

RECORDING REQUESTED BY:  
WARDLEY, McLACHLAN, L.L.C.

WHEN RECORDED, MAIL TO:  
WARDLEY, McLACHLAN, L.L.C.  
5296 Commerce Drive  
Salt Lake City, Utah 84107

ENT 126379:2002 PG 1 of 19  
RANDALL A. COVINGTON  
UTAH COUNTY RECORDER  
2002 Oct 24 4:55 pm FEE 46.00 BY SS  
RECORDED FOR BRIGHTON TITLE

SPACE ABOVE FOR RECORDER'S USE

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

This Declaration of Covenants, Conditions and Restrictions and Grant of Easements (hereinafter referred to as the "**Declaration**"), is made and executed as of January 4, 2002, by **WARDLEY, McLACHLAN, L.L.C.**, a Utah limited liability company (hereinafter referred to as "**Wardley**").

### RECITALS

A. Description of Subject Land. Wardley is the Owner of the "**Subject Land**" as hereinafter defined in Section 1(b), which Subject Land is located in Utah County, State of Utah, and more particularly described in Exhibit "A" attached hereto.

B. Improvement of Subject Land. Wardley proposes to improve the Subject Land as a "**Shopping Center**" in one or more phases under a general plan or scheme of development, and for that purpose Wardley intends to hereby create and establish certain easements, restrictions, and obligations with respect to the Subject Land.

C. Buildings on Subject Land. Wardley and/or third parties have erected or intend to erect various buildings including, but not limited to, a Smith's Food & Drug Center located on the Building Area designated as "**Smith's**" (hereinafter, "**Smith's Parcel**") on the site plan ("**Site Plan**") attached hereto as Exhibit "B", and other similar structures upon certain portions of the Subject Land, and Wardley has set aside for additional construction of structures or buildings on the Subject Land certain portions of the Subject Land, as more particularly defined as "**Building Areas**" in Section 1(d).

D. Common Areas. There shall be certain roadways, sidewalks, driveways, parking areas, Building Areas, mall, and utility improvements and facilities, including grading, surfacing, lighting, striping, planting, installation of sewer, water, electrical, and gas lines in, under, over, and upon the Subject Land and Wardley intends for such purposes to set aside certain portions of the Subject Land referred to and defined hereinafter in Section 1(g) as the Common Areas.

E. Easement and Maintenance Obligations. Wardley desires to establish and create for the benefit of each Building Area certain easements and rights-of-way for access over and upon the Common Areas, as well as obligations of maintenance, repair, and replacement of common facilities as the same are or will be included within the Common Areas.

F. Intent and Purpose. Wardley intends by recording this Declaration, together with the exhibits attached hereto, to subject the Subject Land and all improvements situated or to be situated thereon to the provisions of this Declaration and to impose upon the Subject Land mutually beneficial restrictions for a general plan of improvements for the benefit of the Owners of all interests in the Subject Land.

**NOW, THEREFORE,** Wardley, as the Owner of the Subject Land, for itself and its legal representatives, successors, and assigns hereby declares as follows:

1. Definitions.

a. Defined Terms. Unless the context clearly indicates otherwise, certain terms as used in this Declaration shall have the meanings set forth in this section.

b. "Subject Land" shall mean the land consisting of approximately Thirty-Five (35) acres as shown on the Site Plan specifically identified and designated as: Smith's Parcel, Anchor B, Retail A, Retail B, Retail C, and various Pads located in Phases I through IV of the Shopping Center. The Subject Land is located in Saratoga Springs, County of Utah, State of Utah, and is legally described in Exhibit "A" which is attached hereto and by this reference incorporated herein.

c. "Shopping Center" shall mean all Parcels of land contained in the Subject Land and contains all Building Areas and Common Areas, collectively. The Shopping Center shall consist of one or more phases. The first development phase consists of the development of the Smith's Parcel and certain shops and pads. The subsequent development phases, if they occur, shall consist of the development of the remaining Building Areas in Phase II.

d. "Building Areas" shall mean those areas within each separate Parcel on the Site Plan as outlined and identified on Exhibit "B", upon which buildings may be constructed. Any Owner shall have the right at any time subsequent to the execution of this Declaration to expand the Floor Area of its building on its Parcel(s) within the limits of the Building Area shown by the dotted black line on Exhibit "B" hereto, provided that such expansion does not reduce the number of available parking spaces on its Parcel below the greater of: (i) a minimum of five (5) parking stalls per 1,000 square feet of floor area, or (ii) such number as required by all applicable laws, rules or regulations (without a variance) governing or relating to parking accommodations, without taking into account the parking which may exist on the other Parcels.

e. "Site Plan" shall mean the Site Plan attached hereto as Exhibit "B" and by this reference incorporated herein, as may be amended from time to time by the parties as set forth in this Declaration.

f. "Building" shall mean the structure or structures to be constructed within the Building Areas.

g. "Common Areas" shall mean all real property within the Shopping Center except the Building Areas; provided those portions of the Building Areas upon which an Owner is not obligated to construct (or does not construct) buildings pursuant to this Declaration shall be deemed to be Common Area until such time as construction of buildings thereon commences. Canopies which are attached to buildings but which extend over Common Area shall be deemed to be part of the building to which attached and not part of the Common Area. Those portions of the Building Areas on each Parcel which are not from time to time used, or cannot under the terms of this Declaration 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 in this Declaration. An area converted to Common Area may be, as set forth below, converted back to Building Area, if at the time of conversion back to Building Area, it meets the requirements of this Declaration.

h. "Owner" shall mean the Owner of the fee title to a Parcel.

i. "Parcel" shall mean each separate parcel of land contained in the Shopping Center held by any record Owner.

j. "Responsible Owner" shall mean the Owner or Tenant of a Parcel with a Building Area thereon which exceeds forty thousand (40,000) square feet, and shall include Smith's Food & Drug Centers, Inc, or its successor Tenants.

k. "Floor Area" shall be defined as the square foot floor area within exterior walls of any building or structure, excluding any equipment, storage, office, restroom, lounge or other raised mezzanine; exterior, trash enclosures; enclosed or open loading docks which are not heated or air conditioned; canopies and roof overhangs; and vestibules for ingress and egress. Such exclusions from Building Area may project from any building or structure up to a distance of twenty-five (25) feet over or outside of the Building Area on any Parcel; provided any such projection or extension complies with all applicable laws, rules, ordinances and regulations of every governmental body having jurisdiction over the Shopping Center; and provided further no such extension or projection shall be allowed if it materially alters the parking configuration or vehicular or pedestrian circulation, and/or access in and through the entire Shopping Center as shown on the Site Plan.

## 2. Buildings.

a. General Use. The Buildings shall be commercial buildings of the type usually found in attractive and well-kept retail shopping centers in the greater metropolitan area in which the Shopping Center is located. The Owners or tenants occupying the Buildings shall be primarily retail and service businesses of the type normally associated with retail shopping centers in such metropolitan area.

b. Restrictions on Types of Uses.

(i) No part of the Shopping Center (including any expansion areas) other than the Smith's Parcel shall be used as a supermarket (which shall be defined as any store or department containing at least 5,000 square feet of floor area, including aisle space and storage, primarily devoted to the retail sale of food for off-premises consumption); as a bakery or delicatessen; as a cigarette or smoke shop or any other shop or store the primary business of which is to sell tobacco products; as a convenience store which exceeds 1,800 square feet of floor space; for the sale of fresh or frozen meat, fish, poultry or produce for off-premises consumption; for the sale of alcoholic beverages for off-premises consumption (except from a convenience store which does not have in excess of 1,800 square feet of floor space); for on-premises film development; or for the sale or offer for sale of any ethical pharmaceutical products requiring the services of a registered pharmacist. With the exception of Pad D initially leased and operated by Smith's, no part of the Shopping Center will be used as a station for the sale of gasoline or other petroleum products. No part of the Shopping Center will be used as a tavern, cocktail lounge, adult book or adult video store. No part of the Shopping Center will be used as a bar, with the exception of bars operated within sit-down restaurants where bar tabs do not amount to more than twenty-five percent (25%) of total sales for such restaurant.

(ii) With the exception of Pads A, B, and F, no part of Phases I, II or III of the Shopping Center shall be used for an automotive maintenance or repair facility or warehouse. With the exception of Pads A and B, no part of Phases I or II of the Shopping Center will be used for a car wash, entertainment or recreational facility or training or educational facility; for the renting, leasing or selling of or displaying for the purpose of renting, leasing or selling of any boat, motor vehicle or trailer; or for industrial purposes. For the purpose of this section, the phrase "**entertainment or recreational facility**" shall include, without limitation, a theater, bowling alley, skating rink, gym, health spa or studio, dance hall, billiard or pool hall, massage parlor, game parlor or video arcade (which shall be defined as any store containing more than four [4] electronic games). The phrase "**training or educational facility**" shall include, without limitation, a beauty school, barber college, reading room, place of instruction or any other operation catering primarily to students or trainees as opposed to customers.

(iii) No part of the Shopping Center within 200 feet of the Building Area of the Smith's Parcel shall be used as a restaurant or as a medical (including, without limitation, eye care or chiropractic), dental, professional or business office (the foregoing office uses being referred to hereinafter as "**Office Use(s)**"). Notwithstanding the foregoing, Office Uses and restaurants may be located on Pad B, Retail C, and the eastern half of Retail A facing Highway 73 as shown on the Site Plan attached hereto as Exhibit "A". In addition, take-out restaurants which have a floor area less than 1,500 square feet, and which have no more than ten (10) seats for customers may be located anywhere in the Shopping Center.

(iv) No restaurant, bank or other facility featuring vehicular drive-up or drive-through customer service shall be located in the Shopping Center unless Smith's has first given its written consent, which shall not be unreasonably withheld, to the location, parking and drive lanes of such facility. Smith's hereby approves the vehicular drive-up and drive-through customer service facilities shown on the Site Plan. The review of drive-up and drive-through facilities by Tenant as provided herein is not intended to prohibit drive-up and drive-through

facilities but is intended to insure that the location, layout and stacking for such drive-up and drive-through facilities do not negatively affect the access, driveways, circulation and parking for the Shopping Center.

(v) There shall be no open or enclosed malls in the Shopping Center unless Smith's has first given its written consent, which shall not be unreasonably withheld, to the location of the entrance to such mall.

All uses allowed and existing within the Shopping Center must include, within the Parcel upon which such use is located, parking equal to such amounts as set forth in Section 1(d).

c. Location. No Building shall be constructed on the Parcels, except within the Building Areas shown on the Site Plan.

d. Design and Construction. The Buildings shall be designed so that the exterior elevation of each will be architecturally and aesthetically compatible. The design and construction shall be in conformity with sound architectural and engineering standards and the construction shall be first quality. Smith's is a national grocery and drug supermarket retailer and therefore the architectural theme of its store is related to operational and marketing strategies which change from time to time. Although Smith's has no reason to believe that the architectural theme and signage, once adopted, will be subject to change, Smith's reserves the sole right upon instruction from its Real Estate Committee (evidenced by a certificate therefrom given to Owner) to make such changes as are instructed to the signage and exterior design, materials, color, elevations and/or other elements of the architectural theme as it pertains to the Smith's Building, provided that these changes meet any local governmental regulations and restrictions. All construction, alteration, and repair work relative to the Shopping Center shall be accomplished in an expeditious manner, in compliance with all laws, rules, regulations, orders, permits, approvals, and licenses of governmental authorities having jurisdiction. The Owner undertaking such work shall take all reasonable measures to minimize any disruption or inconvenience caused by such work. Such work shall be accomplished in such a manner as to minimize any damage or adverse effect which might be caused by such work to any other party or to the Parcel on which the work is being done or any other Parcel in the Shopping Center. The Owner undertaking such work shall repair at its own cost and expense any and all damage caused by such work and shall restore the affected portion of the Parcel upon which such work is performed to a condition which is equal to or better than the condition which existed prior to the beginning of such work, unless such requirement is waived by Wardley to accommodate further or additional construction, and such waiver is approved in writing by Smith's. In addition, the Owner undertaking such work shall promptly pay all costs and expenses associated therewith and shall indemnify and hold all Owners harmless from all damages, losses, or claims, including reasonable attorneys' fees, attributable to the performance of such work. Except in cases of emergency or the prior consent of the Responsible Owners, which consent shall not be unreasonably withheld, all such work shall be undertaken only after giving said Responsible Owners thirty (30) days' prior written notice of the work to be undertaken, the scope and nature of the work, the duration of the work, and the area in which the work is to be performed.

All buildings and other structures in Phases I and II of the Shopping Center shall be single story with mezzanine permitted. All buildings and other structures located on the Smith's Parcel, Retail B, Retail C, and Anchor B shall not exceed thirty-seven (37) feet in height (including mechanical fixtures and equipment and screening for the same). The service station canopy on the Smith's Parcel shall not exceed twenty-eight (28) feet in height. All buildings or other structures located on Retail A, Pad A, Pad B, Pad C, Pad D, and Pad F shall not exceed twenty-four (24) feet in height plus an additional four (4) feet for architectural elements, features and towers or service station canopies and playlands. No mezzanine or basement shall be used for the sale or display of merchandise or for the offer or provision of retail services to the public. For the purposes of this subparagraph (d), height shall be measured from finished grade of floor to the highest point of the Building. Except for the building on the Smith's Parcel, no Building located in the Shopping Center shall exceed a height of one (1) story, plus mezzanine.

Each of the Pads and Parcels referenced below and as shown on Exhibit "B" may be developed into not more than one (1) Building, which shall not exceed the Floor Area set forth below. Notwithstanding any other provision of this Declaration, the exact location and size of the Buildings located on any Parcel shall be subject to the joint approval of the owner of such Parcel and Smith's or its successor or assign.

**Floor Area**  
**(Excluding)**  
**Expansion Area**

Smith's Parcel	56,640
Anchor B	16,800
Retail A	14,520
Retail B	4,080
Retail C	7,200
Pad A	4,800
Pad B	3,500
Pad C	6,500
Pad D	2,500
Pad F	4,400

e. Footing Easement. In the event it is appropriate or practical to have building wall footings encroach from one Parcel onto the other Parcel, the Owner onto whose Parcel the footings encroach shall cooperate in granting an encroachment permit or easement to the Owner who desires to have its Building wall footings so encroach.

f. Fire Protection. Smith's Building will be constructed to meet a Type II (Uniform Commercial Building Code) non-rated building and will be sprinklered. Any Building(s) constructed in the Shopping Center shall be constructed and situated with necessary

setbacks in a manner which will preserve Smith's Building rating and shall be maintained in a manner to preserve the type and sprinklered insurance rate obtained on Smith's Building. The Owners of other Parcels in the Shopping Center shall provide no-build easements or yard agreements as may be required by the appropriate governmental agencies necessary for Smith's to comply with its obligation as set forth herein.

3. **Common Areas Use.**

a. Grant of Easements. Smith's hereby grants to each and every Owner and their respective successors, assigns, mortgagees, lessees, sublessees, employees, agents, customers, licensees, and invitees, and declares for the benefit of each of the respective Parcels within the Shopping Center permanent, common, mutual, reciprocal, and non-exclusive easements and rights to use the Common Areas for the purposes for which they are provided and intended, including, but not limited to, ingress, egress, access, and parking for vehicular or pedestrian traffic, upon or across the parking areas, entrances, exits, driveways, walks, or service drives located within the Common Areas and the use of storm drainage and retention facilities, landscaping, public rest rooms, if any, and other public facilities, directional signs and other areas intended for common use.

b. Use. Subject to existing easements of record, the Common Areas shall be used for landscaping, roadways, walkways, ingress and egress, parking of motor vehicles, loading and unloading of commercial and other vehicles, for driveway purposes, and for the comfort and convenience of customers, invitees and employees of all businesses and occupants of the buildings constructed on the Building Areas defined above.

c. 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 Parcels; provided, however, reasonable traffic controls approved in advance by Smith's 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 Declaration, (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, and (3) for temporary blockage of certain areas deemed necessary by the parties to prevent a public dedication of an easement or access right.

d. Limitations on Use.

(i) Customers. Customers and invitees shall not be permitted to park on the Common Areas except while shopping or transacting business on the Smith's Parcel or the other Parcels with the occupants thereof.

(ii) Employees. Employees shall not be permitted to park on the Common Areas, except in areas designated as "employee parking areas." Owners may from time to time mutually designate and approve "employee parking areas"; however, if they do not, each party may designate "employee parking areas" on its own Parcel.

(iii) General. All of the uses permitted within the Common Areas shall be used with reason and judgment so as not to interfere with the 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. Persons using the Common Areas in accordance with this Declaration shall not be charged any fee for such use.

e. Utility and Service Easements. The Owners shall cooperate in the granting of appropriate and proper easements for the installation, repair and replacement of storm drains, sewers, utilities and other proper services necessary for the orderly development and operation of the Common Areas and buildings to be erected upon the Building Areas. The Owners will use their best efforts to cause the installation of such utility and service lines prior to paving of the Common Areas.

#### 4. **Common Areas: Development, Maintenance and Taxes.**

##### a. Development Timing.

(i) By Owner of Parcel. When any Building is constructed within the Building Areas on a Parcel, the Common Areas on that Parcel associated with such Building shall be developed in accordance with the Site Plan attached hereto as Exhibit "B" subject to modifications as contemplated and provided for in Section 2(d) herein, all at the expense of the Owner of said Parcel.

(ii) By Smith's. If Smith's constructs improvements on the Smith's Parcel prior to the development of the other Parcels, Smith's may grade, pave and otherwise improve and use any portion of the Common Areas of the other Parcels in accordance with Exhibit "B". Smith's shall cause all of said Common Area improvement work to be separately bid on a competitive basis, and the costs and proposed work shall be approved in advance by the Owner(s) of the other Parcels in writing, provided that such approval shall not be unreasonably withheld or delayed. The Owner(s) of the affected Parcel(s) shall reimburse Smith's for the costs of the Common Area improvement work done on the other Parcel(s) by Smith's when Buildings on any portion of the other Parcels are developed or upon the sale of any portion of the other Parcels, whichever first occurs.

##### b. Maintenance.

(i) Standards. Following completion of the improvement of the Common Areas, the Owners of the Parcels shall maintain their respective portions of the Common Areas on their respective Parcels in good condition and repair. The maintenance is to include, without



limiting the generality of the foregoing, 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, debris, filth and refuse and thoroughly sweeping the area to the extent reasonably necessary to keep the area in a clean and orderly condition, and free of snow, ice, dirt, and debris.

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

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

(e) Maintaining all perimeter walls in good condition and state of repair; and

(f) Maintaining all landscaped areas in a thriving and trimmed condition and making such replacements of shrubs and other landscaping as is necessary;

(ii) Expenses. The respective Owners shall timely pay the maintenance expense of their respective Parcels.

(iii) By agent. Subject to the revocable mutual agreement of the Owners, any Owner or a third party may be appointed as agent to maintain the Common Areas in the Shopping Center 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 costs, which sums are to be included in the general maintenance expense paid by the respective Owners of the Common Areas.

(iv) Taxes. Each Owner shall 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 the respective portion of the Common Areas owned by it.

5. **Signs.**

a. Subject to governmental approval, a free-standing sign shall be erected at each of the two (2) locations designated "**Center Pylon Sign**" on Exhibit "B". Each such sign shall display the designation of Smith's or other occupant of the Smith's Parcel (including, without

limitation, at the option of Smith's or the occupant of the Smith's Parcel and as a part of the designation otherwise permitted to Smith's or the occupant of the Smith's Parcel, and signs identifying banking and/or financial services located within Smith's Buildings) and, provided the amount of signage otherwise permitted by governmental authority to Smith's (or other occupant of the Smith's Parcel) is not adversely affected thereby, designations for not more than four (4) other businesses in the Shopping Center. Any such other business, in order to display its designation on a Center Pylon Sign, must occupy not less than 2,500 square feet of ground floor area, and in no event shall the total square footage of designation to which a single other business is entitled on a Center Pylon Sign exceed the total square footage of designation to which Smith's (or other occupant of the Smith's Parcel) is entitled. The cost of constructing, installing, maintaining, repairing and replacing each Center Pylon Sign structure (excluding electrical hookup to the Common Area meter) shall be paid by Wardley and Smith's in the proportion that the total square footage of each party's designation or designations bears to the total square footage of all designations entitled to be displayed thereon. Each person displaying a designation on a Center Pylon Sign shall supply and maintain its own sign fascia and can. The design of each Center Pylon Sign structure shall be subject to the approval of Wardley and Smith's, as shall be the size, design and location of the sign fascia used; provided, however, that Smith's and other persons occupying not less than 2,500 square feet of ground floor area may use such standard fascia as they from time to time use generally in carrying on their businesses. Smith's (or other occupant of the Smith's Parcel) shall have the top designation on each Center Pylon Sign, immediately below the Shopping Center designation, if any exists. Wardley and Smith's shall mutually agree upon the designation, size and design of the Shopping Center designation found on any pylon sign. Wardley, at Wardley's option, may supply and maintain sign fascia and cans for any of Wardley's tenants otherwise entitled to place a sign on the Center Pylon Sign. Subject to governmental approval, Smith's shall be entitled to display gasoline and fuel prices under the designation of Smith's on the Center Pylon Signs.

b. In addition to the foregoing Center Pylon Signs, and provided the amount of signage otherwise permitted by governmental authority to the owner or occupant of the Smith's Parcel is not adversely affected thereby, each of the owners of the Smith's Parcel, Pad A, Pad B, Pad C, Pad D, and Pad F shall have the right, subject to governmental approval, to erect one free-standing monument sign not to exceed five (5) feet in height and twenty (20) square feet of sign fascia per side at each of the locations designated "**Monument Sign Permitted**" on Exhibit "B". Each such sign shall display only the designation of the owner or occupant of the Parcel upon which such sign is located. The cost of constructing, installing, maintaining, repairing and replacing each Monument Sign structure shall be paid by the respective owner of the Parcel upon which such sign is located. The design of each Monument Sign structure and sign fascia used shall be subject to the approval of Wardley and Smith's.

c. There shall be no other signs, except directional signs and signs on buildings in the Shopping Center. All exterior building signs (except Smith's's exterior building signs) shall be restricted to identification of the business(es) or service(s) located or provided therein. No exterior building sign shall be placed on penthouse walls, extend above the building roof or be painted on the exterior building surface. No exterior building or free-standing sign shall utilize flashing, moving or audible lights or appurtenances.

d. Notwithstanding anything to the contrary that may be set forth herein, Smith's (or other occupant of the Smith's Parcel) shall be entitled to use such standard signs, sign fascia and logos (including, without limitation, gas pricing signs, and exterior signs identifying in-store banking and/or other financial services) as they may exist from time to time, and Wardley's

approval thereof shall not be required. Except for directional signs for guidance upon the Common Areas, no pylon or pole signs shall be located on the Common Areas on the Smith's Parcel or any other Parcel except in accordance with the terms and conditions of this Declaration.

**6. Indemnification/Insurance.**

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a. Indemnification. Each Owner shall agree to indemnify, defend and save the other Owners harmless from any and all liability, damage, expense, causes of action, suits, claims or judgments arising from injury to person or property and occurring on its own Parcel, except if caused by the act or neglect of the Owner seeking indemnification.

b. Insurance. Each Owner shall provide commercial general liability insurance affording protection to itself and the other Owners on its own Parcel(s), naming the other Owner as an "additional insureds" under the policy or policies, for a combined bodily injury and property damage limit of liability of not less than \$2,000,000 per occurrence, \$3,000,000 aggregate. Such insurance may be a part of blanket liability coverage carried by an Owner so long as such blanket policy does not reduce the limits or diminish the coverage required herein.

c. Self Insurance. Each Owner shall have the right to satisfy its insurance obligations hereunder by means of self-insurance to the extent of all or part of the insurance required hereunder, but only so long as the Owner so self-insuring shall have a net worth of at least Fifty Million Dollars (\$50,000,000), or if such self-insurance plan is furnished through a related entity of the Owner, the entity furnishing such self-insurance shall have a net worth of at least Fifty Million Dollars (\$50,000,000). Any Owner providing self-insurance shall, upon request, provide the other Owner with a description of such self-insurance program, financial statements evidencing the required net worth, and evidence of any partial insurance coverage which may be supplementing any plan of partial self-insurance. Any deductible under any policy of insurance in excess of Five Thousand Dollars (\$5,000) shall be deemed self-insurance.

d. Other Insurance Matters. All policies of insurance required by this Declaration shall insure the performance of the Owner insured thereunder of the indemnity requirements contained in this Paragraph 6, shall name the other Owners as additional insureds and shall contain a provision that the insurance company will provide all parties with twenty (20) days advance written notice of any cancellation or lapse, or the effective date of any material reduction in the amounts or scope of coverage. Each Owner shall deliver to the other Owners a certificate or statement from the Owner's insurance company that such insurance insures the performance by the Owner insured of the indemnity requirements specified in this Paragraph 6 and the existence of the insurance coverage to the limits herein required. Each Owner shall promptly notify the other Owners of any asserted claim with respect to which such Owner is or may be indemnified against hereunder and shall deliver to such Owner copies of process and pleadings.

**7. Eminent Domain.**

a. Owner's Right to Award. Nothing herein shall be construed to give any Owner an interest in any award or payment made to other Owners in connection with any exercise of eminent domain or transfer in lieu thereof affecting said other Owners' Parcel or give the public

or any government any rights in the Smith's Parcel or any other Parcels. In the event of any exercise of eminent domain or transfer in lieu thereof of any part of the Common Areas located on any Parcel, the award attributable to the land and improvements of such portion of the Common Areas shall be payable only to the Owner in fee thereof and no claim thereon shall be made by the Owners of any other portion of the Common Areas.

b. 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.

c. Tenant's Claim. Nothing in this Paragraph 7 shall prevent a tenant from making a claim against an Owner pursuant to the provisions of any lease between such tenant and Owner for all or a portion of any such award or payment.

d. Restoration of Common Areas. The Owner of the fee of each portion of the Common Areas so condemned shall promptly repair and restore the remaining portion of the Common Areas so owned as near as practicable to the condition of 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.

e. Casualty. In the event of destruction or damage from fire or any other casualty to any Buildings or improvements erected on the Subject Land, the Owner having its Buildings or improvements destroyed or damaged, at its sole cost and expense, shall at its option within six (6) months of the date of such fire or casualty either: (i) commence its efforts to rebuild or repair its improvements; (ii) level and pave the same. If any Owner elects to rebuild or repair, the Buildings or improvements shall be at least substantially the same size and in as good a condition as they were in immediately preceding such fire or casualty and shall be completed within one (1) year of the date of such fire or casualty. If the Owner elects to level and pave the Buildings or improvements destroyed or damaged, the same shall be leveled and paved so that the affected area conforms substantially to the Common Areas surrounding it. Anything in this subparagraph notwithstanding, if such event shall destroy five percent (5%) or less of the ground floor area of such Building or structure, then the Owner of such Building or structure shall have no option to level or pave the Building or improvement and shall rebuild or repair the same in accordance with this subparagraph.

## 8. **Enforcement.**

a. Right to Enforce. The right to enforce the terms, covenants, and easements contained herein shall belong only to the Owners, lessees of the Owners, if any, and to mortgagees under mortgages covering any of the Subject Land and beneficiaries and trustees under deeds of trust covering any of the Subject Land of the Owners, provided that the lease or memorandum of lease in favor of such lessee, mortgage in favor of such mortgagee, or deed of trust in favor of such beneficiary and trustee is recorded in the office of the Recorder of Utah County, State of Utah.

b. Modification, Cancellation and Delegation of Authority. This Declaration

(including Exhibit "B") may be modified or cancelled only by written consent of all Responsible Owners, which consents shall not be unreasonably withheld. Any purchaser, lender, mortgagee, lessee, assignee, grantee, sublessee or other party having any interest in any portions of the Smith's Parcel shall be deemed to have appointed Smith's as their attorney-in-fact for the Smith's Parcel for the purpose of negotiating and entering into any modifications of this Declaration, except for extending the duration hereof. Cancellation of this Declaration shall not be considered a modification.

c. Breach. In the event of violation or threatened violation of this Declaration, only all record Owners as a group, or Smith's, so long as it has an interest as Owner or tenant in the Smith's Parcel, shall be entitled to institute proceedings for full and adequate relief from the consequences of said breach. The unsuccessful party in any action shall pay to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

d. Remedies for Default; Waiver. If the Owner of any Parcel shall, during the term of this Declaration, default in the full, faithful and punctual performance of any obligation required hereunder and if at the end of thirty (30) days after written notice from any Owner of a Parcel or the party to whom its authority has been delegated, stating with particularity the nature and extent of such default, the defaulting Owner has failed to cure such default, and if a diligent effort is not then being made to cure such default, then any other Owners or the party to whom its authority has been delegated shall, in addition to all other remedies it may have at law or in equity, have the right to perform such obligation of this Declaration on behalf of such defaulting Owner and be reimbursed by such defaulting Owner for the cost thereof with interest at the rate of ten percent (10%). Any such claim for reimbursement, together with interest as aforesaid, shall be a secured claim and a lien shall attach and take effect upon recordation of a property claim of lien by the claimant in the office of the county recorder of Utah County. The claim of lien shall include the following: (1) the name of the claimant; (2) a statement concerning the basis of the claim of lien; (3) the last known name and address of the Owner or reputed Owner of the Parcel against which the lien is claimed; (4) a description of the property against which the lien is claimed; (5) a description of the "work performed or payment made" which has given rise to the claim of lien hereunder and a statement itemizing the amount thereof; and (6) a statement that the lien is claimed pursuant to the provision of this Declaration reciting the date, book and page of the recordation hereof. The notice shall be duly verified, acknowledged and contain a certificate that a copy thereof has been served upon the party against whom the lien is claimed, either by personal service or by mailing (first class, certified, or return receipt requested) to the defaulting Owner, at the address for mailing of tax statements with respect to the property against which the lien is claimed. The lien so claimed shall attach from the date of recordation solely in the amount claimed thereby and it may be enforced in any manner allowed by law for the foreclosure of liens. Notwithstanding the foregoing, such lien shall be subordinate to any first mortgage or deed of trust given in good faith and for value now or hereafter encumbering the property subjected to the lien, and any purchaser at any foreclosure or trustee's sale (as well as any grantee by deed in lieu of foreclosure or trustee's sale) under any first mortgage or deed of trust shall take free and clear from any such then existing lien, but otherwise subject to the provisions of this Declaration. The failure of the Owner or Owners of any of the Parcels subject to this Declaration to insist in any one or more cases upon the strict performance of any of the promises, covenants, conditions, restrictions or agreements herein, shall not be construed as a waiver or relinquishment of any future violation of the same or other provisions hereof.

e. Non-Merger. So long as an Owner is a tenant of a Parcel, this Declaration shall not be subject to the doctrine of merger, even though the underlying fee Ownership to the Parcels described herein is vested in such party.

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f. Duration. Unless otherwise cancelled and terminated, this Declaration and all the easements, rights and obligations hereof shall automatically terminate and be of no further force or effect after seventy-five (75) years from the date hereof, except that the access easements and those designated on Exhibit "B" to be used for driveways (but not the parking easements) described in Paragraph 3(a) and except that the utility easements granted pursuant to Paragraph 3(e), if any, shall continue in full force and effect until terminated in writing by the parties entitled to modify this Declaration in accordance with the provisions of 8(a) hereof.

**9. Rights and Obligations of Lenders.**

Subject to the provisions of 7(c) above, the charges and burdens of this Declaration are, and shall at all times be, prior and therefore superior to the lien or charge of any mortgage or deed of trust made in good faith and for value affecting any Parcel, or any improvements now or hereafter placed thereon. However, a breach of any of the easements, covenants, or restrictions hereof shall not defeat or render invalid the lien or charge of any mortgage or deed of trust. The superiority of this Declaration shall be limited to the extent that title to any property acquired through sale under foreclosure of any mortgage or deed of trust effected by powers of sale, judicial proceedings, or otherwise, shall be subject to all the charges and burdens affecting the Parcels by virtue of this Declaration, as noted in 8(c) hereof.

**10. Release from Liability.**

Any person acquiring fee or leasehold title to any Parcel or any portion thereof shall be bound by this Declaration only as to the Parcels or portion of the Parcels acquired by such person. Such person shall be bound by this Declaration only during the period such person is the fee or leasehold Owner of such Parcel(s) or portion of the Parcel(s), except as to obligations, liabilities or responsibilities that accrue during said period. Although persons may be released under this paragraph, the easements, covenants and restrictions in this Declaration shall continue to be benefits and servitudes which run with the land as described in Paragraph 11 next below.

**11. Rights of Successors.**

The easements, covenants, conditions, restrictions, benefits, and obligations hereunder shall create mutual benefits and servitudes upon the Parcels in the Shopping Center and shall run with the land. This Declaration shall bind and inure to the benefit of the Owners, their respective heirs, personal representatives, tenants, successors, and/or assigns. The singular number includes the plural and any gender includes all other genders.

**12. Paragraph Headings.**

The paragraph headings herein contained 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.

**13. Not a Public Dedication.**

Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Common Areas to the general public or for the general public or for any public purposes whatsoever, it being the intention of Smith's that this Declaration shall be strictly limited to and for the purposes herein expressed. The right of the public or any person to make any use whatsoever of the Common Areas of the Parcels herein affected, or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to the control of the Owner thereof. Notwithstanding any other provisions herein to the contrary, the Owners of the Parcels affected hereby may periodically restrict ingress and egress from the Common Areas in order to prevent a prescriptive easement from arising by reason of continued public use. Any restriction on ingress and egress shall be limited to the minimum period necessary to prevent the creation of a prescriptive easement and shall occur at such a time as to have a minimum effect on the parties in occupancy within the Shopping Center.

**14. Severability.**

If any clause, sentence, or other portion of the terms, covenants, or restrictions of this Declaration becomes illegal, null, or void for any reason, or is held by any Court of competent jurisdiction to be so, the remaining portions shall remain in full force and effect.

**15. Modifications.**

This document once executed and delivered, shall not be modified, changed or altered in any respect except by writing executed and delivered in the same manner as required for this document.

**16. Compliance with Laws.**

All Owners shall comply promptly with all federal, state, and municipal statutes and ordinances, and with all regulations, orders, and directives of appropriate governmental agencies pertaining to the use of occupancy of the Subject Land, as such statutes, ordinances, regulations, orders, and directives now exist or may hereafter provide.

**17. Effective Date.**

This Declaration shall take effect immediately upon recording.

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

WARDLEY, McLACHLAN, L.L.C.,  
a Utah limited liability company

By: *Lynn E. Wardley*

Its: *Manager*

*Scott McLachlan*  
*Manager*

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

Before me, the undersigned authority, on this day personally appeared *Lynn E. Wardley* of Wardley, McLachlan, L.L.C., a Utah limited liability company, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of said company.

Given under my hand and seal of office on this *27* day of *December*, 2001.



*Sharee Nelson*  
Notary Public

Residing at: *Salt Lake County*

My Commission Expires:  
*3/21/2005*



**EXHIBIT "A"**

## (Legal Description of Subject Land)

Commencing at a point which is South 1434.50 feet and East 44.82 feet from North 1/4 corner of Section 14, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 89°26'17" East along the extended line of a fence and along said fence line 1284.87 feet to another fence line; thence South 00°26'07" West along said fence line 1205.22 feet to another fence line; thence South 89°52'45" West along said fence line 1283.68 feet to another fence line; thence North 00°22'37" East along said fence line and its line extended 1220.52 feet to the Point of Beginning.

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**EXHIBIT "B"**

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**Site Plan**

