

WHEN RECORDED, MAIL TO:  
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BY: ZJM, DEPUTY - WI 14 P.

## DECLARATION AND MAINTENANCE AGREEMENT

THIS DECLARATION AND MAINTENANCE AGREEMENT is made as of the 2 day of November, 2004, by and between **SORENSEN ASSOCIATES, L.L.C.**, a Utah limited liability company (hereinafter referred to as "Sorenson"), **LIBERTY HILL PARTNERS, L.C.**, a Utah limited liability company (hereinafter referred to as "Liberty"), and **SOUTH MOUNTAIN LAND COMPANY, L.C.**, a Utah limited liability company ("SMLC").

### RECITALS

A. Sorenson is the owner of that certain real property located in Draper, Salt Lake County, State of Utah, as more particularly described on Exhibit "A" attached hereto and incorporated herein by reference (herein "Parcel A").

B. Liberty is the owner of that certain real property located in Draper, Salt Lake County, State of Utah, as more particularly described on Exhibit "B" attached hereto and incorporated herein by reference (herein "Parcel B").

C. SMLC is the owner of that certain real property located in Draper, Salt Lake County, State of Utah, as more particularly described on Exhibit "C" attached hereto and incorporated herein by reference (herein "Parcel C").

D. Liberty purchased Parcel B and Parcel C from Sorenson pursuant to the terms and conditions of that certain Agreement for Purchase and Sale of Real Property dated October 16, 2002, by and between Sorenson, as Seller, and Cowboy Partners, L.C., a Utah limited liability company ("Cowboy"), as Buyer, which Agreement was amended by a First, Second and Third Amendment (collectively referred to as the "Agreement").

E. Cowboy assigned its rights under the Agreement to Liberty.

F. Liberty sold Parcel C to Jordan Landing Investments, L.C. ("Jordan") pursuant to the terms and conditions of an Agreement for Purchase and Sale of Real Property and Escrow Instructions, by and between Cowboy, as Seller, and Tuscany Development, Inc., a Utah corporation, as Purchaser, dated November \_\_, 2002 (the "Jordan Purchase Agreement"). Cowboy and Tuscany, each assigned their respective interests in the Jordan

Purchase Agreement to Liberty and Jordan, respectively. Jordan subsequently conveyed Parcel C to SMLC.

G. Under the terms and conditions of the Agreement, Sorenson and Liberty (as the successor to Cowboy), agreed, among other matters, to share in the costs of construction of a public road providing access to and from Highland Drive to Parcel B and Parcel C. Under the terms and conditions of the Jordan Purchase Agreement, Liberty (as the successor to Cowboy) and SMLC (as the successor to Tuscany) agreed to share in the costs of construction of the public road providing access to and from Highland Drive to Parcel B and Parcel C.

H. As a result of the Agreement and the Jordan Purchase Agreement, Sorenson is responsible for sixty-two percent (62%) of the costs of the "entrance boulevard Road and Underground Utilities" (as defined in the Agreement), Liberty is responsible for nineteen percent (19%) of the costs of the "entrance boulevard Road and Underground Utilities" (as defined in the Agreement and the Jordan Purchase Agreement), and SMLC is responsible for nineteen percent (19%) of the costs of the "entrance boulevard Road and Underground Utilities" (as defined in the Jordan Purchase Agreement).

I. The parties contemplate that the "entrance boulevard Road" (herein after referred to as the "Parkway") will be improved with a center island and other landscaping features being deemed part of the Road (collectively the "Landscaping") that Draper City may elect or refuse to maintain.

J. The parties hereto desire to provide for the maintenance of the Landscaping within the Parkway, should Draper City or other governmental entity fail and/or refuse to maintain the same.

NOW, THEREFORE, in consideration of these premises and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the parties hereto agree as follows:

## ARTICLE I

### Definitions

1.1 City. The term "City" shall mean Draper City, Utah, a corporation and body politic of the State of Utah, or its successor municipal corporations.

1.2 Governing Laws. The term "Governing Laws" shall mean all laws, ordinances, regulations, orders, judgments and other legislation pertaining to and governing a Parcel, or the activity or matter in question.

1.3 Landscaping. The term "Landscaping" shall mean the landscape improvements contained in the center island and other landscaping improvements made

and located within the Parkway, excluding those landscape improvements which immediately abut a Parcel and appear to be part of a Parcel, but extend into the road right-of-way of the City (the "Landscape Exclusions").

1.4 Maintenance Area. The term "Maintenance Area" shall mean those areas located within the Parkway which are improved with Landscaping, excluding any roads, curbs, gutters, and/or sidewalks, and excluding those areas that Owners of Parcels have the responsibility to maintain located within or constituting the Parkway not maintained by the City.

1.5 Parkway. The term "Parkway" shall mean those areas located within the dedicated roadway of 65 East Street, located within the City, which has been or will be dedicated to the City and is intended as a public ingress and egress to Parcels A, B, and/or C, including but not limited to all road improvements, all related landscape improvements or Landscaping, and walkways (to the extent not maintained by the City). It is intended that the Parkway shall be dedicated to the City.

1.6 Parties. The term "Parties" shall mean all of the Owners of the Parcels.

1.7 Owner. The term "Owner" shall mean: (i) the holder of record ownership of a fee title interest in a Parcel, and that party's successors and assigns; or (ii) the association of owners of any Parcel, to the extent that ownership of any Parcel identified above, becomes subject to the terms and conditions of a condominium association or other declaration or organizational structure where property rights in whole or part are held in common. Persons or entities that hold an interest in a Parcel merely as security for the performance of an obligation shall not be considered Owners.

1.8 Parcel. The term "Parcel" shall mean and refer to each of Parcels A, B, or C above, or any portion of any one of the foregoing.

1.9 Senior Mortgage. The term "Senior Mortgage" shall mean any Mortgage or Deed of Trust that is (a) recorded against any portion of a Parcel prior to recording any lien for delinquent assessments, claims or other encumbrances by the Owners; and (b) is recorded as a first mortgage prior to and senior in priority to all other loans encumbering such Parcel. Encumbrances for loans recorded in second or lower position shall not be Senior Mortgages without an express written subordination agreement from all Owners which may be given or withheld in the sole discretion of any Owner.

## ARTICLE II.

### NATURE AND PURPOSE OF COVENANTS - OBLIGATIONS

2.1 The covenants, conditions and restrictions set forth herein are intended for the protection and maintenance of each development upon a Parcel to enhance the value,

desirability and attractiveness of each such development for the benefit of all Owners. These covenants, conditions and restrictions are imposed upon the Owners, the Parcels, and the Parkway. Such covenants, conditions and restrictions shall be a burden upon and a benefit to each Owner, and also that Owner's successors and assigns. All such covenants, conditions and restrictions are intended as and are hereby declared to be covenants running with the land or equitable servitudes upon the land, as the case may be.

2.2 Maintenance of Parkway. To the extent the Landscaping located within the Parkway is not maintained by the City, and subject to the Governing Laws, the Owners shall cause the Landscaping to be maintained. Maintenance shall be provided by (i) any Owner, or (ii) a contract provider approved by Owners obligated to pay greater than fifty percent (50%) of the costs of such maintenance.

### ARTICLE III.

#### COVENANT FOR ASSESSMENTS

3.1 Covenant to Pay Assessment. Each Owner, by acquiring or in any way becoming vested with a Parcel, or portion thereof, shall be deemed to covenant and agree to pay to the other Owners, in advance, the periodic assessments described in this Article, together with the hereinafter provided for interest and costs of collection. 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 itself or its Parcel from liability for payment of assessments by waiver of his rights concerning the Landscaping or by abandonment of its 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.

3.2 Purpose of Assessments. Assessments levied by the Owners shall be used exclusively for the maintenance of the Landscaping and the appearance and aesthetics of the Parkway. The use made by the Owners of funds obtained from assessments may include, but is not limited to maintenance, repair and improvement of the Maintenance Areas; establishing and funding a reserve to cover major repair or replacement of Landscaping within the Maintenance Areas; and any expenses necessary or desirable to enable the Owners to perform or fulfill their obligations, functions or purposes under this Declaration.

3.3 Rate of Assessments. Assessments shall be levied against each Parcel according to the following formula: (a) to Parcel A - sixty two percent (62%) of the Total Assessment; (b) to Parcel B - nineteen percent (19%) of the Total Assessment; and (c) to

Parcel C - nineteen percent (19%) of the Total Assessment. In the event that an original Parcel (either Parcel A, B, or C) is subdivided, the assessments applicable to that Parcel shall be allocated on the basis of square footage of the subparcels, square footage of improvements, relative values of the subparcels, or on such other reasonable basis as the successor Parcel Owners shall agree. The successor Parcel Owners and the remaining Owners (those owning Parcels other than those being subdivided) shall join in the execution and recording of a supplement to this Declaration, setting forth the new allocation of the portion of the Total Assessment applicable to the subdivided Parcel. Such supplement shall be prepared and recorded at the expense of the successor Parcel Owners of the subdivided Parcel. Until such supplement is executed and recorded, each Owner of a subdivided portion of an original Parcel to be subdivided (Parcel A, B, C, or previously approved subdivided Parcel, as the case may be), shall be jointly and severally liable for the entire assessment attributable to such applicable Parcel prior to subdivision.

3.4 Maximum Annual Assessment. From and after the date hereof, the total annual assessment (the "Total Assessment") attributable to maintenance of the Landscaping shall not exceed one hundred twenty five percent (125%) of the total anticipated costs of maintenance, repair and replacement of Landscaping. Each Parcel shall be assessed its proportionate share (determined in accordance with the requirements of Section 3.3) of the Total Assessment. The initial Total Assessment shall be reasonably determined by Sorenson and notice thereof will be sent by Sorenson to the other Owners. The amount of the Total Assessment shall be reviewed by the Owners annually, and may be increased or decreased with the consent of Owners having an obligation of paying a majority of the Total Assessment. The Total Assessment shall be established by the Owners on or before March 1 of each year for the following spring, summer and winter months. The Owners shall not be required to meet to establish the Total Assessment; however, their agreement shall be evidenced in writing. Notwithstanding the foregoing, in the event that the Owners are not able to approve a Total Assessment for any year, the Total Assessment for the upcoming year shall be the same as the Total Assessment approved by the Owners for the immediately preceding year.

3.5 Special Assessments. Notwithstanding the foregoing, the Owners may levy special assessments for the purpose of defraying, in whole or in part: (a) any expense or expenses not reasonably 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 Landscaping. Any such special assessments must be assessed to by Owners having an obligation to pay a majority of the Total Assessment.

3.6 Periodic Assessment Due Dates. The periodic assessments provided for herein shall be due and payable as provided by the Owners, and may be payable, monthly, quarterly, or annually, provided such assessments are paid in advance of the obligations for which they are to be paid. At the time of establishing the Total Assessment, the Owners may agree that any Owner or an agent designated for all Owners be appointed to act on behalf of the Owners to act as the agent for the Owners, and to collect, assess,

monitor and enforce the provisions of this Declaration. At least fifteen (15) days prior to the effective date of any change in the amount of the Total Assessment, the Owners (or their authorized agent) shall give each Owner written notice of the amount and the first due date of the assessment concerned.

3.7 Effect of Nonpayment of Assessments; Remedies of the Owners. Each Owner shall pay to the designated Agent of the Owners each of the assessments provided for in this Declaration and agrees to the enforcement of all such assessments in the manner herein specified. In addition, a late charge shall be assessed on any assessment not paid within fifteen (15) days after the date on which it becomes due. Such late charge shall be the greater of ten percent (10%) of the delinquent assessment or \$25.00. Any assessment, including late charges and previously accrued interest associated therewith, not paid within thirty (30) days after the assessment becomes due shall thereafter bear interest at an annual percentage rate not to exceed eighteen percent (18%) or the highest rate allowed by law, whichever is less, both before and after judgment. In the event attorneys are employed for collection of any assessment, whether by suit or otherwise, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, each defaulting Owner agrees to pay actual attorneys' fees and costs thereby incurred in addition to any other amounts due or any other relief or remedy obtained against said Owner. In addition to any other remedies herein or by law provided, an Owner or group of Owners or any authorized representative of an Owner, may enforce the obligations of any Owners to pay the assessments provided for in this Declaration, and each of them, in any manner provided by law or in equity, or without any limitation of the foregoing, by either or both of the following procedures:

a. Enforcement by Suit. One or more Owners may commence and maintain a suit at law against any Owner obligated to pay assessments for such delinquent assessments as to which that Owner is personally obligated. Such suit shall be maintained in the name of any one or all other Owners. Any judgment rendered in any such action shall include the amount of the delinquency, together with interest thereon as provided for herein, costs of collection, court costs and reasonable attorneys' fees in such amount as the Court may adjudge against the delinquent Owner. Suit to recover a money judgment for unpaid assessments shall be maintained without foreclosing or waiving the lien provided below.

b. Enforcement by Lien.

i. Grant of Lien. Each Owner hereby irrevocably grants, transfers and assigns to First American Title Insurance Agency of Utah, Inc., 330 East 400 South, Salt Lake City, Utah, 84111, and its successors and assigns ("Trustee"), a power of sale and right of entry and possession for the benefit of the Owners, on all of the granting Owner's Parcel with all rights, rents, issues, profits and other interests associated therewith. There is hereby created a claim of lien, with power of sale, on each and every Parcel to secure payment to the remaining Owners of any and all assessments levied

against any and all Owners and Parcels provided for in this Declaration, and all costs of collection which may be paid or incurred by the non-defaulting Owners in connection therewith, including actual attorneys' fees.

ii. Exercise of Lien Rights. At any time after the occurrence of any delinquency in the payment of any such assessment, any non-delinquent Owner or Owners or any authorized representative thereof may make a written demand for payment to the delinquent Owner. Said demand shall state the date and amount of the delinquency. Each delinquency shall constitute a separate basis for a demand or claim of lien or a lien, but any number of defaults may be included within a single demand or claim of lien and any demand or claim of lien on account of prior delinquencies shall be deemed to include subsequent delinquencies and amounts due on account thereof. If such delinquency is not paid within ten (10) days after delivery of such demand, the non-delinquent Owner or Owners or their duly authorized representative may thereafter elect to file and record a claim of lien on behalf of the non-delinquent Owner or Owners against the Parcel of the defaulting Owner in the Office of the County Recorder of Salt Lake County, Utah. Such claim of lien shall be executed and acknowledged by any non-defaulting Owner or Owners and shall contain substantially the following information:

1. The name of the record Owner who is in default;
2. The legal description of the Parcel against which the claim of lien is made.
3. The total amount claimed to be due and owing for the amount of the delinquency, interest thereon, collection costs, and estimated attorneys' fees (with any proper offset allowed);
4. That the claim of lien is made by the non-defaulting Owner or Owners pursuant to this Declaration;
5. That a lien is claimed against said Parcel in an amount equal to the amount stated, together with all other amounts becoming due from time to time in accordance with this Declaration; and
6. The name and address of the trustee authorized by the non-defaulting Owner or Owners to enforce the lien by sale through non-judicial foreclosure.

Upon recordation of a duly executed original or copy of a claim of lien, the lien claimed therein shall immediately attach and become effective in favor of the non-defaulting Owners as a lien upon the Parcel against which such assessment was levied.

iii. Foreclosure of Lien. Any such lien may be foreclosed by appropriate action in a court or in the manner provided under the Governing Laws for the foreclosure of a Mortgage or Deed of Trust with power of sale, or in any other manner permitted by the Governing Laws. The non-defaulting Owners are hereby authorized to appoint their attorney, any officer or agent of any Owner, or any title company authorized to do business in Salt Lake County as trustee for the purpose of conducting such power of sale foreclosure. The lien provided for herein shall be in favor of the non-defaulting Owners and shall be for the benefit of all other Owners and shall secure payment of all sums set forth in the claim of lien, together with all sums becoming due and payable in accordance with this Declaration after the date of recordation of said claim of lien. The non-defaulting Owners shall have the power to bid at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any Parcel. In the event such foreclosure is by action in Court, reasonable attorneys' fees, court costs, title search fees, interest and all other costs and expenses shall be allowed to the extent permitted by the Governing Laws. Each Owner hereby expressly waives any objection to the enforcement and foreclosure of this lien in this manner. Upon the timely curing of any default for which a notice of claim of lien was filed by non-defaulting Owner or Owners and the payment of all sums secured by the lien created by the recordation of such claim of lien, the non-defaulting Owner or Owners shall cause to be filed and recorded an appropriate release of such claim of lien in the office of the Salt Lake County Recorder. Notwithstanding anything contained in this Declaration to the contrary, no action may be brought to foreclose the lien created by recordation of a claim of lien, whether judicially, by power of sale, or otherwise, until the expiration of ten (10) days after a copy of said claim of lien, showing the date of recordation thereof has been mailed to the Owner of the Parcel described in such claim of lien.

iv. Lien Priority. Such a lien shall have priority over all liens or claims created subsequent to the recordation of this Declaration except for (a) tax liens for real property taxes on any Parcel; (b) assessments on any Parcel in favor of any municipal or other governmental assessing unit; and (c) Senior Mortgages.

3.8 Effect of a Sale or Transfer on Assessments. The sale or transfer of any Parcel shall not affect any assessment lien created pursuant to the term of this Declaration to secure assessments becoming due whether prior to, on, or after the date of such sale or transfer, nor shall such sale or transfer diminish or defeat the personal obligation of any Owner for delinquent assessments as provided for by Section 3.1; provided, however, that the sale or transfer of any Parcel pursuant to a judicial foreclosure or foreclosure by power of sale of a Senior Mortgage, or proceeding in lieu of foreclosure of a Senior Mortgage, shall extinguish any assessment lien which has attached and become effective with regard to the Parcel being so transferred prior to the time of such sale or transfer, and shall



prohibit the recordation of any assessment lien against such Parcel on account of assessments which became due prior to the date of such sale or transfer; provided, however, that there shall be a lien on the interests of the purchaser at such sale which shall attach, be created and become effective and be foreclosed in accordance with this Declaration and which shall secure all assessments becoming due after the date of any such sale or transfer. In the event that all or any portion of an assessment is extinguished from a Parcel under this Section, the Owners shall have the right, but not the obligation, to proportionately reallocate all or any portion of that extinguished assessment among the other Parcels. For the purpose of this Section, a sale or transfer of a Parcel shall occur on the date of recordation of a deed or other instrument of title evidencing the conveyance of record title to the Parcel. Notwithstanding the extinguishment of any assessment lien by a Senior Mortgage, that extinguishment shall not relieve the Owner originally responsible for the delinquent assessment secured by that lien for the obligation to pay that delinquent assessment to the Owners. The Owners shall execute and deliver a separate subordination agreement requested by any lender that holds a Senior Mortgage.

3.9 Delivery by Owner. Each Owner shall, as soon as practicable before the transfer of a Parcel, or the execution of a real property sales contract, give to the prospective transferee a copy of this Declaration, and a true statement in writing from the remaining Owners as to the amount of any delinquent assessments and information relating to penalties, attorneys' fees and other charges authorized by this Declaration on the applicable property as of the date the statement is issued.

3.10 Damage. If all or any portion of the Landscaping is damaged or destroyed by casualty, the Owners shall be required and are hereby authorized to take any and all action to repair or rebuild the damaged portions or to cause the damaged portions to be repaired or rebuilt.

#### ARTICLE IV

#### MISCELLANEOUS

4.1 In each instance in which notice is to be given to an Owner, the same shall be in writing and may be delivered personally or such notice may be delivered by United States mail, certified or registered, postage prepaid, return receipt requested, addressed to the Owner at the most recent address furnished by the Owner in writing for the purpose of giving notice, or if no such address shall have been furnished, then to the address of such Owner as set forth in the records of the Department of Commerce of the State of Utah, and any notice so deposited in the mail within Salt Lake County shall be deemed delivered forty-eight (48) hours after such deposit.

4.2 Term. Subject to the limitations set forth in this Section 4.2, this Declaration and the covenants herein contained shall be in effect until December 31, 2050 and shall automatically be extended for successive periods of ten (10) years unless within six (6) months prior to the expiration of the initial term or any ten (10) year renewal period a

written agreement executed by all of the then Owners shall be placed on record in the Office of the County Recorder of Salt Lake County by the terms of which agreement the effectiveness of this Declaration is terminated or the covenants herein contained are extinguished in whole or in part as to all or any part of the property then subject thereto.

4.3 Amendments. This Declaration may be amended with the affirmative vote of Owners obligated to pay a majority of the Total Assessment; provided, however that the protections provided to Senior Mortgages in Sections 3.7 and 3.8 hereof shall not be amended except with the consent of all then Senior Mortgage holders.

4.4 Construction. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the maintenance of the Maintenance Areas. The Article and Section headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction. No rule of strict interpretation shall be applied against any Party.

4.5 Singular Includes Plural. Whenever the context of this Declaration requires same, the singular shall include the plural and the masculine shall include the feminine.

4.5 Attorneys' Fees. In the event of any controversy or claim respecting this Declaration or in connection with the enforcement of this Declaration, the prevailing parties shall be entitled to be reimbursed for reasonable expenses (including attorneys' fees) and damages that they may incur.

4.6 Performance. Each Party, person and/or entity governed and affected by this Declaration shall perform its respective obligations under this Declaration in a manner that will not unreasonably or materially delay, disrupt or inconvenience any other Party, person and/or entity governed and affected by this Declaration, the development of any portion of a Parcel or the issuance of certificates of occupancy or other approvals associated therewith.

4.7 Assignability. The Parties shall not assign, convey, encumber or otherwise transfer their respective obligations under this Declaration separate from their respective interests in a Parcel.

4.8 No Third Party Rights. The obligations of the Parties set forth in this Declaration shall not create any rights in or obligations to any other persons or entities other than the Parties.

4.9 No Waiver. Any Party's failure to enforce any provision of this Declaration shall not constitute a waiver of the right to enforce such provision. The provisions may be waived only in a writing by the party intended to be benefitted by the provisions, and a waiver by a Party of a breach hereunder by the other Party shall not be construed as a waiver of any succeeding breach of the same or other provisions.


4.10 Time of Essence. Time is expressly made of the essence with respect to the performance of each and every obligation hereunder.

4.11 Cooperation. The Parties shall cooperate together, take such additional actions, sign such additional documentation and provide such additional information as reasonably necessary to accomplish the objectives set forth herein.

IN WITNESS WHEREOF, that parties have executed this Declaration and Maintenance Agreement the day and year first above appearing.

**Sorenson:**

**SORENSEN ASSOCIATES, L.L.C.**, a Utah limited liability company


By:   
Its Manager

**Liberty:**

**LIBERTY HILL PARTNERS, L.C.**, a Utah limited liability company

By: Cowboy Partners, L.C. its manager  
by Brent M. Jamn  
Its Vice President

**SOUTH MOUNTAIN LAND COMPANY**, a Utah limited liability company

By:   
Its MANAGER

NO ACKNOWLEDGEMENT  
CO. RECORDER

**EXHIBIT "A"**

**Legal Description**

Lot 1, SOUTH POINTE COMMERCE CENTER SUBDIVISION,  
according to the Official Plat thereof on file and of record in the  
Salt Lake County Recorder's Office.

34-07-328-002

**EXHIBIT "B"**

Legal Description

Lot 3, SOUTH POINTE COMMERCE CENTER SUBDIVISION,  
according to the Official Plat thereof on file and of record in the  
Salt Lake County Recorder's Office.

**EXHIBIT "C"**

Legal Description

Lot 2, SOUTH POINTE COMMERCE CENTER SUBDIVISION,  
according to the Official Plat thereof on file and of record in the  
Salt Lake County Recorder's Office.