax Obligations.** If the applicable Parcel constitutes a separate tax lot or parcel, each Owner shall pay directly to the taxing authorities prior to the delinquency date for the payment of such taxes, the Real Estate Taxes assessed against the Parcel in which the Owner has an interest, including the portion of the Common Facilities located on such Owner's Parcel. Each Owner shall have the right to contest the amount or validity of all or any part of said taxes and assessments and to obtain reimbursement from its Authorized Occupants pursuant to agreement with such Authorized Occupants. In the event of such contest, the contesting Person shall prosecute such contest with diligence, shall take such steps as are necessary to avoid a tax sale of its Parcel and, upon final determination of such contest, shall promptly pay when due the taxes and assessments then due. In the event that the Parcels are not separate tax parcels, the Association shall, to the extent it has received payment therefor from the Owners or Authorized Occupants, pay the Real Estate Taxes for all of such Parcels which are not separately assessed and such Real Estate Taxes shall be an element of Operating Costs allocable to and payable by the Owners of such Parcels as set forth in **Article 7**. If any Owner pays real estate taxes separately assessed to its Parcel, such Owner shall not be obligated to contribute toward the real estate taxes of another Parcel or any other portion of the Commercial Center.

## 10. EFFECT OF SALE OF A PARCEL BY AN OWNER

- 10.1 **Sale by Owner.** In the event an Owner sells all or any portion of its interest in its Parcel, such Owner shall thereupon be released and discharged from any and all obligations as Owner in connection with the property sold or conveyed by it arising under this Declaration after the effective date of the sale or conveyance of title but shall remain liable for all obligations arising under this Declaration prior to the effective date of the sale or conveyance of title.
- 10.2 [Intentionally Omitted.]
- 10.3 **Obligation of New Owner.** An Owner (including, without limitation, any Owner who acquires its interest by foreclosure, trustee's sale or otherwise) shall be liable for all obligations arising under this Declaration with respect to such Parcel or portion thereof or interest therein after the effective date of the acquisition of title or, as applicable, the receipt of an assignment of an interest.
- 10.4 **Miscellaneous.** Nothing contained herein shall bar or restrict the operation of **Articles 11 and 12** which permit the filing of a Notice of Lien and foreclosure of the same upon a Parcel for certain defaults under this Declaration. Notwithstanding the foregoing to the contrary, no first priority Lienholder or purchaser at a foreclosure sale of a first mortgage or first deed of trust shall be liable for any obligation arising under this Declaration prior to the sale or conveyance of title pursuant to such foreclosure or deed in lieu thereof.

## 11. DEFAULTS

- 11.1 **Assessments and Other Charges.** In the event any Owner (“**Defaulting Party**”) fails or refuses to pay when due its Assessments, including but not limited to Common Facilities Charge or any other amount owed to the Association, Declarant, or other Owner pursuant to the provisions of this Declaration (a “**Non-defaulting Party**”), which failure is not cured for a period of ten (10) days after receipt of written notice thereof, such failure shall constitute a default and legal action may thereafter be instituted by the Non-defaulting Party against the Defaulting Party, which term shall apply to any Owner in default pursuant to the provisions of this **Article 11** of this Declaration) for such amount plus interest from and after the date said obligation was due and payable at the Default Rate. Furthermore, the Non-defaulting Party shall have a “**Common Facilities Lien**” on the Parcel of the Defaulting Party (or on the Defaulting Party’s interest therein, as applicable) by following the procedures specified in Section 12.4 and filing a Notice of Lien in the official records of the Recorder for such amount plus accrued interest at the Default Rate as set forth above, plus any costs and expenses of pursuing any legal or other action to obtain such amount, including without limitation a reasonable attorneys’ fee and expert witness fee (including without limitation such as may be incurred in any appeal or in bankruptcy court) and the fees of any expert retained for such action (collectively the “**Collection Costs**,” including all such collection costs, expenses, and fees as the Non-defaulting Party may be entitled pursuant to **Section 11.4** of this Article). The Association, by its Trustee (identified in Section 11.6) may foreclose the lien against such Parcel in the manner of a Trust Deed.
- 11.2 **Deficiencies.** In the event that any Owner shall fail to obtain and maintain insurance, as required by this Declaration, or to perform any other obligation imposed upon an Owner, any Non-defaulting Party may send written notice of such failure to the Defaulting Party. Such notice shall contain an itemized statement of the specific deficiencies (hereinafter referred to as the “**Deficiencies**”) of the Defaulting Party’s performance of its obligations, monetary or otherwise. The Defaulting Party shall have thirty (30) days after receipt of the said notice in which to cure the Deficiencies or in which to commence to cure the Deficiencies if the Deficiencies cannot be cured within the said thirty (30) day period, and thereafter, to proceed diligently to complete the curing of the Deficiencies. If necessary for the safety of the Commercial Center or to prevent a gap in, or a lapse of, any insurance, the thirty (30) day time period referred to above may be appropriately shortened. In the event that the Defaulting Party shall fail or refuse to cure or to begin and continue diligently thereafter to cure the Deficiencies, as the case may be, the Non-defaulting Party may, at its option, cure the Deficiencies. In the event that the Non-defaulting Party shall exercise the option and shall cure the Deficiencies, the Defaulting Party shall, promptly upon receipt from the Non-defaulting Party of an itemized invoice for the costs incurred by the Non-defaulting Party in curing the Deficiencies, pay all such costs and expenses to the Non-defaulting Party, together with interest at the Default Rate from the date of the Non-defaulting Party’s payment of the same until paid, plus Collection Costs. Furthermore, the Non-defaulting Party shall have a Common Facilities Lien on the Parcel of the Defaulting Party (or on the Defaulting Party’s interest therein, as applicable) by filing a Notice of Lien in the official records of the Recorder for such amounts.

**11.3 Taxes.** In the event any Owner fails to pay when due all Real Estate Taxes that the Owner is obligated to pay, which failure is not cured for a period of ten (10) days after receipt of written notice thereof from any Non-defaulting Party, such failure shall constitute a default, and any Non-defaulting Party may, but is not obligated to, thereafter pay such Real Estate Taxes if such Real Estate Taxes are delinquent and the Defaulting Party has not commenced and is not duly prosecuting any protest of such taxes. If such Real Estate Taxes are paid by a Non-defaulting Party, the Non-defaulting Party shall then provide evidence of payment and an invoice for the expenses incurred. The Defaulting Party shall have ten (10) days within which to pay the amounts due, together with interest at the Default Rate from the date of the Non-defaulting Party's payment of the Real Estate Taxes until paid, plus Collection Costs, if any. If the Defaulting Party does not so pay, then the Non-defaulting Party shall have a Common Facilities Lien on the Parcel of the Defaulting Party (or on the Defaulting Party's interest therein, as applicable) by filing a Notice of Lien in the official records of the Utah County Recorder, State of Utah, for such amounts.

**11.4 Default.** Except as specified in **Sections 1.1.1 (Assessments), Section 11.2 (Insurance), and Section 11.3 (Taxes)** or other Section in this Declaration where a specific remedy and/or cure period is specified, a Person shall be deemed to be in default of this Declaration only upon the expiration of thirty (30) days from receipt of written notice from any Owner or Authorized Occupant or the Association specifying the particulars in which such Person has failed to perform the obligations of this Declaration unless such Person, prior to the expiration of said thirty (30) days (or other such period as is elsewhere specified), has cured the particulars specified in said notice of default.

**11.5 Remedies.** In addition to the remedies set forth in this Article and in **Article 12** of this Declaration, each Person entitled to enforce this Declaration shall have all other remedies provided by law and equity to the same extent as if fully set forth herein. No remedy herein conferred upon, or reserved to any Person, shall exclude any other remedy herein or by law or equity provided, but each shall be cumulative and non-exclusive.

**11.6 Trustee.** The Trustee for purposes of this **Article 11** shall mean The Rudd Firm, PC, whose address is 10150 S. Centennial Pkwy, Ste 150, Sandy, Utah 84070, or any successor trustee designated by the Association.

## **12. ASSOCIATION, MEMBERSHIP, VOTING, POWERS, AND ASSESSMENTS**

### **12.1 Membership and Voting Rights.**

**12.1.1. Membership.** Every Owner shall be a Member of the Association. Membership in the Association shall be mandatory, shall be appurtenant to the Parcel in which the Owner has the necessary interest, and shall not be separated from the Parcel to which it appertains.

**12.1.2. Voting Rights.** The Association shall have the following described two classes of voting membership:

Class A. Class A Members shall be all Owners other than the Declarant until the Class B membership ceases. Class A Members shall be entitled to the

number of votes equal to the Parcel Size in square feet contained in such Parcel as shown on the Plat for such Member's Parcel in which the interest required for membership in the Association is held.

Class B. The Class B Member shall be the Declarant. The Class B Member shall be entitled to the number of votes equal to three (3) multiplied by the cumulative total Parcel Size of all the Parcels in which the Declarant holds the interests required for Membership in the Association. The Class B Membership shall automatically cease and be converted to a Class A membership on the first to occur of the following events:

(a) When the total number of votes held by all Class A Member(s) equals the total number of votes held by the Class B Member(s); or

(b) The Declarant voluntarily elects to convert its Class B Membership to Class A Membership; or

(c) The Declarant no longer owns any Parcels in the Commercial Center.

The period commencing upon the recording of this Declaration with the Recorder and ending upon the first to occur of the foregoing three (3) events is referred to herein as the "**Declarant Control Period**".

**12.1.3. Multiple Ownership Interests.** In the event there is more than one Owner of a particular Parcel, the vote relating to such Parcel shall be exercised as such Owners may determine among themselves. A vote cast at any Association meeting by any of such Owners, whether in person or by proxy, shall be conclusively presumed to be the vote attributable to the Parcel concerned unless an objection is immediately made by another Owner of the same Parcel. In the event such an objection is made, the vote involved shall not be counted for any purpose whatsoever other than to determine whether a quorum exists.

**12.1.4. Record of Ownership.** Every Owner shall promptly cause to be duly filed of record with the Recorder the conveyance document (or in the case of contract buyer, a copy of the sales contract) to him of his Parcel. Each Owner shall file a copy of such conveyance document (or contract) with the secretary of the Association with a transfer fee of Twenty-Five and 00/100 Dollars (\$25.00), who shall maintain a record of ownership of the Parcels. Any Owner who mortgages his Parcel or any interest therein by a mortgage which has priority over the lien of any assessment provided herein shall notify the secretary of the Association of the name and address of the Mortgagee and also of the release of such Mortgage; and the secretary of the Association shall maintain all such information in the records of ownership. Any cost incurred by the Association in obtaining the information about an Owner as specified herein which is not furnished by such Owner shall nevertheless be at the expense of such Owner and shall be reimbursed to the Association as a Reimbursement Assessment in accordance with the provisions of **Section 12.3**.

## **12.2 Duties and Powers of the Association.**

**12.2.1. Duties of the Association.** Without limiting any other duties which

may be imposed upon the Association by its the Association Documents; the Association shall have the obligation and duty to do and perform each and every one of the following for the benefit of the Owners and the maintenance and improvement of the Commercial Center:

12.2.1.1 The Association shall accept all Owners as Members of the Association.

12.2.1.2 The Association shall maintain, repair, and replace all Common Facilities, excluding only any landscaping installed by an Owner without the Association's express agreement to maintain such landscaping.

As provided in **Section 2.5.6**, each Owner shall have the obligation to provide exterior and interior maintenance of its Building including but not limited to painting, repair, replacement and care of roofs, gutters, downspouts, exterior building surfaces, and the maintenance all mechanical devices, including but not limited to, appurtenant electrical, plumbing and heating, ventilating and air conditioning systems, and adjacent sidewalks. The maintenance of all Buildings shall be in accordance with the requirements of **Section 2.5**.

In the event that the need for maintenance or repair of Common Facilities as specified herein is caused through the willful or negligent acts of an Owner, or through the willful or negligent acts of an Owner's Authorized Occupant, the Association may cause such repairs to be made by the Association and the cost of such maintenance or repair (and administrative expenses equal to ten percent [10%] of such costs) shall be added to and become part of the Reimbursement Assessment (as set forth in **Section 12.3**) to which such Parcel is subject.

12.2.1.3 To the extent not assessed to or paid by the Owners directly, the Association shall pay all Real Estate Taxes levied upon any portion of the Common Facilities, provided that the Association shall have the right to contest or compromise any such Real Estate Taxes.

12.2.1.4 The Association shall obtain and maintain in force the policies of insurance required by the provisions of this Declaration.

12.2.1.5 The Association may employ a responsible Person as a Manager to manage and maintain the Common Facilities, subject at all times to direction by the Association, with such administrative functions and powers as shall be delegated to the Manager by Association. The compensation of the Manager shall be such as shall be specified by the Association in its agreement with the Manager. Any agreement appointing a Manager shall be consistent with the requirements of **Section 6.2**. A Manager shall be an independent contractor and not an agent or employee of the Association.

**12.2.2 Powers and Authority of the Association.** The Association shall have all the powers set forth in the Association Documents, together with its general powers as a nonprofit corporation, and the power to do any and all things which may be authorized, required or permitted to be done by the Association under and by virtue of this Declaration, including the power to levy and collect assessments as hereinafter provided. Without in any way limiting the generality of the foregoing, the Association shall have the following specific

powers:

12.2.2.1 The Association shall have the power and authority at any time and from time to time and without liability to any Owner for trespass, damage or otherwise, to enter upon any Parcel for the purpose of maintaining and repairing the Common Facilities located upon such Parcel or any improvement thereon if for any reason the Owner fails to maintain and repair such improvement, or for the purpose of removing any improvement constructed, reconstructed, refinished, altered or maintained upon such Parcel in violation of **Article 2** or **3** of this Declaration. The Association shall have the right to close all or any portion of a Common Facility to such extent as may be legally sufficient to prevent a dedication thereof or the accrual of any right therein to any person or the public. The Association shall also have the power and authority from time to time in its own name, on its own behalf, or in the name and behalf of any Owner or Owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration or any Rules and Regulations promulgated by the Association's Board of Directors (the "**Board of Directors**") or to enforce by mandatory injunction or otherwise all of the provisions of this Declaration and such Rules and Regulations.

12.2.2.2 In fulfilling any of its duties under this Declaration, including its duties for the maintenance, repair, operation or administration of the Common Facilities (and exterior repairs of Building to the extent necessitated by the failure of the Owners of such Parcels) or in exercising any of its rights to construct, maintain and repair improvements or other work upon any of the Common Facilities, the Association shall have the power and authority (i) to pay and discharge any and all liens placed upon any Common Facilities on account of any work done or performed by the Association in the fulfillment of any of its obligations and duties of maintenance, repair, operation or administration and (ii) to obtain, contract and pay for, or to otherwise provide for:

i. Construction, maintenance, repair and landscaping of the Common Facilities (and exterior repairs of Building upon Parcels to the extent necessitated by the failure of Owners of such Parcels) on such terms and conditions as the Board of Directors shall deem appropriate.

ii. Such insurance policies or bonds as the Board of Directors may deem appropriate for the protection or benefit of Declarant, the Association, the members of the Board of Directors and the Owners;

iii. Such utility services, including (without limitation) water, sewer, trash removal, snow removal, electrical, telephone and gas services, as the Board of Directors may from time to time deem desirable;

iv. The services of architects, engineers, attorneys and certified public accountants and such other professional or nonprofessional services as the Board of Directors may deem desirable;

v. Fire, police and such other protection services as the Board of Directors may deem desirable for the benefit of the Owners or any of the Property;



and

vi. Such materials, supplies, furniture, equipment, services and labor as the Board of Directors may deem necessary.

12.2.2.3 The Board of Directors may delegate by resolution or contract to the Manager any of its powers under this Declaration; provided, however, that the Board of Directors cannot delegate to such Manager the power to execute any contract binding on the Association for a sum in excess of Five Thousand and 00/100 Dollars (\$5,000.00), nor the power to sell, convey, mortgage, or encumber any Common Facilities.

**12.2.3 Association Rules and Regulations.** The Board of Directors, from time to time and subject to the provisions of this Declaration, may promulgate, adopt, amend, repeal and enforce reasonable, non-discriminatory rules and regulations (“**Rules and Regulations**”) governing, among other things: (a) the use of the Common Facilities, including the regulation of employee parking; (b) the use of any roads or utility facilities owned by the Owners or the Association; (c) the collection and disposal of refuse; (d) the types of animals permitted and the maintenance of permitted animals on the Commercial Center Property (provided that there shall be no prohibition for the use or presence of service animals); and (e) other matters concerning the use and enjoyment of the Commercial Center and the conduct of Authorized Occupants and the Benefitted Parties.

**12.2.4 Limitation of Liability.** No member of the Board of Directors acting in good faith shall be personally liable to any Owner, Benefitted Parties or any other person for any error or omission of the Association, its officers, representatives and employees, the Board of Directors, any committee or the Manager.

**12.2.5 Insurance.** The Association shall secure and at all times maintain the following insurance coverage:

12.2.5.1 A policy or policies insuring the Association as specified in Section 7.5.

12.2.5.1 In addition to the insurance described above, the Association shall secure and all times maintain insurance against such risks as are or hereafter may be customarily insured against in connection with developments similar to the Property in construction, nature and use.

(1) The Association shall have the authority to adjust losses.

(2) Insurance secured and maintained by the Association shall not be brought into contribution with insurance held by the individual Owners or their mortgagees.

(3) Each policy of insurance obtained by the Association shall, if reasonably possible, provide: a waiver of the insurer's subrogation rights with respect to the Association, the Owners, and their respective directors, officers, agents, employees, invitees, and Authorized Occupants; that it cannot be cancelled, suspended or invalidated due

to the conduct of any particular Owner or Owners; that it cannot be cancelled, suspended or invalidated due to the conduct of the Association or of any director, officer, agent or employee of the Association without a prior written demand that the defect be cured; without a prior written demand that the defect be cured; that any "no other insurance" clause therein shall not apply with respect to insurance held individually by Owners.

**12.2.6 Quorum Requirements.** The quorum required for any action by the Members hereunder, unless otherwise specifically set forth in this Declaration, shall be as follows: At the first meeting called the presence of Members or of proxies entitled to cast seventy percent (70%) of the Proportionate Shares for all Parcels shall constitute a quorum. If a quorum is not present at the first meeting or any subsequent meeting, another meeting may be called at which a quorum shall be one-half of the quorum which was required at the immediately preceding meeting. No such subsequent meeting shall be held more than thirty (30) days following the immediately preceding meeting.

### 12.3. Assessments.

**12.3.1 Personal Obligation and Lien.** Each Owner shall, by acquiring or in any way becoming vested with his interest in a Parcel, be deemed to covenant and agree to pay to the Association the periodic (Common Facilities Charge), special assessments and Reimbursement Assessments described in this **Section 12.3**, together with the hereinafter provided for interest at the Default Rate and Collection Costs. All such amounts shall be, constitute, and remain: (a) a charge and continuing lien upon the Parcel with respect to which such assessment is made; and (b) the personal obligation of the person who is the Owner of such Parcel at the time the assessment falls due. No Owner may exempt himself or his Parcel from liability for payment of assessments by waiver of his rights concerning the Common Facilities or by abandonment of his Parcel. In a voluntary conveyance of a Parcel, the grantee shall be jointly and severally liable with the grantor for all such unpaid assessments, late payment fees, interest and costs of collection, including reasonable attorneys' fees, which shall be a charge on the Parcel at the time of the conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor.

**12.3.2 Purpose of Assessments.** Assessments levied by the Association shall be used exclusively for the purpose of maintaining, repairing, replacing and managing the Common Facilities and making repairs to Buildings as permitted in this **Article 12**, including but not limited to the enhancement of the appearance and aesthetics of the Commercial Center. The use made by the Association of funds obtained from assessments may include, but is not limited to, payment of the cost of taxes, if any, and insurance on the Common Facilities; maintenance, repair and improvement of the Common Facilities; establishing and funding a reserve to cover major repairs or replacements of improvements within the Common Facilities; and any expenses necessary or desirable to enable the Association to perform or fulfill its obligations, functions or purposes under the Association Documents..

**12.3.3 Special Assessments.** For the purposes identified in **Sections 7.1.5** or **7.1.6**, the Association may levy special assessments for the purpose of defraying, in whole or in part ("**Special Assessments**"): (a) any expense or expenses not reasonable capable of being fully paid with funds generated by periodic assessments; or (b) the cost of any construction,

reconstruction or unexpectedly required repair or replacement in connection with the Common Facilities. Any such special assessments must be assented to by the Consent of Owners, other than the Declarant, present in person or represented by proxy are entitled to cast a vote at a meeting duly called for the purpose. Written notice setting forth the purpose of the meeting shall be sent to all Owners at least ten (10) but not more than thirty (30) days prior to the meeting date.

**12.3.4 Reimbursement Assessment on Specific Parcel.** In addition to the periodic assessment and any special assessment authorized pursuant to **Sections 12.3.1, 12.3.2 and 12.3.3** above, the Board of Directors may levy at any time Special Assessments (a) on each Parcel specifically benefitted by any improvement to adjacent roads, sidewalks, planting areas or other portions of the Common Facilities made on the written request of the Owner of the Parcel to be charged; (b) on each Parcel the Owner or Authorized Occupant of which shall cause any damage to the Common Facilities necessitating repairs; and (c) on each Parcel as to which the Association shall incur any expense for maintenance or repair work performed, or enforcement action taken, pursuant to **Section 12.2.2.1, Section 11.1** or other provisions of this Declaration (all or part of the foregoing being sometimes referred to as "**Reimbursement Assessment**"). The aggregate amount of any such Reimbursement Assessments shall be determined by the cost of such improvements, repairs, maintenance or enforcement action, including all overhead and administrative costs and attorneys' fees, and shall be allocated among the affected Parcels according to the special benefit or cause of damage or maintenance or repair work or enforcement action, as the case may be, and such assessment may be made in advance of the performance of work. If a special benefit arises from any improvement which is part of the general maintenance obligations of the Association, it shall not give rise to a Reimbursement Assessment against the Parcels benefitted.

**12.3.5 Rate of Assessment.** Except as provided in **Section 12.3.4** above, periodic and Special Assessments shall be a fixed rate based upon the Owner's Proportionate Share.

**12.3.6 Periodic Assessment Due Dates.** The periodic assessments (Common Facilities Charges) provided for herein shall commence as to all Parcels as provided in Section 7.4.4. The first periodic assessment shall be adjusted according to the number of days remaining in the month of conveyance. Thereafter and except as provided below, all periodic assessments shall be due and payable on the first day of each month. A periodic assessment not paid within ten (10) days of the due date thereof shall be deemed late and subject to a late fee of Fifteen and 00/100 Dollars (\$15.00). At least fifteen (15) days prior to the effective date of any change in the amount of the periodic assessment, the Association shall give each Owner written notice of the amount and the first due date of the assessment concerned.

NOTWITHSTANDING THE FOREGOING, with the Consent of the Owners, the Association may provide for the payment of periodic assessments on a quarterly basis, provided such periodic assessments are payable in advance.

**12.3.7 Certificate Regarding Payment.** Upon the request of any Owner or prospective purchaser or encumbrancer of a Parcel, the Association shall issue a certificate stating whether or not all assessments respecting such Parcel are current and, if not, the

amount of the delinquency. Such certificate shall be conclusive in favor of all persons who in good faith rely thereon.

**12.3.8 Effect of Non-Payment; Remedies.** Any assessment (including periodic assessments, Special Assessments, or Reimbursement Assessments) not paid when due, together with the hereinafter provided for interest and Collection Costs shall be, constitute and remain a continuing lien on the affected Parcel; provided, however, that any such lien will be subordinate to the lien or equivalent security interest of any first mortgage on the Parcel recorded prior to the date any such assessments became due. If the assessment is not paid within sixty (60) days after the date on which it becomes delinquent, the amount thereof shall bear interest from the date of delinquency at the Default Rate and the Association may bring an action either against the Owner who is personally liable or to foreclose the lien against the Parcel. Any judgment obtained by the Association shall include reasonable attorneys' fees, court costs, and each and every expense incurred by the Association in enforcing its rights.

**12.4 Procedure.** The lien provided for in **Article 11.1** and **Section 12.3.8** shall be referred to herein as the "**Common Facilities Lien**" and shall only become effective when a Notice of Lien is filed for record in the official records of the Recorder, by the Association, the Owners or another Non-defaulting Party as a claim for a Common Facilities Lien against the Defaulting Party's Parcel or interest therein. Such Notice of Lien shall contain at least the following:

- 12.4.1 Statement.** A reference to this Section of the Declaration and an itemized statement of all amounts due and payable pursuant hereto, except as to Collection Costs, and, for Collection Costs, a statement that such are included in the Common Facilities Lien and will be itemized and specifically set forth at the time of foreclosure or immediately prior to payment;
  - 12.4.2 Parcel Description.** A description sufficient for identification of that Parcel in which the Defaulting Party has an interest and which is the subject of the Common Facilities Lien;
  - 12.4.3 Owner.** The name of the Owner or reputed Owner of the Parcel which is the subject of the Common Facilities Lien;
  - 12.4.4 Defaulting Party.** The name of the Defaulting Party and the extent of the Defaulting Party's interest in the Parcel if the Defaulting Party is other than the Owner; and
  - 12.4.5 Non-defaulting Party.** The name and address of the Non-defaulting Party or its agent.
- 12.5 Priority.** The Common Facilities Lien, when the same is perfected against a Parcel by the filing of a Notice of Lien, shall be prior and superior to any right, title, interest, lien or claim which may be or has been acquired or attached to such Parcel after the time of filing the Notice of Lien. Prior to the filing of a Notice of Lien, unperfected Common Facilities Liens

shall in all cases be subordinate to each first mortgage lien that encumbers a Parcel or an interest therein from time to time (i.e., a mortgage or deed of trust that is given by the Owner of a Parcel and/or the Owner of improvements on a Parcel, that secures repayment of a loan and that is in a first priority position as to voluntary liens). The Common Facilities Lien shall be for the use and benefit of the Non-defaulting Party having a right thereto pursuant to this Declaration and may be enforced and foreclosed as a mortgage in a suit or action brought in any court of competent jurisdiction or pursuant to a power of sale held by the Trustee designated in **Section 11.6**.

## 12.6 Number and Election of Directors.

12.6.1 The Board of Directors shall consist of three (3) directors (“**Directors**”). The initial Directors shall hold office until the election or appointment of their successors at the first annual meeting after expiration of the Declarant Control Period. Thereafter, subject to the terms and conditions of **Sections 12.6.3** and **12.6.4** below, the Owners of the Parcels that comprise the Commercial Center shall have the right to appoint the Directors by a 75% vote of the Owners. Each Director will hold office for a term of two (2) years.

### 12.6.2 Powers of the Board of Directors.

12.6.2.1 Except as provided in the Association Documents, the Board of Directors may act on behalf of the Association in all instances.

12.6.2.2 The Board of Directors may retain by written contract the Manager who shall be responsible for the routine operation and maintenance of the Common Facilities.

12.6.2.3 The Board of Directors may not act on behalf of the Association to:

- (i) amend this Declaration;
- (ii) terminate the Association or this Declaration;
- (iii) elect Directors to the Board of Directors; or
- (iv) determine the qualifications, powers and duties, or terms of office, of Directors.

### 12.6.3 Appointment of Directors.

12.6.3.1 Subject to the terms and conditions of **Sections 12.6.3.2** and **12.6.3.3** below, but notwithstanding anything else to the contrary contained in this Declaration or in any other Association Document, Declarant shall have the exclusive right to appoint and remove all Directors and Officers during the Declarant Control Period.

12.6.3.2 Declarant may voluntarily surrender its right to appoint and

remove Officers and Directors prior to the expiration of the Declarant Control Period, but, in that event, Declarant may require, for the remainder of the Declarant Control Period, that specific actions of the Association or the Board of Directors, as described in a recorded instrument executed by Declarant, be approved by the Declarant before they become effective.

12.6.3.3 During the thirty (30)-day period immediately preceding the date on which the Declarant Control Period expires, the Owners shall elect a Board of Directors of three (3) Directors as set forth in **Section 12.6.1** above. Such Directors shall take office upon election.

12.6.3.4 The Declarant need not designate a Manager or a Board of Directors during the Declarant Control Period.

#### 12.6.4 Removal of Directors.

(a) Directors appointed by Declarant may be removed, with or without cause, solely by Declarant.

(b) Each Director, other than a Director appointed by Declarant, may be removed, with or without cause, by 66% vote of the Owners.

#### 12.6.5 Replacement of Directors.

(a) Vacancies on the Board of Directors created by the removal, resignation or death of a Director appointed by Declarant shall be filled by a Director appointed by Declarant.

(b) A vacancy on the Board of Directors created by the removal, resignation, or death of a Director appointed by a vote of the Owners shall be filled by a majority vote of the Owners.

(c) Any Director elected or appointed pursuant to this **Section 12.6.5** shall hold office for the remainder of the unexpired term of the Director that Director replaced.

**12.6.6 Board of Directors Liability.** No Director or officer of the Association shall be liable to the Owners for any mistake in judgment, for negligence, or on other grounds, except for such Director's or officer's own individual and willful misconduct or bad faith. The Owners and Association shall indemnify and hold harmless each Director and officer from and against all liability to third parties arising out of any contract made by the Board of Directors on behalf of the Association or Owners, unless such contract was made in bad faith or contrary to the provisions of this Declaration or the Association Documents. The liability of an Owner arising out of the foregoing indemnification shall be limited to the total liability concerned multiplied by such Owner's Proportionate Share. The Association shall be authorized to obtain liability insurance for the errors and omissions of its Directors and officers.

### 13. INDEMNITY; HAZARDOUS SUBSTANCES

- 13.1 **Subrogation Waiver.** To the extent that liability of an Owner or Authorized Occupant to another Owner or Authorized Occupant or employees, agents, contractors, invitees, tenants, subtenants, successors and assigns of the same is covered by insurance, each Owner or Authorized Occupant respectively waives all rights of subrogation against the other Owners or Authorized Occupants, and agrees to cause its insurer to waive its rights of subrogation against the other Owners or Authorized Occupants to the same extent provided above.
- 13.2 **Indemnification.** Subject to the provisions of **Section 13.1**, each Owner and Authorized Occupant hereby agrees to indemnify, defend and hold harmless the other Owners, the Declarant, Authorized Occupants, and the Association and their respective agents, officers, directors, employees, servants, employees and contractors, from and against any and all liabilities, claims, damages, expenses (including reasonable attorneys' fees and reasonable attorneys' fees on any appeal), judgments, proceedings and causes of action, for bodily injury, death property damage arising from the active or passive negligence of such Owner or Authorized Occupant, and their respective agents, employees, servants, and contractors acting within the scope of their employment.
- 13.3 **Hazardous Substances.** Each Owner agrees as follows with respect to its Parcel(s):
- 13.3.1 **Care of Parcel.** The Owner shall not use, produce, store, release, dispose or handle in or about its Parcel or transfer to or from its Parcel (or permit any other Person under its control or any Authorized Occupant to do such acts) any Hazardous Substance except in compliance with all applicable Environmental Laws. No Owner shall construct or use any improvements, fixtures or equipment or engage in any act on or about its Parcel that would require the procurement of any license or permit pursuant to any Environmental Law, except for (i) the routine use and sale of substances necessary to the use and occupancy of the Parcel; (ii) the pursuit of the Owner's or Authorized Occupant's legal business on the Parcel; and (iii) for the sale to the public of substances generally handled in businesses similar to the Owner's or Authorized Occupant's legal business, so long as the requisite licenses or permits are obtained and maintained.
- 13.3.2 **Definitions.** In this Declaration the term "**Environmental Laws**" shall mean any federal, state or local statute, ordinance, rule, regulation or guideline pertaining to health, industrial hygiene, or the environment, including without limitation the federal Comprehensive Environmental Response, Compensation, and Liability Act; and the term "**Hazardous Substance**" shall mean all substances, materials and wastes that are or become regulated or classified as hazardous or toxic, under any Environmental Law, including, but not limited to gasoline, diesel fuel and petroleum products.
- 13.3.3 **No Knowledge.** To the best of the Owner's knowledge after reasonable inquiry, each Owner represents and warrants the following to the other Owners with respect to its Parcel. These representations and warranties shall be effective first at the time the Owner acquires an interest in its Parcel and shall continue while the Owner holds an interest in its Parcel. If at any time these representations and warranties are inaccurate, the Owner shall immediately

give written notice thereof to the other Owners and the Association. The representations and warranties are:

- 13.3.3.1 Except as permitted by Environmental Laws, there are no Hazardous Substances or regulated substances thereon or to be installed thereon, whether contained in barrels, tanks, equipment (movable or fixed) or other containers; deposited or located in land, waters, or sumps; or incorporated into any structure or in any other part of the Parcel.
- 13.3.3.2 No asbestos-containing materials have been or will be installed or affixed to the Buildings located or to be located on the Parcel at any time in violation of any Environmental Laws.
- 13.3.3.3 The Parcel and all uses thereon are not in violation of any Environmental Laws, whether they govern the existence, clean-up and/or remedy of contamination from any Hazardous Substance or regulated substances, and no governmental entity has served upon such Owner any notice claiming any violation of any such statute, ordinance or regulation.
- 13.3.4 **Notification.** If any Owner becomes aware of any condition relating to the existence, release or threatened release of any Hazardous Substance or violation of any Environmental Law on its Parcel, the cure or remediation of which is required by law or dictated by commercially reasonable business practices, such Owner shall promptly notify the other Owners and Association in writing thereof and shall promptly cure or remediate such condition.
- 13.3.5 **Right to Cure.** If any Defaulting Party fails to perform its duty to cure or remediate as required by Applicable Laws or this Section 13, a Non-defaulting Party may proceed to cure after thirty (30) days' written notice and failure of the Defaulting Party to commence, and thereafter diligently to prosecute, such cure, and the Non-defaulting Party shall be entitled to a reimbursement of all costs incurred in effectuating such cure together with interest at the Default Rate from the date such costs were paid, plus Collection Costs. Furthermore, the Non-defaulting Party shall have a Common Facilities Lien on the Parcel of the Defaulting Party (or on the Defaulting Party's interest therein, as applicable) by filing a Notice of Lien in the official records of the Recorder for all such amounts. In case of an emergency, the Person becoming aware of the condition shall attempt reasonable efforts to notify the Person with the duty of cure of the condition requiring attention; however, any Person may in such emergency, without notice, proceed in good faith to effectuate a cure, giving such notice later as soon as possible.
- 13.3.6 **Indemnity.** The Owner of each Parcel agrees to indemnify, defend and hold harmless the other Owners, the Association, the Declarant, Manager and Authorized Occupants of all other Parcels from and against any and all liabilities, claims, damages, expenses (including reasonable attorneys' fees and reasonable attorneys' fees on any appeal), judgments, proceedings and causes of action, relating to or connected with any of the foregoing obligations and/or liabilities identified in this Section 13.3, for injury to or death of any Person or damage to or destruction of any property occurring on or originating from said Owner's Parcel or arising out of the act or omission of such Owner, its Authorized Occupants, unless caused by the negligent or willful acts or omissions of the otherwise indemnified Person, its agents, contractors or employees.



#### 14. CONDEMNATION

If at any time or times all or any part of the Common Facilities shall be taken or condemned by any public authority under power of eminent domain, the provisions of this Article shall apply. A voluntary sale or conveyance of all or any part of the Common Facilities in lieu of condemnation but under threat of condemnation shall be deemed to be a taking by eminent domain. All compensation, damages, and other proceeds from any such taking by power of eminent domain (“**Condemnation Award**”) attributable to the value of any land and improvements within the Common Facilities shall be payable only to the Owner thereof (and its Authorized Occupants and assigns according to their respective interests therein) and no claim thereon shall be made by the other Owners; provided, however, that all other Owners may file collateral claims with the condemning authority over and above the value of the land and improvements located within the Common Facilities so taken to the extent of any damage suffered by their respective Parcels (as intended and permitted hereunder if there is then no building thereon) resulting from severance of the appurtenant portions of the Common Facilities so taken. The Owner of the portions of the Common Facilities so condemned shall promptly repair and restore the remaining portion of the Common Facilities so owned by such Owner as near as practicable to the condition of the same immediately prior to the condemnation and without contribution from any other Owner; provided, however, that the obligation to repair or reconstruct shall be limited such that the cost thereof shall not exceed the amount of the Condemnation Award payable to the Owner of the Common Facilities so condemned less said Owner’s costs associated with the condemnation, including but not limited to attorneys’ fees and court costs arising out of the condemnation proceedings.

#### 15. GENERAL PROVISIONS

- 15.1 **Covenants Run With the Land.** Each restriction on each Parcel shall be a burden on that Parcel, shall be appurtenant to and for the benefit of the other Parcels and each part thereof and shall run with the land.
- 15.2 **Successors and Assigns.** This Declaration and the Restrictions created hereby shall inure to the benefit of and be binding upon the Owners as they exist from time to time, their respective heirs, personal representatives, successors, assigns, agents, employees, Authorized Occupants and the remaining Benefitted Parties, and upon any Person acquiring a Parcel, or any portion thereof, or any interest therein, whether by operation of law or otherwise, to the extent that the foregoing is consistent with the provisions of **Article 10** of this Declaration. With respect to rights in or to any Parcel which have been severed from the rights or estates owned by Declarant pursuant to the terms of this Declaration, Declarant intends that such rights remain severed notwithstanding that during any time in which this Declaration is in effect Declarant or any other Person may own the underlying estate or servient estate as well as the lesser right or dominant estate, respectively, so that Declarant’s purposes in making this Declaration, as listed in the recitals, may be served, and any doctrine of merger of estates, or principle of law having similar effect, shall not apply to diminish any right hereunder or combine any right created or severed hereunder with any other estate or interest.
- 15.3 **Duration.** Except as otherwise provided herein, the term of this Declaration shall be for fifty (50) years and shall be thereafter automatically renewed for successive terms of ten (10) years

each unless terminated by the filing of a Termination Notice executed by all of the Owners of all of the Parcels and first mortgage Lien Holders owning or having first mortgage (including trust deed) liens upon all of the Parcel Area in the Commercial Center, which Termination Notice shall be executed by said Owners and mortgage holders and recorded in the official records of the Recorder at least one (1) year before the effective date of termination of the primary term or any renewal term.

- 15.4 **Arbitration.** As required by specific references within this Declaration to arbitration but otherwise only with the consent of the Persons affected thereby, any controversy or claim arising out of or relating to this Declaration, or the breach thereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
- 15.5 **Injunctive Relief.** In the event of any violation or threatened violation by any Person of any of the Restrictions contained in this Declaration, the Association, any or all of the Owners and Authorized Occupants of the property included within the Commercial Center shall have the right to enjoin such violation or threatened violation in a court of competent jurisdiction. The right of injunction shall be in addition to all other remedies set forth in this Declaration or provided by law.
- 15.6 **Modification and Termination.** This Declaration may not be modified in any respect or terminated, in whole or in part, except with the Consent of the Owners, and then only by written instrument duly executed and acknowledged by the Consent of the Owners or an officer of the Association who certifies that the required consents have been obtained, and recorded in the official records of the Recorder. No modification or termination of the Declaration shall affect the rights of any first Lienholder unless the first Lienholder consents in writing to the modification or termination. Notwithstanding any other provision hereof, this Declaration may not be modified in such a manner as would prohibit or restrict the use of a Parcel without the written consent of the Owner of the Parcel.
- 15.7 **Method of Approval.** Whenever the Consent of the Owners or other approval is required under this Declaration, such consent or approval must be given in accordance with the particular provision requiring consent by the other Person or Persons from whom consent is required. The Person requesting approval or consent (the “**Requesting Person**”) shall give notice in writing to the Person or Persons whose consent or approval is required (the “**Approving Person**”). Within thirty (30) days after receipt of said written request, each Approving Person shall notify the Requesting Person whether or not such consent or approval is granted. In the event that the Approving Person does not provide notification to the Requesting Person within thirty (30) days from the date of receipt of notice sent pursuant to **Section 15.10.1**, then the Approving Person shall be deemed to have granted consent or approval. Notwithstanding the above, this Section shall not be interpreted to permit a modification or termination of this Declaration without the express written Consent of the Owners as provided in **Section 15.6** and in such situation the failure to respond or notify any Requesting Person shall not be deemed an approval or consent thereto. Approval of any act, plan, budget, or any other item or fact under this Declaration shall not constitute a waiver of any requirements, duties, or obligations of any Person under this Declaration.

15.8 **Not a Public Dedication.** Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Commercial Center or any Parcel to the general public or for the general public or for any public purpose whatsoever, it being the intention of the Owners that this Declaration shall be strictly limited to and for the purposes herein expressed.

15.9 **Breach Shall Not Permit Termination.** It is expressly agreed that no breach of this Declaration shall entitle the Association, any Owner or Authorized Occupant to terminate this Declaration, but such limitation shall not affect in any manner any other rights or remedies which such Association, Owner or Authorized Occupant may have hereunder by reason of any breach of this Declaration. Any breach of the Declaration shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value, but this Declaration shall be binding upon and be effective against any Owner whose title is acquired by foreclosure, trustee’s sale or otherwise.

15.10 **Notices.**

15.10.1 **Method of Delivery.** All notices given pursuant to this Declaration shall be in writing and shall be given by personal delivery, by United States mail or by United States express mail or other established express delivery service (such as Federal Express), postage or delivery charge prepaid, return receipt requested, addressed to the Person and address designated below or, in the absence of such designation, to the Owner at its address shown on the then current real property records of the Recorder is located, or to an Authorized Occupant, to the premises which are occupied:

Declarant: Canyon Gate LLC  
 Attn: Paul M. Jensen  
 5284 S. Commerce Drive,  
 Suite C-274  
 Murray, Utah 84107  
 E-mail: pmj@pmjcompanies.com  
 Fax: 801.568.3999

With a copy to:  
 Sandy McCleve  
[sandy@pmjcompanies.com](mailto:sandy@pmjcompanies.com)

The Person and address to which notices are to be given may be changed at any time by any party upon written notice to the other parties. All notices given pursuant to this Declaration shall be deemed given upon receipt.

15.10.2 **Receipt.** For the purpose of this Declaration, the term “receipt” shall mean the earlier of any of the following: (i) the date of delivery of the notice or other document to the address specified pursuant to Section 15.10.1 above as shown on the return receipt, (ii) the date of actual receipt of the notice or other document by the Person specified pursuant to Section 15.10.1 above, or (iii) in the case of refusal to accept delivery or inability to deliver the notice or other document, the earlier of (a) the date of the attempted delivery or refusal to

accept delivery, (b) the date of the postmark on the return receipt, or (c) the date of receipt of notice of refusal or notice of non-delivery by the sending Person.

- 15.11 **Waiver.** The failure of a Person to insist upon strict performance of any of the Restrictions contained herein shall not be deemed a waiver of any rights or remedies that said Person may have, and shall not be deemed a waiver of any subsequent breach or default in the performance of any of the Restrictions contained herein by the same or any other Person.
- 15.12 **Attorneys' Fees.** In the event any Person initiates or defends any legal action or proceeding to enforce or interpret any of the terms of this Declaration, the prevailing party in any such action or proceeding shall be entitled to recover from the losing party in any such action or proceeding its reasonable costs, expenses, expert fees, and attorneys' fees (including its reasonable costs and attorneys' fees on any appeal).
- 15.13 **Severability.** If any term or provision of this Declaration or the application of it to any Person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Declaration or the application of such term or provision to Persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each term and provision of this Declaration shall be valid and shall be enforced to the extent permitted by law.
- 15.14 **Not a Partnership.** The provisions of this Declaration are not intended to create, nor shall they be in any way interpreted or construed to create, a joint venture, partnership, or any other similar relationship between the Owners or other beneficiaries hereof.
- 15.15 **Third Party Beneficiary Rights.** This Declaration is not intended to create, nor shall it be in any way interpreted or construed to create, any third party beneficiary rights in any Person or entity not specifically mentioned herein (such as Owner, Declarant, etc.) unless otherwise expressly provided herein.
- 15.16 **Captions and Headings.** The captions and headings in this Declaration are for reference only and shall not be deemed to define or limit the scope or intent of any of the terms, covenants, conditions, restrictions, or agreements contained herein.
- 15.17 **Grammar Construction.** In construing the provisions of this Declaration and whenever the context so requires, the use of a gender shall include all other genders, the use of the singular shall include the plural, and the use of the plural shall include the singular.
- 15.18 **Joint and Several Obligations.** In the event any party hereto is composed of more than one Person, the obligations of said party shall be joint and several.
- 15.19 **Recordation.** This Declaration shall be recorded in the official records of the County Recorder's office in the County of Utah, State of Utah.
- 15.20 **Disparity with ECR.** In the event that this Declaration shall specifically be incongruent or contradict any prohibition, use, restriction, or covenant referenced in the ECR, the ECR shall govern.

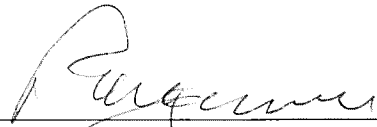
15.21 **As-is/Waiver.** The Owners hereby accept their respective Parcels at conveyance with no warranties of fitness and acknowledge that neither Declarant nor developer nor any agent, contractor or employee of Declarant or developer has made any representation or warranty of any kind with respect to the Commercial Center, any Common Facilities and areas, specifically including, but not limited to, any representation or warranty of suitability or fitness of the Commercial Center and/or the Parcels, land, property, or Buildings for any particular purpose, or the use thereof, and the Owners hereby waive any and all claims related thereto. Owners shall be deemed to have accepted the Commercial Center, land, Buildings, Common Facilities, and the Common area and all aspects thereof in an "AS IS - WHERE IS" condition and "WITH ALL FAULTS," including, but not limited to any latent or patent defects.

15.22 **Indemnification.** The Owners shall indemnify Declarant for any and all liability associated with Declarant's duties and obligations associated with this Declaration, including the paying of any reasonable attorney's fees and court costs.

**EXECUTED** as of the day and year first above written.

**CANYON GATE LLC,**

a Utah limited liability company

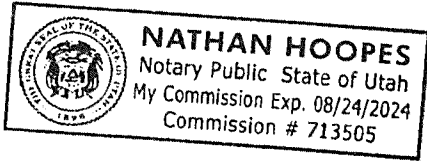
By:   
Paul M. Jensen, Manager


STATE OF UTAH )

:ss

COUNTY OF Salt Lake )

The foregoing instrument was acknowledged before me this 15<sup>th</sup> day of January, 2021, by Paul M. Jensen in the capacity indicated.



Notary Public: 

**SCHEDULE "A"**  
**TO DECLARATION**  
**(Legal Description of the Commercial Center)**

Utah County Tax Parcel Nos.: 65:601:0101, 65:601:0102, 65:601:0104, 65:601:0105, 65:601:0106, 65:601:0107, 65:601:0108

A PARCEL OF LAND SITUATED IN THE NORTHWEST QUARTER OF SECTION 28, TOWNSHIP 8 SOUTH, RANGE 3 EAST, SALT LAKE BASE AND MERIDIAN, SPANISH FORK CITY, UTAH COUNTY, STATE OF UTAH, ALSO BEING LOT 103, CANYON GATE SUBDIVISION, AS RECORDED IN THE OFFICE OF THE UTAH COUNTY RECORDER, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE SOUTHERLY RIGHT OF WAY LINE OF HIGHWAY 6, SAID POINT BEING SOUTH 00°24'38" EAST 203.42 FEET ALONG THE SECTION LINE AND EAST 522.06 FEET FROM THE NORTHWEST CORNER OF SAID SECTION 28, AND RUNNING THENCE SOUTH 55°07'00" EAST 538.97 FEET ALONG SAID SOUTHERLY RIGHT OF WAY LINE; THENCE SOUTH 35°04'26" WEST 127.74 FEET; THENCE SOUTH 17°04'11" WEST 38.34 FEET; THENCE SOUTH 13°40'49" EAST 138.41 FEET; THENCE SOUTH 79°04'15" WEST 392.61 FEET; THENCE NORTH 00°24'38" WEST 658.37 FEET TO THE POINT OF BEGINNING.

CONTAINS 187,252 SQ FT OR 4.299 ACRES

7 LOTS





**SCHEDULE "C"**  
**TO DECLARATION**  
**(Proportionate Share of the Owners)**

| <b>Parcel</b> | <b>Pad</b> | <b>Parcel Size (sq ft.)</b> | <b>Proportionate Share (%)</b> |
|---------------|------------|-----------------------------|--------------------------------|
| Lot 101       | C          | 24,626 sq. ft.              | 13.26%                         |
| Lot 102       | A          | 22,651 sq. ft.              | 12.10%                         |
| Lot 104       | B          | 28,562 sq. ft.              | 15.35%                         |
| Lot 105       | E          | 24,350 sq. ft.              | 13.03%                         |
| Lot 106       | F          | 43,054 sq. ft.              | 23.03%                         |
| Lot 107       | D          | 29,981 sq. ft.              | 16.05%                         |
| Lot 108       | G          | 14,030 sq. ft.              | 7.44%                          |

**SCHEDULE "D"**  
**TO DECLARATION**  
**EXCLUSIVE USE RESTRICTIONS**

1. **EXCLUSIVE USE RESTRICTIONS BENEFITTING ICEBERG.** The following exclusive use restrictions shall be applicable during the period in which Iceberg occupies any Parcel in the Commercial Center:

The operation of a restaurant company which derives more than 60% of its business from the sale of hamburgers, frozen yogurt and ice cream novelties. This restriction shall include, but not limited to, such companies as McDonald's, Wendy's, Burger King, Carl's Jr, Cold Stone, Baskin-Robbins, etc. and their related entities, successors and assignees, or other companies which derive more than 60% of their business from the sale of hamburgers, frozen yogurt, and ice cream novelties.

2. **EXCLUSIVE USE RESTRICTIONS BENEFITTING DEL TACO.** The following exclusive use restrictions shall be applicable during the period in which Del Taco occupies any Parcel in the Commercial Center:

The operation of a restaurant company which derives more than 60% of its business from the sale of tacos and Mexican fast food. This restriction shall include, but not limited to, such companies as Taco Bell, etc. and their related entities, successors and assignees, or other companies which derive more than 60% of their business from the sale of tacos and Mexican fast food.

**SCHEDULE "E"**  
**TO DECLARATION**  
**ECR**

ENT-13238:2017 PG 1 of 21  
Jeffery Smith  
Utah County Recorder  
2017 Feb 07 04:40 PM FEE-51.00 BY SW  
RECORDED FOR Metro National Title  
ELECTRONICALLY RECORDED

When recorded return to:  
Thomas E. Halter  
Gust Rosenfeld P.L.C.  
One East Washington, Suite 1600  
Phoenix, AZ 85004-2553  
MNT: 48530  
TAX ID: 27:038:0285

Spanish Fork (East), UT #3988-00

**EASEMENTS WITH COVENANTS AND RESTRICTIONS  
AFFECTING LAND ("ECR")**

THIS AGREEMENT is made as of the 6<sup>th</sup> day of December, 2016,  
between WAL-MART STORES, INC., a Delaware corporation ("Wal-Mart"), and WDG  
SPANISH FORK, LLC, a Utah limited liability company ("Developer").

**WITNESSETH:**

**WHEREAS**, Wal-Mart is the ground lessee of the Wal-Mart Tract (the "Wal-Mart Tract") as shown on the plan attached hereto as Exhibit A-1 hereof, said Tract being more particularly described in Exhibit B attached hereto;

**WHEREAS**, Developer is the owner of the Developer Tract (the "Developer Tract") and the Outparcels (the "Outparcels") shown on the plan attached hereto as Exhibit A-1 hereof, the same being more particularly described in Exhibit C hereof and is the fee title owner of the Wal-Mart Tract; and

**WHEREAS**, Wal-Mart and Developer desire that the Wal-Mart Tract, the Developer Tract and the Outparcels be developed in conjunction with each other pursuant to a general plan of improvement to form a commercial Shopping Center (sometimes hereinafter referred to as the "Shopping Center"), and further desire that the Shopping Center be subject to the easements and the covenants, conditions and restrictions hereinafter set forth;

**NOW, THEREFORE**, for and in consideration of the premises, easements, covenants, conditions, restrictions, and encumbrances contained herein, the sufficiency of which is hereby acknowledged, Wal-Mart and Developer do hereby agree as follows:

1. Building/Common Areas.

1.1 "Building Areas" as used herein shall mean those portions of the Shopping Center shown on Exhibit A-2 as "Building Area" (and "Future Building Area" and "Future Expansion Area"). Canopies may encroach from the Building Areas over the Common Areas provided the canopies: (a) do not interfere with the use of the Common Areas; (b) project from any building or structure more than five feet (5') over or outside of the Building Area (c) comply with all applicable laws, rules, ordinances and regulations of every governmental body having jurisdiction over the Shopping Center; and (d) do not materially alter the parking

configuration or vehicular or pedestrian circulation, and/or access in and through the entire Shopping Center.

1.2 "Common Areas" shall be all of the Shopping Center, except the Building Areas. Docks, loading areas, service areas and canopies which are attached to buildings but which extend over Common Area shall be deemed to be part of the Building Area which they serve or the buildings to which they are attached and not part of the Common Areas.

1.3 "Tracts" as used herein shall mean the Wal-Mart Tract and the Developer Tract but not the Outparcels. Reference to a "Tract" refers to the Wal-Mart Tract or the Developer Tract but not the Outparcels.

1.4 Conversion to Common Areas: Those portions of the Building Areas which are not from time to time used or cannot, under the terms of this Agreement, be used for buildings shall become part of the Common Area for the uses permitted hereunder and shall be improved, kept and maintained as provided herein. An area converted to Common Area may be, as set forth above, converted back to Building Area, if at the time of conversion back to Building Area, it meets the requirements of this ECR.

2. Use. Buildings in the Shopping Center shall be used for commercial purposes of the type normally found in a retail shopping center including, without limitation, restaurants, insurance agencies, stock brokerage offices, financial institutions, service shops, offices, and retail stores. No theatre, bowling alley, billiard parlor, night club or other place of recreation or amusement in excess of 5,000 square feet in size, day care facility, child care facility, preschool or children's nursery, any business which derives in excess of 30% of its gross sales from the sale of alcoholic beverages, any business or facility used in growing, delivering, transferring, supplying, dispensing, dispersing, distributing or selling marijuana, whether by prescription, medical recommendation or otherwise, and whether consisting of live plants, seeds, seedlings or processed or harvested portions of the marijuana plant, shall occupy space within the Shopping Center without the prior written consent of Wal-Mart, which Wal-Mart may withhold in its sole and absolute discretion. No restaurant or cafeteria shall occupy space on any portion of the Restaurant Restriction Area depicted on Exhibit A-2 without the prior written consent of Wal-Mart, which Wal-Mart may withhold in its sole and absolute discretion. Developer recognizes that said businesses may inconvenience Wal-Mart's customers and adversely affect Wal-Mart's business. Notwithstanding anything to the contrary contained herein it is expressly agreed that nothing contained in this Agreement shall be construed to contain a covenant, either express or implied, to either commence the operation of a business or thereafter continuously operate a business by Wal-Mart on the Wal-Mart Tract. Developer recognizes and agrees that Wal-Mart may, at Wal-Mart's sole discretion and at any time during the term of this Agreement, cease the operation of its business on the Wal-Mart Tract; and Developer hereby waives any legal action for damages or for equitable relief which might be available to Developer because of such cessation of business activity by Wal-Mart.

3. Competing Business. Developer covenants that as long as Wal-Mart, or any affiliate of Wal-Mart, is the user of the Wal-Mart Tract, either as owner or lessee, no space in or portion of the Developer Tract or the Outparcels, and no space in or portion of any other real property adjacent to the Shopping Center which may subsequently be acquired by Developer, shall be leased or occupied by or conveyed to any other party for use as (i) a remote operation or distribution (such as remote internet fulfillment center or locations, locker, grocery, drive-through, grocery home shopping pick-ups, mail order, or similar pick-up facility), (ii) a facility dispensing gasoline or fuel from pumps, (iii) a pharmacy, (iv) a variety, general,

convenience or "dollar" store, (v) a grocery store or supermarket as such terms are defined below, or (vi) as any combination of the foregoing uses. In the event of a breach of this covenant, Wal-Mart shall have the right to terminate this Agreement and to seek any and all remedies afforded by either law or equity, including, without limitation, the rights to injunctive relief. "Grocery store" and "supermarket", as those terms are used herein, shall mean a single food store or food department containing more than 3,000 square feet of building space used for the purpose of selling food for off premises consumption, which shall include but not be limited to the sale of dry, refrigerated or frozen groceries, meat, seafood, poultry, produce, delicatessen or bakery products, refrigerated or frozen dairy products, or any grocery products normally sold in such stores or departments. In no event shall a restaurant that primarily sells prepared ready to eat meals and/or fast-food meals for on-site and off-site consumption be deemed to be a Grocery Store or a supermarket.

#### 4. Buildings.

4.1 Design and Construction. The Buildings constructed on the Shopping Center shall be designed so that the exterior elevation of each shall be architecturally and aesthetically compatible and so that building wall footings shall not encroach from one Tract or Outparcel onto another Tract or Outparcel except as provided for in Subsection 4.4, below. The design and construction shall be of high quality. No improvements shall be constructed, erected or expanded or altered on the Outparcels until the plans for the same (including site layout, exterior building materials and colors and parking) have been approved in writing by Developer. No building constructed on the Wal-Mart Tract or the Developer Tract shall exceed 40' in height above the elevation of the applicable Tract or Outparcel as of the date hereof ("Height"). Incidental architectural embellishments and peaks shall not be considered in connection with determining compliance with said Height restriction. Except for a building used for a bank or credit union, which may not exceed twenty-seven feet (27') in Height, no building constructed on the Outparcels shall exceed twenty-three (23') in Height (except all mechanical improvements and architectural embellishments can be up to six feet (6') making the total maximum height twenty-eight feet (28')) in Height. No building shall have a metal exterior.

4.2 Location/Size. No building shall be constructed on the Shopping Center (as either immediate development or future expansion) except within the Building Areas. Any buildings located on the Outparcels shall not exceed 8,000 square feet in size.

4.3 Fire Protection. Any building constructed within sixty (60) feet of the Wal-Mart Tract shall be constructed and operated in such a manner which will preserve the sprinklered rate on the Wal-Mart building.

4.4 Easements. In the event building wall footings encroach from one Tract onto the other Tract, despite efforts to avoid that occurrence, the party onto whose Tract the footings encroach shall cooperate in granting an encroachment permit or non-exclusive easement to the party whose building wall footings encroach for the construction, maintenance and replacement of such footings.

#### 5. Common Areas.

5.1 Grant of Easements. Each party, as grantor, hereby grants to the other party, as grantee, and to the agents, customers, invitees, licensees, tenants and employees of grantee, a nonexclusive permanent easement over and through the Wal-Mart Tract and the Developer Tract (exclusive of Building Areas) for roadways, walkways, ingress

and egress, parking of motor vehicles, loading and unloading of commercial and other vehicles, and the use of facilities installed for the comfort and convenience of customers, invitees, licensees, tenants and employees of all businesses and occupants of the buildings constructed on the Building Areas located on the Wal-Mart Tract and the Developer Tract. Wal-Mart and Developer hereby grant for the benefit of the Outparcels, nonexclusive permanent easements for vehicular and pedestrian access, ingress, and egress over and across the Wal-Mart Tract and the Developer Tract (exclusive of the Building Areas), provided, however, in no event shall the owner, occupant, licensee or invitee of any of the Outparcels(s) be permitted to use the Wal-Mart Tract or the Developer Tract for vehicular parking or for any other purpose other than as described above. Developer hereby grants to Wal-Mart for the benefit of the Wal-Mart Tract, nonexclusive permanent easements for vehicular and pedestrian access, ingress, and egress over and across the Outparcels (exclusive of the Building Areas), provided however, in no event shall the owner, occupant, licensee or invitee of the Wal-Mart Tract be permitted to use the Outparcels for vehicular parking or for any other purpose other than as permitted pursuant to the terms of this Agreement. The foregoing notwithstanding, the use of the Common Areas for ingress, egress, access and parking shall not cause the obstruction nor the impediment of vehicular or pedestrian traffic, upon or across the parking areas, entrances, exits, driveways, walks or service drives located within the Common Areas. The foregoing notwithstanding, in no event shall any portion of the Wal-Mart Tract be used for construction vehicular ingress or egress except for that portion of the Wal-Mart Tract identified as the "Construction Access" on Exhibit A-3 attached hereto.

**5.2 No Barriers.** No walls, fences, or barriers of any kind shall be constructed or maintained on the Common Areas, or any portion thereof, by any party which shall prevent or impair the use or exercise of any of the easements granted herein, or the free access and movement, including without limitation, of pedestrians and vehicular traffic between the various lots; provided, however, reasonable traffic controls (which approval shall not be unreasonably withheld or delayed) as may be necessary to guide and control the orderly flow of traffic may be installed so long as access driveways to the parking areas in the Common Areas are not closed or blocked. The only exceptions to this provision shall be (1) for changes to the Building Areas and Common Areas permitted by this ECR, (2) for incidental encroachments upon the Common Areas which may occur as a result of the use of the ladders, scaffolding, storefront barricades and similar facilities resulting in temporary obstruction of the Common Areas, all of which are permitted hereunder so long as their use is kept within reasonable requirements of construction work being expeditiously pursued, (3) for incidental, immaterial and temporary encroachments upon the Common Areas which may occur in conjunction with the construction, maintenance or repair of buildings and improvements on the Tracts or Outparcels, so long as such construction, maintenance or repair is being diligently pursued; (4) for temporary blockage of certain areas deemed necessary by the parties to prevent a public dedication of an easement or access right, and (5) for parking lot paving, landscaping and lighting facilities; such directional traffic signs as are required to facilitate the orderly and free flow of pedestrian and vehicular traffic, and pylon sign in the location indicated on the Site Plan.

### **5.3 Limitations on Use.**

(1) **Customers.** Each party shall use reasonable efforts to ensure that customers and invitees shall not be permitted to park on the Common Areas except while shopping or transacting business in the Shopping Center.

(2) **Employees.** Each party shall use reasonable efforts to ensure that employees park on the Common Areas of said party's Tract or Outparcel.

(3) General. Any activity within the Common Areas other than its primary purpose of the Common Areas, which is to provide for parking for the customers, invitees and employees of those businesses conducted within the Building Areas and for the servicing and supplying of such businesses, shall be permitted so long as such activity shall not unreasonably interfere with such primary purpose. The use by Wal-Mart of the Common Areas on the Wal-Mart Tract for the display, sale and storage of merchandise and for the use of seasonal sales structures is expressly permitted, provided such use does not materially impair the primary purpose of the Common Areas (as stated above). Persons using the Common Areas in accordance with this Agreement shall not be charged any fee for such use. Notwithstanding the foregoing, each party covenants and agrees that, to the extent allowed by law, neither party will allow the Common Areas on its tract to be used for rallies, demonstrations, protests, picketing or handbilling to protest, publicize or allege improprieties regarding the acts, policies or operating practices of any business operating within the Shopping Center.

5.4 Utility and Service Easements. Each party hereby establishes and grants to the other party a perpetual nonexclusive easement for the benefit of the owner of each Tract or Outparcel, on, across and under the Common Areas, to install, use, maintain and repair public-utility services and distribution systems (including storm drains, sewers, utilities and other proper services necessary for the orderly development and operation of the Shopping Center, now upon or hereafter installed on, across or under the Common Areas, to the extent necessary to service such Tract or Outparcel). Both parties shall use their best efforts to cause the installation of such utility and service lines prior to paving of the Common Areas. No such lines, sewers, utilities or services of one party shall be installed within the Building Areas on the other party's parcel nor shall any utility lines be constructed in any manner as to impede or restrict vehicular or pedestrian traffic upon and across the parking areas, entrances, exits, driveways, walks or other drives located within the Common Areas. Subject to the foregoing, the location of any utilities hereafter installed shall be determined by the owner of the Tract or Outparcel upon which such utilities are to be installed. Subject to the restrictions on location set forth in this Section 8.3, any such installed utility services may be relocated by the owner of a Tract or Outparcel on such owner's Tract or Outparcel, subject to compliance with applicable laws, at the expense of the owner of that Tract or Outparcel, provided that such relocation shall not interfere with, increase the cost of, or diminish utility services to any other Tract or Outparcel.

5.5 Water Flow. Each party hereby establishes and grants a perpetual nonexclusive easement on its Tract or Outparcel for the benefit of the owner of each other Tract or Outparcel to use, maintain and repair any storm water drainage system (the "Storm Drainage System") now or hereafter located on either Tract or any Outparcel, together with the right to discharge surface water runoff across portions of either Tract or any Outparcel in accordance with the design of the Storm Drainage System. Any alteration in the natural water flow which may occur as a natural consequence of normal construction activities and the existence of the party's improvements substantially as shown on Exhibit A-2 (including without limitation building and building expansion, curbs, drives and paving) shall be permitted; provided that no such alterations shall be installed within the Building Areas on the other party's parcel nor shall any utility lines be constructed in any manner as to impede or restrict vehicular or pedestrian traffic upon and across the parking areas, entrances, exits, driveways, walks or other drives located within the Common Areas.



6. Development, Parking Ratios, Maintenance, and Taxes.

6.1 Development. The arrangement of the Common Areas shall not be changed in a manner inconsistent with the provisions of this Agreement.

6.2 Wal-Mart Tract and Developer Tract "Parking Ratio". Wal-Mart agrees that at all times there shall be independently maintained on the Wal-Mart Tract parking area sufficient to accommodate not fewer than 4.0 car spaces for each 1,000 square feet of building or buildings on the Wal-Mart Tract. Developer agrees that at all times there shall be independently maintained on the Developer Tract parking area sufficient to accommodate not fewer than 5.0 car spaces for each 1,000 square feet of building or buildings on the Developer Tract.

6.3 Outparcel "Parking Ratio". Developer agrees that at all times there shall be independently maintained on each Outparcel parking area sufficient to accommodate not fewer than: (i) 10 spaces for every 1,000 square feet of building space for any restaurant or entertainment use; or (iii) 5.0 spaces per 1,000 square feet of building space for any other use.

6.4 Maintenance.

(1) Standards. The Outparcels, the Developer Tract and the Wal-Mart Tract shall be kept neat and orderly until improved and constructed. Following completion of the improvements on the Common Areas, the parties hereto shall maintain the Common Areas in good condition and repair. The maintenance is to include, without limitation, the following:

(a) Maintaining the surfaces in a level, smooth and evenly-covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use, and durability;

(b) Removing all papers, ice and snow, mud and sand, debris, filth and refuse and thoroughly sweeping the area to the extent reasonably necessary to keep the area in a clean and orderly condition;

(c) Placing, keeping in repair and replacing any necessary appropriate directional signs, markers and lines;

(d) Operating, keeping in repair and replacing, where necessary, such artificial lighting facilities as shall be reasonably required;

(e) Maintaining all perimeter and exterior building walls including but not limited to all retaining walls in a good condition and state of repair;

(f) Maintaining, mowing, weeding, trimming and watering all landscaped areas and making such replacements of shrubs and other landscaping as is necessary; and

(g) Maintaining elements of the Storm Drainage System,

(2) Expenses. The respective owners shall pay the maintenance expense of their Tracts or Outparcels.

(3) By Agent. Subject to the mutual agreement of the parties hereto, a third party may be appointed as an agent of the parties to maintain the Common Areas in the manner as above outlined. Said third party may receive for such agency a fee that is mutually acceptable to all parties to cover supervision, management, accounting and similar fees, which sums are to be included in the general maintenance expense paid by the respective owners of the Common Areas.

6.5 Taxes. Each of the parties hereto agrees to pay or cause to be paid, prior to delinquency, directly to the appropriate taxing authorities all real property taxes and assessments which are levied against that part of the Common Areas owned by it. If any such owner shall fail to so pay such taxes and assessments, any other property owner, or the tenant of the property owner, may pay the taxes and assessments and the paying property owner or tenant may then bill the defaulting property owner for the expense incurred, and the defaulting property owner shall pay said bill within fifteen (15) days of receipt thereof. Notwithstanding the foregoing, a property owner shall not be required to pay, discharge or remove any tax or assessment on its property so long as it shall contest at its own expense the existence, amount or validity thereof by appropriate proceedings which shall prevent the collection of or other realization upon the tax or assessment so contested, and the sale, forfeiture or loss of the property subject to the tax or assessment to satisfy the same.

7. Signs. No rooftop sign shall be erected on the building constructed on the Outparcels. No freestanding identification sign may be erected on the Outparcels without approval of the Developer, and in no event shall such freestanding identification sign exceed the height of the Shopping Center pylon sign or block the visibility of the Wal-Mart Store. Notwithstanding the foregoing, there may be erected entrance-exit signs to facilitate the free flow of traffic, which entrance-exit signs shall be of a monument type, not to exceed 3'3" in height, the type and location of such signs to be approved by Developer. No sign shall be located on the Common Areas on the Wal-Mart Tract and the Developer Tract except signs advertising businesses conducted thereon. No signs shall obstruct the ingress and egress shown on Exhibit A-2. Developer shall install and maintain Shopping Center pylon sign (the "Pylon Sign") in the location shown on Exhibit A-2 attached to this Agreement. The design of the Pylon Sign shall be as shown on Exhibit D attached to this Agreement or such other design as mutually approved by Wal-Mart and Developer. Developer, as grantor, grants to Wal-Mart, as grantee, for the benefit of the Wal-Mart Tract, appurtenant to the Wal-Mart Tract, a perpetual, non-exclusive easement to construct, maintain, operate and replace, at Wal-Mart's sole cost and expense, sign panels on the Pylon Sign. Wal-Mart shall have the right to install its sign panel in the first position of the Shopping Center occupants on the Pylon Sign. Such panel shall be of the dimensions shown on Exhibit D. No other occupant or owner in the Shopping Center shall be allocated signage panels on the Pylon Sign which in the aggregate exceed the signage allocated to Wal-Mart. Wal-Mart agrees to pay to Developer Wal-Mart's proportionate share (as calculated below) of Developer's actual out-of-pocket costs paid to third parties for constructing and maintaining the Pylon Sign, including utility costs for illuminating the Pylon Sign, if applicable; provided, however, that Wal-Mart's share of the cost of constructing the Pylon Sign will not exceed \$54,000.00; and provided further that in the case of maintenance that includes only specific panels on the Pylon Sign the party who owns such panels shall pay the entire cost of such maintenance. Wal-Mart's proportionate share of the cost of said construction and maintenance shall be calculated by multiplying the total cost of said construction or maintenance, as the case may be, by a fraction, the numerator of which is the total square

footage of the Pylon Sign allocated by Developer to Wal-Mart for Wal-Mart's use and the denominator of which is the total square footage of the Pylon Sign allocated for use by Wal-Mart and other tenants or occupants of the Shopping Center. Wal-Mart shall pay to Developer Wal-Mart's proportionate share of the cost of constructing the Pylon Sign in one lump-sum payment within 30 days after receipt by Wal-Mart of Developer's written invoice therefor accompanied by satisfactory evidence of the actual costs contained in such invoice. Developer may bill Wal-Mart for Wal-Mart's proportionate share of Developer's reasonable actual out-of-pocket costs paid to third parties for maintaining the Pylon Sign no more frequently than quarterly and Wal-Mart shall pay its proportionate share of the Pylon Sign maintenance costs within 30 days after receipt of a written invoice therefor accompanied by satisfactory evidence of the actual costs contained in such invoice from Developer. The Pylon Sign shall be completed on or before January 1, 2017 (the "Completion Date"). In the event the Pylon Sign is not completed on or before the Completion Date, Wal-Mart shall have the right to construct the Pylon Sign and Developer shall reimburse Wal-Mart for Developer's share of the cost of constructing the Pylon Sign, which share shall be to the costs of construction less the Wal-Mart share.

**8. Indemnification/Insurance.**

**8.1 Indemnification.** Each party hereby indemnifies and saves the other party harmless from any and all liability, damage, expense, causes of action, suits, claims, or judgments arising from personal injury, death, or property damage and occurring on or from its own Tract or Outparcel, except if caused by the act or negligence of the other party hereto.

**8.2 Insurance.**

(1) Each owner and/or lessee of any portion of the Shopping Center shall procure and maintain in full force and effect throughout the term of this Agreement general public liability insurance and property damage insurance against claims for personal injury, death or property damage occurring upon, in or about its property; each party's insurance to afford protection to the limit of not less than \$2,000,000.00 for injury or death of a single person, and to the limit of not less than \$2,000,000.00 for any one occurrence, and to the limit of not less than \$2,000,000.00 for property damage. Each party shall provide the other party with certificates of such insurance from time to time upon written request to evidence that such insurance is in force. Such insurance may be written by additional premises endorsement on any master policy of insurance carried by the party which may cover other property in addition to the property covered by this Agreement. Such insurance shall provide that the same may not be canceled without 10 days prior written notice to Wal-Mart and the Developer.

(2) At all times during the term of this Agreement, each party shall keep improvements on its property insured against loss or damage by fire and other perils and events as may be insured against under the broad form of Uniform Extended Coverage Clause in effect from time to time in the state in which the parties' respective properties are located, with such insurance to be for the full replacement value of the insured improvements. The owner or lessee, as applicable, of a Tract or Outparcel shall pay for any increase in the cost of insuring the improvements on the other Tracts or Outparcels if such increase is due to the use by such owner or its tenant(s).

(3) Policies of insurance provided for in this Section 8 shall name Wal-Mart and Developer as insureds.

(4) Each owner and Lessee of any portion of the Shopping Center for itself and its property insurer hereby releases the other owners of portions of the Shopping Center from and against any and all claims, demands, liabilities or obligations whatsoever for damage to property or loss of rents or profits resulting from or in any way connected with any fire or other casualty whether or not such fire or other casualty shall have been caused by the negligence or the contributory negligence of the party being released or by any agent, associate or employee of the party being released, this release being to the extent that such damage or loss is covered by the property insurance which the releasing party is obligated hereunder to carry, or, if the releasing party is not carrying that insurance, then to the extent such damage or loss would be covered if the releasing party were carrying that insurance.

(5) Notwithstanding anything to the contrary contained in this Section 8, so long as the net worth of Wal-Mart shall exceed \$100,000,000.00, and so long as Wal-Mart is owner or lessee of the Wal-Mart Tract, Wal-Mart shall have the right to retain (in whole or in part) the financial risk for any claim. If Wal-Mart elects self-insurance, Wal-Mart shall, upon request, provide Developer with a description of such self-insurance program, financial statements, and evidence of any partial insurance coverage which may be supplementing any plan of partial self-insurance.

## 9. Eminent Domain.

9.1 Owner's Right To Award. Nothing herein shall be construed to give either party any interest in any award or payment made to the other party in connection with any exercise of eminent domain or transfer in lieu thereof affecting said other party's Tract or Outparcel giving the public or any government any rights in said Tract or Outparcel. In the event of any exercise of eminent domain or transfer in lieu thereof of any part of the Common Areas located in the Shopping Center, the award attributable to the land and improvements of such portion of the Common Areas shall be payable only to the owner thereof, and no claim thereon shall be made by the owners of any other portion of the Common Areas.

9.2 Collateral Claims. All other owners of the Common Areas may file collateral claims with the condemning authority for their losses which are separate and apart from the value of the land area and improvements taken from another owner.

9.3 Tenant's Claim. Nothing in this Section 9 shall prevent a tenant from making a claim against an owner pursuant to the provisions of any lease between tenant and owner for all or a portion of any such award or payment.

9.4 Restoration Of Common Areas. The owner of any portion of the Common Areas so condemned shall promptly repair and restore the remaining portion of the Common Areas within its respective Tract or Outparcel as nearly as practicable to the condition of the same immediately prior to such condemnation or transfer, to the extent that the proceeds of such award are sufficient to pay the cost of such restoration and repair and without contribution from any other owner.

10. Rights And Obligations Of Lenders. Any holder of a first lien on any portion of the Shopping Center, and any assignee or successor in interest of such first lienholder, shall be subject to the terms and conditions of this Agreement.

11. Release from Liability. Any person acquiring fee or leasehold title to any portion of the Shopping Center shall be bound by this Agreement only as to the Tract, Outparcel or portion of the Tract or Outparcel acquired by such person. In addition, such person shall be bound by this Agreement only during the period such person is the fee or leasehold owner of such Tract, Outparcel or portion of the Shopping Center, except as to obligations, liabilities or responsibilities that accrue during said period of ownership or lease. Although persons may be released under this Section, the easements, covenants and restrictions in this Agreement shall continue to be benefits to and servitudes upon said tracts running with the land.

12. Breach. In the event of breach or threatened breach of this Agreement, only all of the record owners of the Wal-Mart Tract as a group, or all record owners of the Developer Tract as a group, or Wal-Mart so long as it or any affiliate has an interest as owner or lessee of the Wal-Mart Tract or Developer so long as it or any affiliate has an interest as owner or lessee of the Developer Tract, shall be entitled to institute proceedings for full and adequate relief from the consequences of said breach or threatened breach. Notwithstanding the foregoing, all of the record owners of an Outparcel shall be entitled to take any action permitted by this Agreement with respect to the breach of Sections 5.1, 6.4, 6.5, 8.1, 8.2(4) and 9. A "breach" for purposes of this ECR shall mean: a default by any party in a material respect under any term or condition of this Agreement that such party fails either to cure or comply with or to diligently pursue a cure within (i) ten (10) days of receipt of written notice thereof from any other party or record owner, with respect to any monetary default, or (ii) thirty (30) days of receipt of written notice thereof from any other party or record owner with respect to a non-monetary default; provided, however, in the event such non-monetary breach or default is curable but is of such a nature that it cannot with due diligence be cured within such thirty (30) day period, then, provided such party commences to cure such non-monetary breach or default within the thirty (30) day period and continues to cure such non-monetary breach or default with due diligence, then such thirty (30) day period shall be extended for so long as it shall require such party in the exercise of due diligence to cure such non-monetary breach or default, but not to exceed an additional ninety (90) days. In addition to the rights and remedies set forth in this Section 12, in the event of a monetary default, interest shall accrue on all amounts from the due date until the date of actual payment in the amount of 12% per annum. Further, in the event of breach of this Agreement, the prevailing party shall be entitled to recover all costs of collection, including attorneys' and filing fees and court costs.

13. Rights of Successors. The easements, restrictions, benefits and obligations hereunder shall create mutual benefits and servitudes running with the land. This Agreement shall bind and inure to the benefit of the parties hereto, their respective heirs, representatives, lessees, successors and assigns. The singular number includes the plural and the masculine gender includes the feminine and neuter.

14. Document Execution, Modification and Cancellation. It is understood and agreed that until this document is fully executed by both Developer and Wal-Mart there is not and shall not be an agreement of any kind between the parties hereto upon which any commitment, undertaking or obligation can be founded. This Agreement (including exhibits) may be modified or canceled only by the mutual agreement of (a) Wal-Mart as long as it or its affiliate has any interest as either owner or lessee of the Wal-Mart Tract, or its successors in interest, and (b) Developer, as long as it or its affiliate has any interest as either owner or lessor of the Developer Tract, or its successors in interest.

15. Non-Merger. So long as Wal-Mart or its affiliate is owner or lessee of the Wal-Mart Tract, this Agreement shall not be subject to the doctrine of merger.

16. Duration. Unless otherwise canceled or terminated, all of the easements granted in this Agreement shall continue in perpetuity and all other rights and obligations hereof shall automatically terminate and be of no further force and effect after 99 years from the date hereof.

17. Headings. The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.

18. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto. The parties do not rely upon any statement, promise or representation not herein expressed, and this Agreement once executed and delivered shall not be modified or altered in any respect except by a writing executed and delivered in the same manner as required by this document.

19. Transfer of Interests; Notices.

19.1 Transfer of Interests. In the event that any person or entity (the "Acquiring Party") shall acquire a fee or mortgage interest in any portion of the Shopping Center subject to this Agreement, or any portion thereof, the Acquiring Party shall execute and file in the land records of Utah County, Utah, a statement setting forth the name of the Acquiring Party, the address of the Acquiring Party to which all notices for the purposes of this Agreement may be sent, the nature of the interest held by the Acquiring Party, and the date that such interest was acquired (the "Notice Statement"). Contemporaneously with such filing, the Acquiring Party shall also send by certified mail, return receipt requested, a copy of such Notice Statement to all other persons or entities then holding fee or mortgage interests in any tract subject to this Agreement, or any portion thereof, as reflected by the Notice Statements then of record in the land records of Utah County, Utah (the "Existing Interest Holders"). Until such time as an Acquiring Party files and mails such Notice Statement in accordance with the terms of this Section 19.1, it shall not be entitled to receive any notice required or permitted to be given under this Agreement, and the Existing Interest Holders shall have no obligation to give any such notice to the Acquiring Party. Any change of address shall require the filing and mailing of a new Notice Statement. It is understood and agreed that the provisions of this Section 19.1 regarding the recordation of the Notice Statement are satisfied with respect to Developer and Wal-Mart.

19.2 Notices. All notices and other communications required or permitted to be given hereunder shall be in writing and shall be mailed by certified or registered mail, postage prepaid, or by Federal Express, Airborne Express, or similar overnight delivery service, addressed as follows:

Wal-Mart: Wal-Mart Stores, Inc. (#3988-00)  
Attention: President  
2001 S.E. 10th Street  
Bentonville, AR 72716  
Telephone: \_\_\_\_\_

With a copy to:

Wal-Mart Stores, Inc. (#3988-00)  
Attention: Property Management, State of Utah  
2001 S.E. 10th Street  
Bentonville, AR 72716-0550  
Telephone: \_\_\_\_\_

Developer: WDG Spanish Fork, LLC  
Attn: Spencer Wright  
1178 Legacy Crossing Blvd, Suite 100  
Centerville, Utah 84014  
Telephone: 801-773-7339

Notices shall be effective upon receipt or refusal. The telephone numbers listed above are for purposes of providing the same to overnight delivery services and are not to be otherwise used for notice purposes. In the event that any person acquires a fee interest in the Shopping Center said person shall be entitled to provide a request for notice to the addressees listed above, which request, in order to be effective, must also be recorded in the county recorder's office in the county in which the Shopping Center is located. Any party shall be entitled to change its address for notice by providing notice of such change and recording a copy of the notice of such change in the county recorder's office in the county in which the Shopping Center is located. Until such time as the notice of change is effective pursuant to the terms of this Section 19 and until such time as it is recorded as required above, the last address of said party shall be deemed to be the proper address of said party.

20. Consent. The owner of the Wal-Mart Tract agrees that for so long as a lease of all or a portion of the Wal-Mart Tract is in effect with Wal-Mart as lessee, whenever the consent of the owner of the Wal-Mart Tract is required under the Agreement, the owner of the Wal-Mart Tract will give such consent only after obtaining Wal-Mart's consent.

21. Obligations of the owner of the Wal-Mart Tract. Wal-Mart hereby agrees that so long as a lease of all or a portion of the Wal-Mart Tract is in effect, it will satisfy the obligations of the owner of the Wal-Mart Tract hereunder, and will hold harmless and indemnify the owner of the Wal-Mart Tract from any and all loss, damage, expense, fees, claims, costs, and liabilities, including, but not limited to, attorneys' fees and costs of litigation, arising out of this Agreement, except for those arising out of the acts or omissions of the owner of the Wal-Mart Tract or its employees, agents, contractors or invitees.

22. Counterparts. This Agreement may be executed in one or more counterparts each of which in the aggregate shall constitute one and the same instrument.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first written above.

WAL-MART STORES, INC., a Delaware corporation

By   
L.B. Johnson  
Its Vice President of Real Estate

"Wal-Mart"

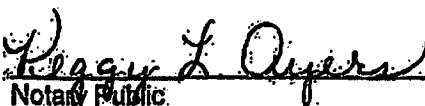
State of Arkansas:

County of Benton

The foregoing instrument was acknowledged before me this 15<sup>th</sup> day of August, 2016, by L.B. Johnson, a Vice President of Real Estate of Wal-Mart Stores, Inc., a Delaware corporation, on behalf of the corporation.

(Seal and Expiration Date)

PEGGY L. AYERS  
BENTON COUNTY  
NOTARY PUBLIC -- ARKANSAS  
My Commission Expires Sept. 17, 2023  
Commission No.: 12395785

  
Notary Public



**WDG SPANISH FORK, LLC,**  
a Utah limited liability company

By Spencer H. Wright

Its MANAGER

"Developer"

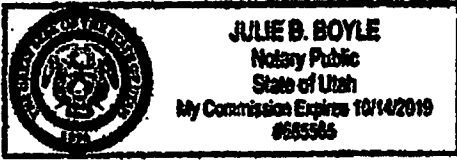
State of Utah

County of Davis

The foregoing instrument was acknowledged before me this 17 day of October, 2016, by Spencer H. Wright, the Manager of WDG Spanish Fork, LLC, a Utah limited liability company, on behalf of the company.

(Seal and Expiration Date)

Julie B. Boyle  
Notary Public



**BENEFICIARY'S CONSENT**

The undersigned beneficiary hereby consents to the placement of the easements, restrictions, and covenants contained in the foregoing instrument on the parcels of land described therein and further agree that the same shall not be terminated on any foreclosure on any parcel of land covered by the said instrument.

**ZIONS FIRST NATIONAL BANK**

By: Brian Cooley  
Name: Brian Cooley  
Title: VP

**NOTARY ACKNOWLEDGMENT**

State of Utah

County of WEBER

Be it remembered that on this 3<sup>rd</sup> day of FEBRUARY, 2018, before me a notary public in and for the county and state aforesaid, came BRIAN COOLEY, a Vice President of Real Estate of Zions First National Bank, who is personally known to me to be the person who executed as such officer the within instrument of writing on behalf of such BENEFICIARY and such person duly acknowledged the execution of the same to be the act and deed of said BENEFICIARY.

In testimony whereof, I have hereunto set my hand and affixed my notary seal the day and year last above written.

JAREN BEVAN  
Notary Public

(SEAL)

My commission expires: MARCH 18, 2017

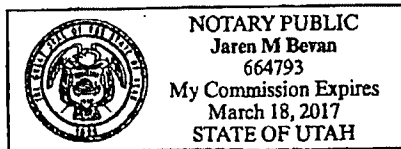
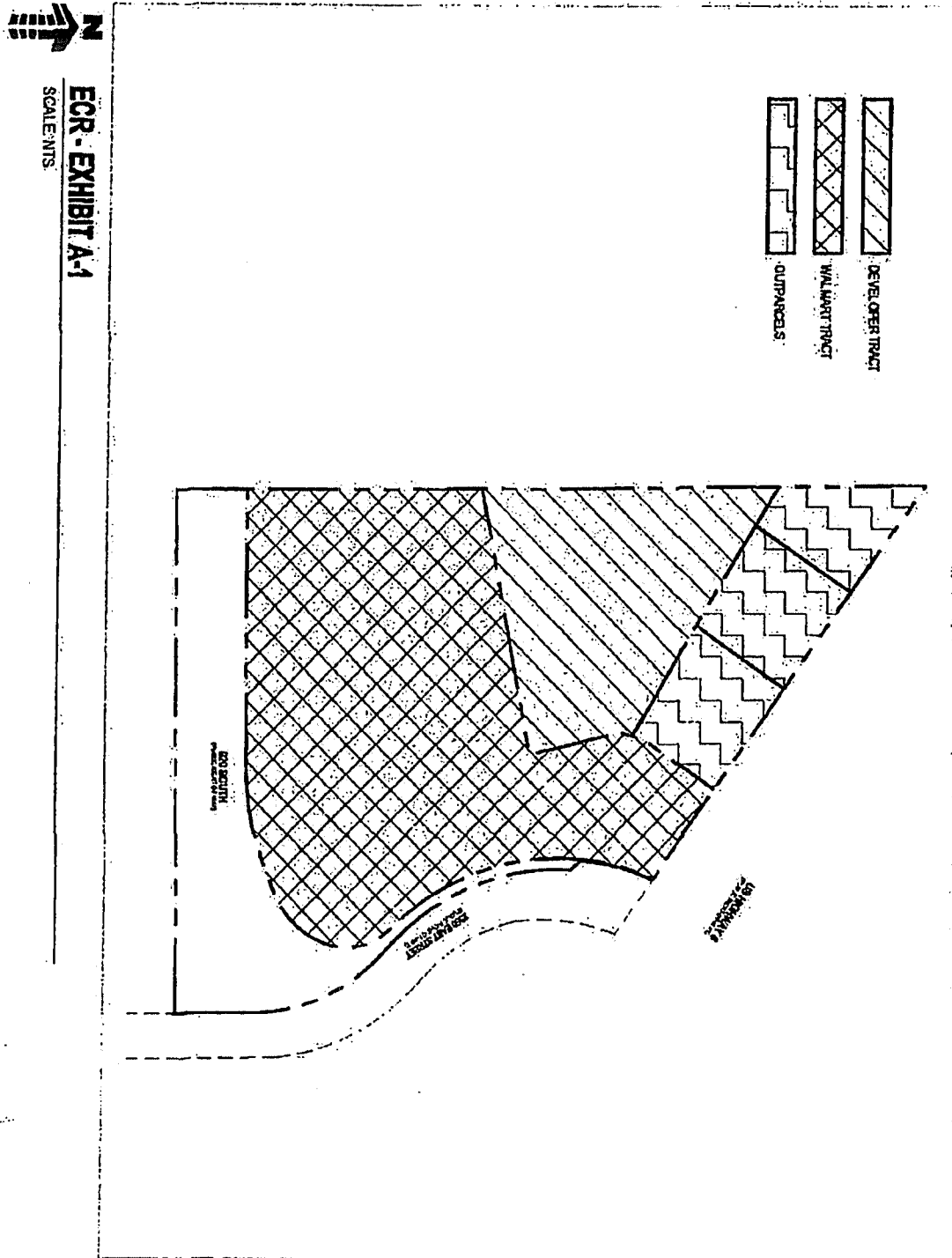


EXHIBIT A-1

(Site plan showing Wal-Mart Tract, Developer Tract and Outparcels)

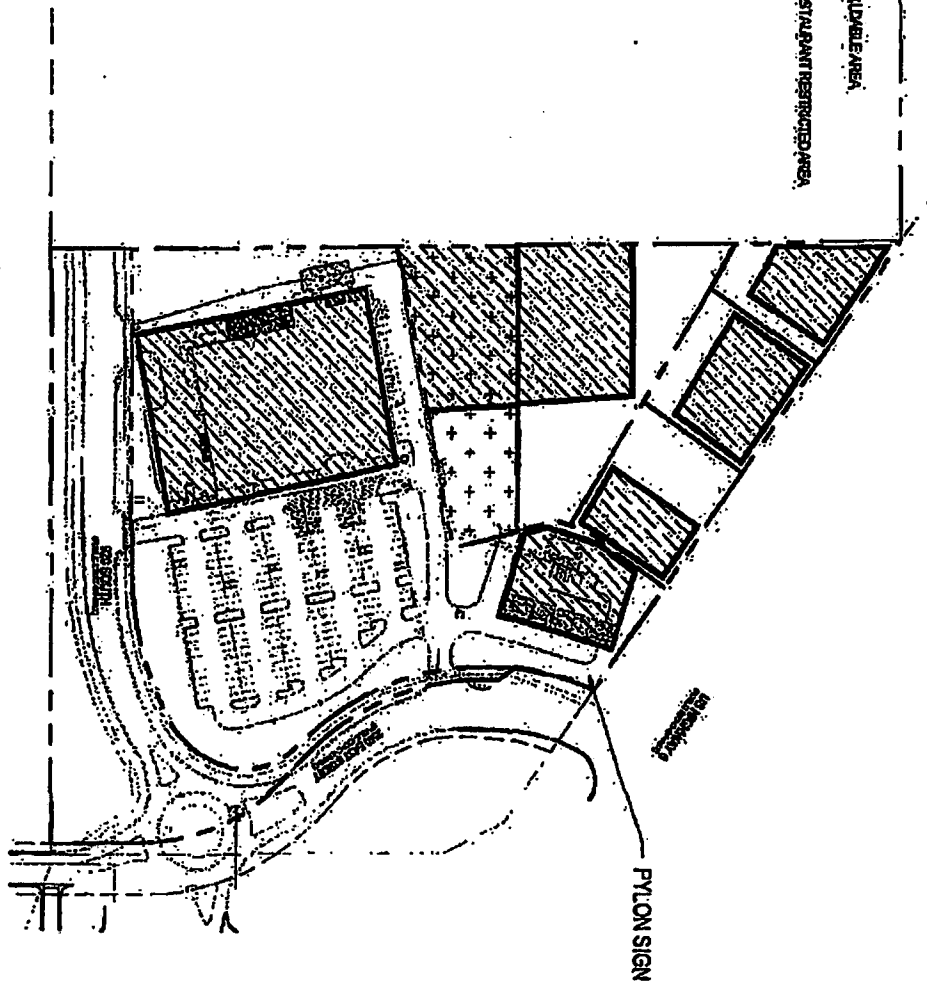


**EXHIBIT A-2**

(Site plan marked to show various development details)



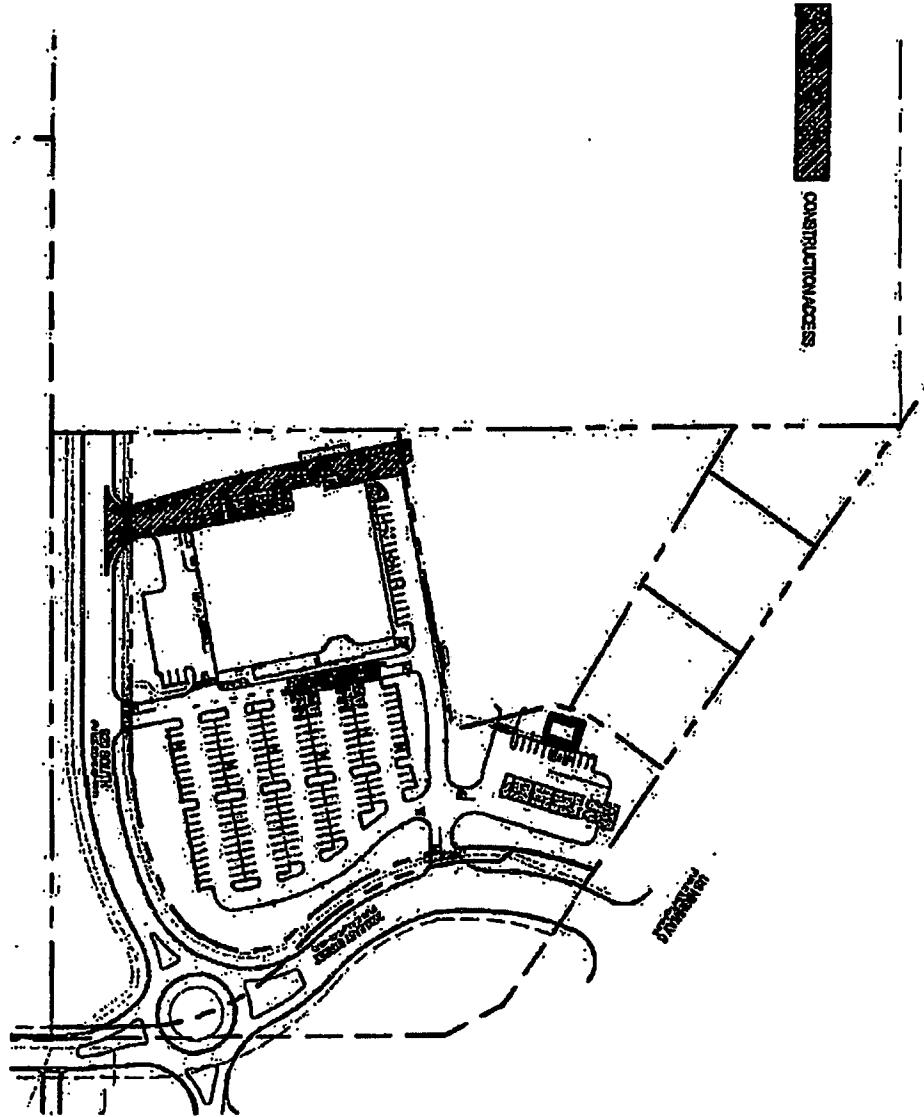
**ECR - EXHIBIT A-2**  
SCALE: NTS



**EXHIBIT A-3**  
**(Construction Access Depiction)**



**ECR - EXHIBIT A-3**  
SCALE: NTS



**EXHIBIT B**

(Wal-Mart Tract legal description)

Lot 1, EAST BENCH COMMERCIAL SUBDIVISION, according to the plat thereof recorded in the office of the Utah County Recorder on December 6, 2016, as Entry No. 122351:2016.

**EXHIBIT C**

(Developer Tract and Outparcels legal description)

Lot 2, EAST BENCH COMMERCIAL SUBDIVISION, according to the plat thereof recorded in the office of the Utah County Recorder on December 6, 2016, as Entry No. 122351:2016.

EXHIBIT D  
 (Signs)

 N  
 ECR - EXHIBIT D  
 SCALE: NTS

