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South Mountain Advancement, LLC  
5670 Wilshire Boulevard, Suite 1250  
Los Angeles, California 90036  
Attn.: Steven Usdan

APN: Part of 27-31-476-003-0000

Above Space for Recorder's Use Only

# 1185195-Jt

## DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS

This Declaration of Easements, Covenants, Conditions and Restrictions is made and entered into as of August 4, 2023 (the “**Effective Date**”) by **SOUTH MOUNTAIN ADVANCEMENT, LLC**, a Delaware limited liability company (“**SMA**”).

### RECITALS

A. As of the Effective Date, SMA owns certain real property generally located at 4140-4170 West 13400 South Street in Riverton, Utah that is legally described on Exhibit A attached hereto and depicted on Exhibit B attached hereto (including all Improvements now or hereafter located thereon, the “**Property**”).

B. The Property is undeveloped land that has been, or is intended to be, subdivided into separate individual parcels and developed as an integrated restaurant, retail and carwash development.

C. To facilitate the separate ownership of each individual parcel, SMA desires to record this Declaration to grant and reserve certain easements and to impose certain covenants, conditions and restrictions pertaining to the ownership, use and operation of the Property.

### ARTICLE 1

#### DEFINITIONS/RULES OF CONSTRUCTION

1.1 **Certain Defined Terms.** The terms defined in this Article 1 shall, for all purposes of this Declaration, have the meanings herein specified.

“**Affiliate**” means with respect to a particular Person, another Person that controls, is controlled by, or is under common control with, such first Person. The term “control” means the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

“**Building**” means each of the buildings now or hereafter situated on the Property.

“**Claims**” is defined in Section 5.6.

**“Common Areas”** mean all sidewalks, ramps, driveways, drive aisles, exterior plazas, parking areas, landscaped areas, fountains, exterior stairways or escalators, and other facilities or areas used in common by the Owners and Occupants of the Property, including all Improvements located thereon and used for such purposes. Notwithstanding any contrary provision of this Declaration, the Common Areas shall exclude (a) the interior portions of any Building, (b) any loading dock that serves a particular Building, and (c) the carwash queue lane on Lot 3 of the Property and the fixtures, equipment, signage or utility systems exclusively serving such carwash queue lane.

**“Declarant”** initially means SMA as fee title owner of the Property. Except as expressly provided herein, SMA shall remain Declarant as long as SMA continues to own fee title to any Parcel of the Property, subject to the following: (a) no conveyance by SMA of any Parcel or Parcels of the Property shall confer upon the transferee the status of “Declarant” under this Declaration except as expressly provided herein; (b) in connection with the conveyance by SMA or the then-existing Declarant of fee title to a Parcel owned by SMA or such then-existing Declarant, SMA or such then-existing Declarant shall have the right to designate the transferee of such Parcel as the successor Declarant under this Agreement; (c) unless a successor Declarant is otherwise expressly designated by SMA or the then-existing Declarant, the transferee of fee title to the last Parcel of the Property owned by SMA or the then-existing Declarant shall automatically become the successor Declarant under this Declaration; and (d) upon the designation by SMA or the then-existing Declarant of the Owner of a particular Parcel as Declarant, or upon the Owner of a Parcel becoming Declarant pursuant to clause (c) above, each successive owner of such Parcel shall thereafter be Declarant under this Declaration. Notwithstanding any contrary term or provision of this Declaration, a Declarant must be the owner of fee title to a Parcel of the Property.

**“Declaration”** means this Declaration of Easements, Covenants, Conditions and Restrictions, including the exhibits attached hereto, which exhibits are hereby incorporated by reference, as such Declaration is hereafter amended, amended and restated, modified and/or supplemented from time to time.

**“Default Curing Owner”** is defined in Section 11.3.

**“Effective Date”** is defined in the preamble to this Declaration.

**“Floor Area”** means the total enclosed leasable square footage on all levels of a Building, measured from the exterior faces of all exterior walls, service corridor and fire walls. Floor Area shall not include any exterior loading docks, loading zones or delivery areas, exterior trash enclosures or pallet areas. No deduction shall be made for columns or interior construction or equipment.

**“Governmental Body”** means any local, state or federal governmental body, including any agency, division, department or board thereof.

**“Governmental Requirements”** means all local, state or federal governmental, special district or public utility approvals, laws, statutes, rules and regulations, building codes, ordinances (zoning or otherwise) and permits which are, or will be, adopted, amended, modified or supplemented, and which govern, affect or relate to the zoning, use, development, improvement, operation or ownership of the Property, or any portion thereof.

**“Improvement Changes”** means all alterations, additions, modifications, replacements, restorations, or other changes after the Effective Date to the exterior components of the Improvements in existence immediately prior to an Improvement Change.

**“Improvements”** means all structures and improvements of any kind now or hereafter located in, on or under the Property, whether above or below the land surface, and whether permanent or temporary, including but not limited to, buildings, parking structures, energy plants, utility lines, driveways, drive aisles, paved parking areas, pathways, fences, exterior stairs connecting paved surfaces, screening walls, awnings, retaining walls, plantings, planted trees, landscaping, hardscaping, irrigation and drainage pipes and fixtures, lighting fixtures and signs.

**“Indemnitee”** means any Owner and its respective officers, directors, agents, members, shareholders and partners who are entitled to indemnification under this Declaration.

**“Indemnitor”** means each Owner required to indemnify an Indemnitee under this Declaration.

**“Interest Rate”** means the Reference Rate plus two percent (2%), but not greater than the interest rate allowed under applicable Governmental Requirements.

**“Mortgage”** means a deed of trust, mortgage or other consensual encumbrance recorded of Record against fee title to any portion of the Property.

**“Mortgagee”** means a beneficiary or holder of a Mortgage.

**“Occupant”** means the Owner of, and any other Person or Persons entitled by leasehold interest or other legal relationship to the exclusive right to occupy, all or any portion of any Parcel or Building.

**“Owner”** means the Person or Persons holding record fee title to a Parcel (excluding any Mortgagee or Person holding such interest merely as security for the performance of an obligation), and their respective heirs, successors and assigns. In the event that the ownership of the Improvements on any Parcel is severed from the land of such Parcel, then only the Person holding title to the land of such Parcel shall have the rights of an Owner hereunder; provided, however, that both the Person holding record fee title to the land of a Parcel and the Person holding record fee title to the Improvements on such Parcel shall be jointly and severally liable for the performance of all duties and obligations of an “Owner” hereunder.

**“Parcel”** or **“Parcels”** mean individually or collectively each current or future separate legal parcel constituting a portion of the Property, as platted, re-platted, adjusted or modified by lot line adjustment or other Governmental Body action at the application of the Owner thereof with the written approval of Declarant (if Declarant is not the Owner thereof), which approval may be withheld by Declarant in its sole and absolute discretion. As of the date of this Declaration, each of Lot 1, Lot 2 and Lot 3 described on Exhibit A is a Parcel. Each reference in this Declaration to a particular “Lot” shall mean the respective Lot described on Exhibit A.

**“Permittees”** means all Occupants and all customers, patrons, employees, concessionaires and other business invitees of the Occupants having business to conduct at the Property.

**“Person”** means any individual, partnership, corporation, limited liability company, trust, estate, Governmental Body or other legal entity.

**“Property”** is defined in the recitals to this Declaration.

**“Record or Recordation”** means, with respect to any document, the recordation thereof, and with respect to any map, the filing thereof, in the office of the County Recorder of Salt Lake County, Utah.

**“Real Estate Taxes and Assessments”** means all real property taxes, possessory-interest taxes, business or license taxes or fees, service payments in lieu of such taxes or fees, annual or periodic license or use fees, excises, transit and traffic charges, housing fund assessments, open space charges, childcare fees, school, sewer and parking fees or any other assessments, levies, fees, exactions or charges, general and special, ordinary and extraordinary, unforeseen as well as foreseen (including fees “in-lieu” of any such tax or assessment) which are assessed, levied, charged, conferred or imposed by any Governmental Body upon any real property or its operations, together with all taxes, assessments or other fees imposed by any Governmental Body upon or measured by any rent or other charges payable under any lease, including any gross receipts tax or excise tax levied by any Governmental Body with respect to receipt of rental income, or upon, with respect to or by reason of the development, possession, leasing, operation, management, maintenance, alteration, repair, use or occupancy of the Property, together with any tax imposed in substitution, partially or totally, of any tax previously included within the aforesaid definition or any additional tax the nature of which was previously included within the aforesaid definition, together with any and all costs and expenses (including, without limitation, attorneys, administrative and expert witness fees and costs) of challenging any of the foregoing or seeking the reduction in or abatement, redemption or return of any of the foregoing.

**“Reference Rate”** means the prime or reference rate announced from time to time by Citibank, N.A. (or if such bank ceases to exist or ceases to regularly announce a prime or reference rate, then the prime or reference rate announced from time to time by the largest bank in terms of assets headquartered in New York, New York which does then regularly announce a prime or reference rate).

**“Site Plan”** is the site plan for the development of the Property attached as Exhibit B to this Declaration, as such Site Plan is hereafter modified or adjusted in accordance with the terms and provisions of this Declaration.

## 1.2 List of Exhibits.

<u>Exhibit A</u>	Legal Description of Property
<u>Exhibit B</u>	Site Plan
<u>Exhibit C</u>	Existing Exclusive Use Restrictions

1.3 **Rules of Construction.** Unless the context otherwise requires, the following rules apply:

1.3.1 “or” is not exclusive, and the term “may” is permissive;

1.3.2 to the extent required by the context, words (a) in the singular include the plural, (b) in the plural include the singular, and (c) in the masculine include the feminine.

1.3.3 references to this Declaration, or the use of the words "herein" or similar references refer to this Declaration as a whole and not to a specific provision thereof by limitation;

1.3.4 the term "including" is by way of example and not by limitation; and

1.3.5 references to an "Article," "Section" or "Exhibit" shall be to an Article, Section or Exhibit of this Declaration.

## **ARTICLE 2**

### **PURPOSE/INTENT TO BIND FUTURE OWNERS**

2.1 **Purpose.** Declarant intends for this Declaration to govern (a) the grant of certain easements in, on, under and over the Property; (b) the regulation of the development, alteration, maintenance, repair, replacement and operation of the Property, including, without limitation, the Common Areas; (c) the creation of certain rights and the imposition of certain restrictions and covenants on and with respect to the Property or portions thereof; and (d) certain other matters set forth herein.

2.2 **Future Dispositions; Intent to Bind.** On and after the Effective Date, to ensure that the purposes set forth in Section 2.1 above are met, Declarant desires to impose upon the Property, and the Parcels and Improvements constituting a portion thereof, the mutual and beneficial covenants, conditions and restrictions set forth in this Declaration. Upon the Recordation of this Declaration, the Property, and the Parcels and Improvements constituting a portion thereof, shall be held, conveyed, hypothecated, encumbered, leased, used, occupied and improved subject to the easements, covenants, conditions and restrictions contained herein, all of which are declared and agreed to be equitable servitudes for the purpose of enhancing and protecting the value, desirability and attractiveness of the Property. All of the covenants, conditions and restrictions set forth herein shall run with the Property and all of the Parcels and Improvements constituting a portion thereof, and shall be binding upon and shall benefit each Owner and their respective heirs, successors and assigns. All of the covenants, conditions and restrictions described herein are made for the direct, mutual and reciprocal benefit of each Parcel, and the Improvements located thereon, and shall create reciprocal rights and obligations, and privity of contract and estate between and among, the Owners and their respective heirs, successors and assigns.

## **ARTICLE 3**

### **REGULATION OF IMPROVEMENTS**

3.1 **Construction of Improvements and Improvement Changes.** All Improvements and Improvement Changes must comply with the terms and provisions of this Declaration. No Improvement Changes shall cause any Improvements to violate the terms and provisions of this Declaration, including the requirements and restrictions set forth in this Article 3 with respect to the Improvements located on each Parcel.

3.2 **General Development of Parcels.** Except with the prior written approval of Declarant, which approval may be withheld by Declarant in its sole and absolute discretion, (a) the Improvements constructed on each of the Parcels shall be in compliance with the Site Plan, including without limitation, the location and configuration of the Building(s) to be constructed on such Parcel, the

location, size, configuration and number of parking spaces on such Parcel, and the location and configuration of the drive aisles, drive-thru facilities (if applicable) and other Improvements to be located on such Parcel as shown on the Site Plan; (b) all Buildings shall be one structural story (including mezzanine); (c) no Building shall be of a height in excess of twenty two (22) feet measured from the elevation of the finished graded pad to the parapet of the Building and twenty four (24) feet to the highest point of the roof or other architectural feature of the Building (excluding the height of HVAC and other mechanical equipment on the roof, all of which shall be screened from view in a manner acceptable to Declarant); and (d) the Floor Area of each Building on a particular Parcel may be less than, but shall not be greater than, the square footage shown for each such Building on the Site Plan.

**3.3 Other Improvement Requirements.** In addition to the requirements set forth in Section 3.2 above, all Improvements or Improvement Changes shall comply with the following requirements: (i) all Improvements and Improvement Changes shall comply with all applicable Governmental Requirements in effect at the time of the construction of such Improvement or Improvement Change; (ii) all Improvements and Improvement Changes shall be consistent and compatible with a first-class restaurant, retail and carwash development; (iii) all Improvements and Improvement Changes shall be architecturally compatible with the other Buildings on the Property; (iv) there shall be no Buildings, kiosks, permanent barriers, free-standing signs (other than parking related or directional signage approved by Declarant), other structures or outdoor sales areas except as shown on the Site Plan or otherwise approved by Declarant; and (v) all construction work or staging with respect to the construction of an Improvement or Improvement Change shall be confined to the Parcel on which the Improvement or Improvement Change is to be located, or other Parcel(s) owned by the same Owner, except as approved by the Owner of a Parcel on which another Owner desires to stage construction; provided, however, that no construction or staging shall interfere with the free flow of traffic over the main drive aisles of the Property, and all construction or staging areas outside of the building envelopes shown on the Site Plan shall be subject to Declarant's prior written approval.

**3.4 Modification of Site Plan.** Declarant shall have the right to modify the Site Plan or modify or waive the requirements of Section 3.2 above or clauses (iii) through (v) of Section 3.3 above, in each case with respect to (a) any Parcel that is owned by Declarant as of the date of such modification or waiver, or (b) any other Parcel with respect to which such modification or waiver is requested or approved by the Owner of such particular Parcel; provided, however, that no modification or waiver pursuant to this paragraph shall (w) reduce the number of parking spaces in the Property to below that required by applicable Governmental Requirements; (x) materially interfere with traffic flow over the main drive aisles of the Property; (y) restrict the construction of Buildings within the outlines of the buildings shown on Exhibit B; or (z) cause any other Parcel of the Property to be in violation of Governmental Requirements applicable to such Parcel.

**3.5 Maintenance and Repair.** Subject to the terms and provisions of Article 10 regarding damage or destruction, each Owner of a Parcel shall maintain, repair, replace and restore such Owner's Parcel and the Improvements located thereon in a clean, orderly and first-class condition similar to that for comparable first-class restaurant, retail and carwash properties in Salt Lake County, Utah and in compliance with applicable Governmental Requirements; provided, however, that the provisions of this Section 3.5 shall not be applicable to the interior portions of a Building that are not visible from the exterior of such Building.

**3.6 Construction Regulations.** All construction activities on the Property shall be performed in accordance with the following requirements:

3.6.1 All Improvements or Improvement Changes shall be constructed pursuant to plans and specifications submitted to and approved by Declarant, which approval shall not be unreasonably withheld; provided, that for purposes of clarification, interior components of Buildings that are not visible from the exterior of a Building shall not be subject to Declarant approval.

3.6.2 no Owner shall unreasonably interfere with any construction work being performed on the remainder of the Property, or any portion thereof;

3.6.3 no construction work shall unreasonably interfere with the use, occupancy or enjoyment of the remainder of the Property, or any portion thereof, by any other Owner or Occupant, or by any of their respective Permittees, subject to normal noise, dust and debris associated with construction in accordance with general industry standards; and

3.6.4 no construction activities shall cause any other Owner to be in violation of any Governmental Requirement.

**3.7 Signage.**

3.7.1 There shall be no pylon, monument or other free-standing signs, or any flags or banners, constructed or exhibited in or on the Property, except as approved by Declarant and the Owner of the Parcel on which such item will be located.

3.7.2 Except as otherwise approved by Declarant, all signage located on a Building shall (a) be subject to and comply with the requirements of Article 3 of this Declaration, (b) comply with the sign criteria for the Property approved by the applicable Governmental Body and otherwise comply with all Governmental Requirements, and (c) advertise only an Occupant of the Property and not the name of any other business not located in the Property.

**3.8 Additional Provisions Affecting Certain Parcels.** Declarant shall have the right to amend this Declaration to (i) impose upon one or more Parcels additional covenants, conditions or restrictions that are specific to such Parcel(s), as long as at the time of such amendment Declarant is the owner of the Parcel(s) burdened by such additional covenants, conditions or restrictions, or Declarant obtains the written agreement of the Owner of such burdened Parcel(s) to same; (ii) grant to one or more Parcels additional rights, easements or other terms for the benefit of such Parcel that encumber another Parcel or Parcel as long as at the time of such amendment Declarant is the owner of the Parcel(s) burdened by such additional rights, easements or other terms, or Declarant obtains the written agreement of the Owner of such burdened Parcel(s) to same; and/or (iii) waive one or more restrictions, requirements or obligations as to a particular Parcel or Parcels as long as such waiver does not affect the use, improvement, easement rights of, or access to, over or from, another Parcel in any material adverse respect.

## ARTICLE 4

### REGULATION OF OPERATIONS AND USES

4.1 **Permitted Use In General.** The Property shall be used only for uses and purposes consistent and compatible with the operation of a restaurant, retail and carwash development. All uses of the Property shall comply with Governmental Requirements, and no portion of the Property shall be used or developed in any manner that would cause another Owner or another Owner's Parcel and/or the Improvements located thereon to be in violation or noncompliance with any Governmental Requirements. Except as permitted under Section 3.6 with respect to construction work, no use of the Property shall be permitted that causes or produces a nuisance or unreasonable disturbance to Occupants and activities on other Parcels, including, but not limited to, vibration, sound, odor, electro-magnetic disturbance, radiation, air or water pollution, dust and emission of odorous, toxic or non-toxic matter.

4.2 **Other Use Restrictions and Prohibited Conduct.**

4.2.1 No condition shall be permitted to exist upon any Parcel or in or on any Improvement that induces, breeds or harbors infectious plant diseases, rodents, or noxious insects.

4.2.2 Subject to Section 4.2.1 above, no Owner or Occupant shall in any way interfere with the established drainage of water over its Parcel from adjoining or other Parcels, nor shall any Owner or Occupant in any way interfere with established drainage of water from its Parcel so as to cause or permit water to drain onto, over or under any adjoining or other Parcel except through established drainage Improvements. If an Owner desires to change the established drainage flow over any other Owner's Parcel to accommodate an Improvement Change on the requesting Owner's Parcel, then the requesting Owner shall be permitted to do so provided such requesting Owner provides for adequate and proper drainage at the requesting Owner's sole cost and expense. For the purposes hereof, "established" drainage is defined as the drainage that exists upon the completion of the development of the Property as contemplated on the Site Plan, given the overall grade of each Parcel and the Improvements to be constructed thereon, as such drainage may hereafter be changed in accordance with the terms and provisions of this Section 4.2.2.

4.2.3 No Owner or Occupant shall in any way unreasonably interfere with the use of the easements granted or reserved hereunder, or do any act or thing inconsistent with such use.

4.2.4 No Owner or Occupant shall solicit business or distribute handbills in the Common Areas of the Property.

4.2.5 No portion of the Common Areas may be used for outdoor promotions, cart storage, merchandise displays, seasonal sales, commercial truck parking, inventory storage, do-it-yourself or demonstration displays, or park and ride or carpooling arrangements, except with the consent of Declarant, which consent may be withheld by Declarant in its sole and absolute discretion; provided, however, that this Section 4.2.5 shall not preclude (a) sidewalk sales consistent with a first-class retail center, (b) outdoor seating areas approved by applicable Governmental Authorities, or (c) use of exterior areas of Lot 3 for purposes of carwash operations consistent with the operation of similar first-class carwash operations.

4.2.6 Except with the consent of Declarant, which consent may be withheld in Declarant's sole and absolute discretion, there shall be no satellite or other communication antennae or other equipment installed on the exterior of the Improvements, except any satellite antennae designed to serve the Occupant of a Building and that is affixed to the roof of such Building and screened from view in a manner reasonably satisfactory to Declarant.

#### 4.3 **Exclusive Use Restrictions.**

4.4.1 **Existing Exclusive Use Restrictions.** No portion of the Property shall be used for any purpose that violates an existing exclusive use restriction set forth on Exhibit C (the "**Existing Exclusive Use Restrictions**") that runs for the benefit of the specific real property benefitted by such Existing Exclusive Use Restriction specified in Exhibit C. Compliance with each Existing Exclusive Use Restriction shall be binding upon the Occupants of the Property as long as such Existing Exclusive Use Restriction remains in effect, regardless of whether the lease or occupancy agreement that contains the Existing Exclusive Use Restriction is assigned, subleased, extended, renewed or modified (except to the extent of modifications that purport to expand the Existing Exclusive Use Restriction). Each Existing Exclusive Use Restriction is enforceable only by the Owner and/or Occupant of the specific real property benefitted by the Existing Exclusive Use Restriction, and is not enforceable by any other Owner or Occupant.

4.4.2 **Future Exclusive Use Restrictions.** No Parcel of the Property shall be used for any purpose that violates any future exclusive use restriction granted after the Effective Date by Declarant to an Occupant of another Parcel of the Property ("**Future Exclusive Use Restrictions**"), except to the extent that at the time of the grant of such Future Exclusive Use Restriction (a) the subject Parcel is then being used, or a lease or occupancy agreement has been executed for the use of such subject Parcel, for a purpose that conflicts with the Future Exclusive Use Restriction, or (b) the subject Parcel is subject to a lease or occupancy agreement as to which the tenant or occupant is not required to be bound by such Future Exclusive Use Restriction. For purposes hereof, a Future Exclusive Use Restriction shall be considered to be "granted" as of the date that a written letter of intent, term sheet, lease or occupancy agreement has been executed after the Effective Date that includes such Future Exclusive Use Restriction and the Owner of the Parcel to be bound by such Future Exclusive Use Restriction has been given written notice of such grant; provided, however, that if the transaction that is the subject of any letter of intent or term sheet is terminated prior to the execution of a binding lease or occupancy agreement for such Future Exclusive Use Restriction, then for purposes of this paragraph the grant of such Future Exclusive Use Restriction shall be considered terminated (until subsequently granted, if applicable). Compliance with each Future Exclusive Use Restriction hereafter granted in favor of an Occupant of a Parcel as provided above shall be binding upon the Occupants of each other Parcel of the Property as long as such Future Exclusive Use Restriction remains in effect, regardless of whether the lease or occupancy agreement which contains the Future Exclusive Use Restriction is assigned, subleased, extended, renewed or modified, and if and so long as the lease or occupancy agreement that contains such Future Exclusive Use Restriction is replaced with a new lease or occupancy agreement with a then-existing Occupant or a new replacement Occupant, as long as any such new lease or occupancy agreement is executed within six (6) months after the date of the termination or expiration of the lease or occupancy agreement in which the Future Exclusive Use Restriction was contained. Each Future Exclusive Use Restriction is enforceable only by the Owner and/or Occupant of the Parcel benefitted by the Future Exclusive Use Restriction as set forth in the notice of the grant of such Future Exclusive Use Restriction, and such

Future Exclusive Use Restriction shall not be enforceable by the Owner or Occupant of any other Parcel. Although no amendment of this Declaration shall be required to document a Future Exclusive Use Restriction, Declarant shall have the right to amend this Declaration to document a Future Exclusive Use Restriction in accordance with the terms and provisions of this Section 4.4.2.

## **ARTICLE 5**

### **INSURANCE/INDEMNIFICATION**

5.1 **Duty to Carry Casualty Insurance.** Each Owner shall carry (or cause to be carried), at its own sole cost and expense, Cause of Loss Special Form (also known as All-Risk or extended) property insurance, and during periods of construction, Cause of Loss Special Form builder's risk insurance, on all of the Improvements located on its Parcel, including the Common Areas located on its Parcel. Such insurance shall be written on an "all risks" of physical loss or damage basis, and shall include a sprinkler leakage, vandalism and malicious mischief endorsement.

5.2 **Duty to Carry Liability Insurance.** Each Owner shall carry (or cause to be carried), at its sole cost and expense, commercial general liability insurance covering the insured against claims of bodily injury, personal injury and property damage covering its Parcel and all Improvements located thereon, including the Common Areas located on its Parcel. Such insurance shall be primary, non-contributory, and include a broad form commercial general liability endorsement covering the indemnity provisions of this Declaration. Each policy under this Section 5.2 shall name as additional insureds the other Owners.

5.3 **Duty to Carry Workers' Compensation Insurance.** Each Owner shall, at its sole cost and expense, keep and maintain, or cause to be kept and maintained, during any period of construction, alteration or repair, or in performing the general operations of the Improvements located on such Owner's Parcel, workers' compensation insurance covering all Persons employed in connection with such work and/or operations and with respect to whom death or bodily injury claims could be asserted against any Owner of the Property.

5.4 **General Requirements for Insurance Coverage.** All insurance required under Section 5.1 above shall:

5.4.1 be maintained under a valid and enforceable policy or policies issued by insurers qualified to do business in the state in which the Property is located and which have a credit rating of "A-" or better by A.M. Best or A- or better by Standard & Poor's Ratings Services, Inc. (or if such ratings are no longer in effect, having a comparable rating by a similarly nationally recognized rating agency);

5.4.2 be in an amount not less than the then-current full replacement cost new, without deduction for depreciation (exclusive of foundations, footings and excavations) for the Improvements being insured, subject only to commercially reasonable deductibles customarily carried by other prudent owners of comparable properties; and

5.4.3 provide, or be to the legal effect, that losses payable to a Mortgagee or any other loss payee shall be payable notwithstanding any act or negligence of any Owner or Occupant.

5.5 **General Requirements for Liability Policies.** All insurance required under Section 5.2 above shall:

5.5.1 be maintained under a valid and enforceable policy or policies issued by insurers qualified to do business in the state in which the Property is located and which have a credit rating of "A-" or better by A.M. Best or A- or better by Standard & Poor's Ratings Services, Inc. (or if such ratings are no longer in effect, having a comparable rating by a similarly nationally recognized rating agency);

5.5.2 insure, on a primary basis, against claims for personal injury or death or property damage occurring upon, in or about each Parcel, or any Improvements on each Parcel or upon, in or about the adjoining land, streets and passageways thereof, such insurance to afford protection in an amount not less than \$5,000,000.00 each occurrence, annual aggregate, subject only to such commercially reasonable deductible as is customarily carried by other prudent owners of comparable properties; provided, however, that no more often than every five (5) years Declarant shall have the right to require that the \$5,000,000 required minimum coverage limit set forth above be increased to the commercially reasonable limit of liability coverage which owners (or their tenants) typically carry in similar shopping centers in Salt Lake County, Utah; in all cases, the required limits of coverage may be achieved through the use of a combination of primary and excess/umbrella coverage; and

5.5.3 provide, or be to the legal effect, that losses payable to a Mortgagee shall be payable notwithstanding any act or negligence of any Owner or Occupant.

5.6 **Indemnification by Parties.** Each Owner shall indemnify, defend and hold harmless all other Owners and each of their respective officers, directors, agents, members, shareholders and partners from and against all claims, liabilities, damages, causes of action, obligations, costs and expenses (including reasonable attorneys' fees) (collectively, "Claims") arising from the death of or bodily injury to any Person, or for damage to the Property of any Persons, as shall occur on such Owner's Parcel or the Improvements located thereon, except in each case to the extent the Claim both (i) is caused by or results from the negligence or willful misconduct of the Indemnitee or its employees, agents or contractors, and (ii) except in the case of the gross negligence or willful misconduct of the Indemnitee, is not covered by insurance and would not have been covered by insurance if such indemnifying Owner had carried the insurance required to be carried by such indemnifying Owner under this Declaration. Each Indemnitee shall provide Indemnitor with prompt written notice of any Claim entitling Indemnitee to indemnification pursuant to this Section 5.6, and Indemnitor shall defend Indemnitee with respect to such Claim with counsel reasonably satisfactory to Indemnitee; provided, however, the failure of an Indemnitee to provide written notice of any Claim entitling Indemnitee to indemnification shall not relieve Indemnitor of the indemnification obligations set forth in this Section 5.6, except to the extent that such failure materially increases the liability of Indemnitor or materially adversely affects Indemnitor's defense against the Claim.

5.7 **Blanket Policies.** Each party may satisfy its obligations under Sections 5.1 through 5.5, in whole or in part, by means of a so-called blanket policy that is in conformity with the requirements of such Sections, provided that the aggregate limits in any blanket liability policy are applicable on a per location basis.

5.8 **Certificate of Insurance.** Each Owner shall, on the request of another Owner, promptly furnish such requesting Owner with a certificate evidencing its compliance with the insurance coverage requirements of this Article 5.

5.9 **Release and Waiver of Subrogation - Parties.** Each Owner hereby waives all rights of recovery and causes of action, and releases all other Owners from any liability, due to losses and damages occasioned to its Parcel and the Improvements located thereon, which losses and damages are of the type covered under the property insurance coverage required under Section 5.1, to the extent that said loss is reimbursed by insurance, or would have been reimbursed if the required coverage had been carried as provided in Section 5.1. The coverage required under Section 5.1 shall provide for waivers of any right of subrogation that the insurer of one Owner may acquire against each other Owner hereto with respect to any such releases.

5.10 **Release and Waiver of Subrogation - Occupants.** Each Person who becomes an Occupant shall be deemed to have waived and released all of its rights to recover from each Owner for losses and damages that the Occupant sustains by reasons of a risk covered under the types of policies required by this Article 5, to the extent of any reimbursement to such Occupant by an insurer. Each Owner hereby releases all of its rights to recover from each Occupant (who makes the above-described waiver and release) all losses and damages that the Owner sustains by reason of risks covered under the types of policies required under Section 5.1 to the extent of any reimbursement to the Owner by an insurer (or to the extent that such reimbursement would have occurred if the coverage required under Section 5.1 had been carried).

## **ARTICLE 6**

### **USE AND OPERATON OF PARKING FACILITIES**

6.1 **Reciprocal Use of Parking Facilities; Parking Easement.** The parking facilities located on the Property shall be used in common by all Owners and their respective Permittees as non-reserved parking on a first-come, first-served basis; provided, however, that the Owners, Occupants and Permittees of Lots 1 and 2 shall have no right to use the parking facilities located on Lot 3, and the Owners, Occupants and Permittees of Lot 3 shall have no right to use the parking facilities located on Lots 1 and 2. Subject to the foregoing limitation, Declarant hereby establishes and reserves for, and grants to, each Owner of a Parcel, the retained right to use, and an easement for access to and use of, the parking facilities located on the Property, on a non-exclusive shared basis. The easement described in this Section 6.1 shall include an easement for vehicular ingress and egress to, from and over the entrances, exits, driveways, drive aisles and other vehicular circulation paths on the Property for the purpose of the enjoyment of the parking easement described in this Section 6.1. Notwithstanding the foregoing, as between Lots 1 and 2, each Owner of Lots 1 and 2 shall have the right to designate up to two (2) (or such greater number as approved by Declarant) of the parking spaces located on its Parcel for each particular Occupant as delivery, carryout or other short term parking for such specific Occupant. There shall be no charges for the shared use of the parking facilities on the Property.

6.2 **Additional Parking Requirements.** Without limitation of the other parking requirements set forth in this Declaration, without the approval of Declarant there shall be no reduction in the number of parking spaces located on a Parcel following the initial development of such Parcel in

accordance with the requirements of this Declaration, except as required to comply with the directive of a Governmental Body.

6.3 **Governmental Parking Tax.** If any Governmental Body 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.

6.4 **Parking Facilities During Construction.** It is acknowledged and agreed that during the period of construction of a Building on a Parcel, the Owner of such Parcel shall have the right to stage or perform construction on the parking facilities located on its Parcel and that such parking facilities may not be available for parking during such period, subject to compliance with the terms and provisions of Section 3.3 of this Declaration with respect to construction staging.

6.5 **Miscellaneous Parking Provisions.**

6.5.1 The parking facilities shall be used for the parking of only motor vehicles or motorcycles, but shall not be used for the parking or storage of recreational or other oversized vehicles.

6.5.2 No parking facilities located on the Property shall be used for off-site purposes or licensed for use by any off-site licensee.

6.5.3 No Owner of Lot 1 or Lot 2 shall have the right to install gates or other entry control equipment with respect to the parking facilities located on its Parcel.

6.5.4 The parking easements granted and reserved in this Article 6 are non-exclusive easements appurtenant to and for the benefit of the specific Parcels of the Property that are bound or benefitted (as applicable) thereby.

**ARTICLE 7**

**OTHER EASEMENTS**

7.1 **In General.** In addition to any other easements otherwise granted or reserved in this Declaration, Declarant grants and reserves the easements described in this Article 7.

7.2 **Vehicular and Pedestrian Access.**

7.2.1 Declarant hereby grants and reserves easements burdening each of the Parcels of the Property for the benefit of each of the other Parcels of the Property, for vehicular ingress and egress across and over the designated vehicular traffic circulation patterns now existing or hereafter created on and over the Common Areas of the Property, as modified from time to time as permitted under this Declaration.

7.2.2 Declarant hereby grants and reserves easements burdening each of the Parcels of the Property for the benefit of each of the other Parcels of the Property, for pedestrian ingress and egress across and over the designated pedestrian traffic circulation patterns now existing or hereafter

created on and over the Common Areas of the Property, as modified from time to time as permitted under this Declaration.

**7.3 Utilities.** Declarant hereby grants and reserves easements burdening each Parcel of the Property for the benefit of the other Parcels of the Property for the installation, use, operation, maintenance, inspection, repair, restoration and replacement of pipes, mains, lines, ducts, wires, conduits and related equipment and facilities for the generation, transmission, delivery or use of utility services (including, without limitation, electricity, gas, water, sprinkler, sewer, heating, ventilation, air conditioning, cable television, communication, emergency power, security and life safety services) through and between the Parcels of the Property. Such easements shall be located in, on and over the Common Areas at such locations as reasonably approved by Declarant and that do not unreasonably interfere with the use and enjoyment of such Common Areas. Any Owner of a Parcel that is the servient estate for a utility easement set forth in this Section 7.3 shall have the right, at its sole cost and expense, upon prior written notice to the other Owners, to relocate such easement (and the Improvements used in connection therewith) to another location on such Owner's Parcel.

**7.4 Support.** Declarant hereby grants and reserves easements burdening each Parcel of the Property for the benefit of the other Parcels of the Property for vertical, lateral and structural load-bearing support, and accommodation of the natural settlement of structures; provided that such easements shall not permit any material interference with the use and enjoyment of the servient tenement.

**7.5 Construction.** Declarant hereby grants and reserves non-exclusive easements burdening each of the Parcels of the Property for the benefit of the other Parcels of the Property for the installation, use, maintenance, repair, replacement and removal of any Improvement, or portion thereof, such as a footing, column, support or foundation, which is located either wholly on one Parcel or partly on the Parcel of one Owner and partly on the Parcel of another Owner, and which has been designed to be used and shared in common for the benefit of two or more Parcels.

The easements granted and reserved in Section 7.3 above and this Section 7.5 shall be subject to the following requirements and limitations:

**7.5.1 Reimbursement for Costs.** The Owner of the Parcel exercising its rights under Section 7.3 above or this Section 7.5 shall reimburse the Owner of the Parcel burdened by the easement for all reasonable costs incurred by the latter and its Occupants as a direct result of its construction, maintenance, inspection, repair, restoration or alteration activities; provided that nothing herein shall require reimbursement for loss of business resulting from the temporary closure of vehicular or pedestrian access as permitted under this Declaration.

**7.5.2 Reasonableness; Notice.** The exercise of the rights set forth in Section 7.3 above or this Section 7.5 shall be undertaken in such a manner so that the interference with the use of then-existing Improvements located on other Parcels will not be unreasonable under the circumstances; and in any event no entry onto the Parcel of another Owner shall be made for the purposes of Section 7.3 above or this Section 7.5 without reasonable prior written notice to the Owner of the affected Parcel.

7.5.3 Quality of Work. The work shall be carried out in a good and workmanlike manner in accordance with reasonable and prudent industry standards. The Owner performing the work shall be responsible for and shall promptly remedy any defects in the work, and shall also indemnify, defend and hold all other Owners harmless from and against any mechanics' liens arising from the work. In the event that a mechanic's lien is filed on another Owner's Parcel, the Owner performing the work giving rise to the lien shall promptly post a bond (or take such other action) adequate to relieve such other Parcel from the effect of such lien.

7.5.4 No Damage. All construction, maintenance, inspection, repair, restoration and alteration of any Improvements shall be performed in a manner that will not damage any Improvements within any other Parcel, other than minor damage in connection with construction, which shall be diligently repaired by the Owner that caused the damage.

7.5.5 Tie Backs. Each Owner hereby agrees to consent to a reasonable request from another Owner for an easement for the purpose of lateral and subjacent support in connection with the construction of future Improvements.

7.5.6 Indemnification. The Owner performing any work under Section 7.3 above or this Section 7.5 shall indemnify, defend (with counsel reasonably acceptable to the Indemnitee) and hold harmless the Owner of the Parcel on which the work is performed, and its officers, directors, agents, shareholders, members and partners, from and against all Claims for the death of or bodily injury to any Person, or for damage to the property of any Person, to the extent arising out of the performance of the work performed by such Owner on the Indemnitee Owner's Parcel, except to the extent caused by the negligence or willful misconduct of any of the foregoing Indemnitees.

7.6 Common Areas. Subject to the limitations expressly set forth in this Declaration, Declarant hereby grants and reserves easements burdening each of the Parcels for the benefit of the other Parcels for the purpose of the use and enjoyment of the Common Areas.

7.7 Encroachments. Declarant hereby grants and reserves easements burdening each of the Parcels for the benefit of each of the other Parcels for any encroachments which may exist as of the Effective Date, or minor encroachments hereafter necessitated by reason of vertical or lateral displacement, movement or settling of Improvements, provided that no encroachment not in existence as of the Effective Date shall be permitted which materially interferes with the use and enjoyment of the servient tenement.

7.8 Easement To Perform Obligations. Declarant hereby grants and reserves an easement burdening each of the Parcels of the Property for the benefit of the other Parcels of the Property for the purpose of the performance by each Owner of the Property of such Owner's obligations under this Declaration.

7.9 Nature Of Easements. Unless specifically described as "exclusive," any easement granted or reserved hereunder shall be non-exclusive. All easements under this Article 7 shall be easements appurtenant to the benefited Parcel.

7.10 No Merger. Notwithstanding the union of (a) the fee simple title to any of the Parcels, or any portion thereof, with (b) any right, title or interest in the easements granted by or reserved pursuant to this Declaration, it is the intention of Owners that the separation of such fee simple estate and such

right, title or interest in such easements shall be maintained, and that a merger shall not take place without the express written consent of the Owner of the affected Parcel.

## ARTICLE 8

### COMMON AREAS

8.1 **Use of Common Areas.** Subject to the limitations expressly set forth in this Declaration, the use of the Common Areas by each Owner and Occupant, and their respective Permittees, shall be in common with all other Owners and Occupants, and their respective Permittees. Each Owner shall keep the Common Areas on its Parcel free and clear of any obstructions created or permitted by such Owner, or resulting from such Owner's or its Occupants' or their Permittees' activities, so as not to unreasonably interfere with the use and enjoyment by the other Owners and Occupants, and their respective Permittees, of the Common Areas for which such other Owners and Occupants have use rights under this Declaration.

8.2 **Maintenance and Repair of Common Areas.**

8.2.1 **In General.** Each Owner shall be responsible for the maintenance, repair and replacement of all Common Areas located on its Parcel in a clean, orderly and first-class condition and appearance, and in compliance with all Governmental Requirements. The foregoing obligations of maintenance, repair and replacement shall include, without limitation, gardening, landscaping, repaving, resurfacing, sealing, repairing, painting, lighting, cleaning, sweeping, Common Area trash removal, replacing necessary appropriate directional signs, markers and lines, maintaining and replacing shrubs, trees, vegetation, the maintenance, repair and replacement of irrigation and lighting systems, and the maintenance, repair and replacement of all systems and equipment serving the Common Areas. Each Owner shall perform its obligations under this Section 8.2 in a manner so as reasonably minimize, to the extent commercially practicable, interference with each Owner's rights of use and enjoyment of the Common Areas.

8.2.2 **Perimeter Shared Streets.** This Section 8.2 shall be applicable to the portion of any private street or driveway that is located along the boundary of an Owner's Parcel and which is partially located on such Owner's Parcel and partially located on adjacent property located outside of the Property (a "Shared Street"). Notwithstanding any contrary provision of this Section 8.2, (a) Declarant shall be entitled to execute and record against the Property an agreement for the shared construction, use, maintenance and repair of Shared Streets, and if such agreement is executed after the conveyance of a Parcel of the Property to a third party Owner, then upon Declarant's request such Owner shall execute such agreement for recordation against such Owner's Parcel, and (b) Declarant shall have the right to perform (or enter into an agreement for a third party to perform) the maintenance and repair of Shared Streets, in which event each Owner of a Parcel on which a Shared Street is located shall be responsible for reimbursement to Declarant (or its designee) of the cost to maintain and repair the portion of the Shared Street located on such Owner's Parcel.

## ARTICLE 9

### REAL ESTATE TAXES AND ASSESSMENTS

Each Owner shall be required to pay all Real Estate Taxes and Assessments assessed or imposed upon or with respect to its Parcel and Improvements located on such Parcel prior to the delinquency date for the payment of such Real Estate Taxes and Assessments.

## **ARTICLE 10**

### **DAMAGE OR DESTRUCTION OF IMPROVEMENTS**

**10.1 Damage or Destruction of Improvements Other Than Common Areas.** If any Improvements located on an Owner's Parcel other than Common Areas are damaged or destroyed by any casualty, or taken by condemnation or the exercise of the power of eminent domain, the Owner of such Parcel shall, at such Owner's sole cost and expense, either (a) promptly restore such Improvements (or such Improvements as have not been taken by condemnation or the exercise of the power of eminent domain) to their condition existing immediately prior to the damage or taking, subject to such alterations as may be permitted pursuant to Section 3.2 of this Declaration, or (b) to the extent the Owner of such Parcel elects not to restore its Improvements, such Owner shall raze such damaged or destroyed Improvements, and shall forthwith grade, pave and/or landscape the area on which such Improvements were located to an attractive and safe condition that is consistent and compatible with the use and appearance of the remainder of the Property as a first-class restaurant, retail and carwash development. The repair, restoration or other work described in this Section 10.1 shall be commenced and completed in a diligent manner.

**10.2 Damage or Destruction of Common Areas.** If any of the Common Areas are damaged or destroyed by any casualty, the Owner of the Parcel on which the affected Common Areas are located shall, at such Owner's sole cost and expense, promptly restore the damaged Common Areas to their condition existing immediately prior to the damage or taking, subject to such alterations as may be permitted pursuant to Section 3.2 of this Declaration; provided, however, that in the case of a Shared Street, Declarant (or its designee) shall have the right to perform the restoration, in which case the Owner of the Parcel on which such Shared Street is located shall reimburse Declarant (or its designee) for the cost of the restoration work for the portion of the Shared Street located on such Owner's Parcel. The repair, restoration or other work described in this Section 10.2 shall be commenced and completed in a diligent manner. No Owner shall have the affirmative obligation to perform alterations or restoration work with respect to the Common Areas located on such Owner's Parcel that are impacted by a condemnation or taking by eminent domain; provided, however, that if such condemnation or taking impairs access over drive aisles or ingress/egress reasonably necessary for the free flow of traffic to and from another Parcel, and the Owner of the Parcel as to which the taking occurred does not perform the necessary alteration or restoration work to restore such access and/or ingress/egress, then the Owner of such other Parcel shall have the right to restore such access or ingress/egress, provided that any alteration or restoration work to restore such affected access and/or ingress/egress does not materially adversely affect or interfere with access to, or the use of parking on, such other Owner's Parcel. In such case, any Owner of a Parcel that receives an award for such taking that includes a portion attributable to the impairment of the particular access or ingress/egress that is the subject of the restoration work shall make available such portion of the award to fund the cost of the alteration or restoration work.

## **ARTICLE 11**

## **DEFAULTS / ENFORCEMENT**

11.1 **Defaults.** Any Person that commits a breach of any material covenant, restriction, term or provision of this Declaration shall be considered to be in default under this Declaration if such Person fails to cure such breach within thirty (30) days following written notice from an aggrieved Owner specifying such breach; provided, however, that if the nature of the particular breach reasonably requires more than thirty (30) days to cure, then such Person shall not be considered to be in default of this Declaration if such Person commences the cure of the breach within the foregoing thirty (30) day period and thereafter diligently prosecutes such cure to completion.

11.2 **General Remedies.** Subject to the provisions of Sections 11.1 and 13.2, and Article 14 below, in the event of any default of this Declaration, an aggrieved Owner shall have the right to prosecute a proceeding at law or in equity against any Owner or Occupant or any other Person or Persons who have violated any of the provisions, covenants, conditions and restrictions set forth in this Declaration, to enjoin or prevent such violation, to cause said violation or breach to be remedied, or to recover damages for said violation; provided, however, that nothing herein contained shall be deemed to impose upon any aggrieved Owner any liability for the failure to prosecute a violation or breach of this Declaration. If a Parcel shall be owned by more than one Owner, each tenant in common or joint tenant Owner shall be jointly and severally liable for the violation or breach of any covenant, condition, restriction or provision contained in this Declaration pertaining to such Parcel. Notwithstanding the foregoing, no Owner shall be permitted to prosecute a proceeding against any Occupant of another Owner's Parcel (as opposed to the Owner itself) for a breach of this Declaration unless such breach has a material adverse effect on the use and enjoyment by the aggrieved Owner of its Parcel and/or Improvements and/or its rights under this Declaration.

11.3 **Action by Default Curing Owner.** Without limitation of any other rights or remedies of an aggrieved Owner under this Article 11, if an Owner defaults in the performance of its obligations under this Declaration as provided in Section 11.1 above, then the Owner that sent the notice of the breach under Section 11.1 above (the "**Default Curing Owner**") may proceed to take the action required to cure the default upon delivery of an additional five (5) days' written notice to the defaulting Owner and the other Owners of the Property specifying that the Default Curing Owner intends to cure the default. If the action taken by the Default Curing Owner was in fact required to have been performed by the defaulting Owner, then the Default Curing Owner shall be entitled to prompt reimbursement from the defaulting Owner for the reasonable costs and expenses incurred by Default Curing Owner in curing the default.

11.4 **Lien Rights.** In addition to any other rights or remedies for a default under this Declaration, but subject to compliance with applicable law, if the Owner of a Parcel fails to make any payment that is owed to another Owner or Declarant under this Agreement, then the defaulting Owner shall be liable to such other Owner or Declarant (as applicable) for all out-of-pocket costs and expenses incurred by such Owner or Declarant in collecting same (including reasonable attorneys' fees), and the unpaid amount owing under this Declaration and all such costs of collection shall constitute a lien on the defaulting Owner's Parcel upon recordation by the obligee Owner or Declarant (as applicable) of a claim of lien in the office of the Recorder of the County in the State of Utah in the Property is located.

11.5 **Deemed to Constitute a Nuisance.** The result of every action or omission whereby any covenant, condition, restriction or provision herein contained is violated, in whole or in part, is hereby

declared to be and constitute a nuisance, and every remedy allowed by law or equity against any person causing a nuisance shall be applicable against the Owner, Occupant or any other Person responsible for such action or omission, and may be exercised by any aggrieved Owner.

**11.6 Failure To Enforce Not A Waiver Of Rights.** The failure of any aggrieved Owner to enforce any covenant, condition, restriction or provision herein contained shall in no event be deemed to be a waiver of the right thereafter to do so, nor of the right to enforce any other covenant, condition, restriction or provision set forth in this Declaration.

**11.7 Termination.** Notwithstanding anything contained or implied in this Declaration to the contrary, in no event shall the remedies available hereunder for a breach or default under this Declaration include termination of this Declaration. Each Owner hereby waives any right under law, equity or otherwise, to terminate this Declaration under any circumstance other than as set forth in Article 12 below.

**11.8 Force Majeure.** Except as otherwise expressly provided in this Article 11 or elsewhere in this Declaration, each Owner shall be excused from performing any obligation or undertaking set forth in this Declaration, except any obligation to pay any money (unless such payment is conditioned upon performance of an obligation or undertaking excused by this Article 11), in the event, but only to the extent and for so long as, the performance of such obligation is prevented, delayed or hindered by any of the following (collectively, "**Force Majeure**"):

- (a) an act of God, fire, earthquake, flood, explosion, action of the elements, war, invasion, insurrection, riot, mob violence, sabotage, pandemic, inability to procure or general shortage of labor, equipment, facilities, materials or supplies in the ordinary course on the open market;
- (b) failure of normal transportation, strike, lockout, action of labor unions;
- (c) condemnation, requisition, law, order of governmental or civil or military authorities;
- (d) the inability to obtain governmental approvals or permits despite the exercise of due diligence and good faith efforts; or
- (e) any other cause similar to the foregoing not within the reasonable control of such Owner (financial ability or negligence excepted).

Each Owner shall give notice of any such delay to the other Owner(s) within thirty (30) days of such Owner's actual knowledge of the occurrence of the event with respect to which such Owner intends to claim a permitted delay hereunder.

## **ARTICLE 12**

### **TERM**

This Declaration shall be effective as of the date of Recordation and shall continue in full force and effect for ninety-nine (99) years thereafter. Thereafter, this Declaration shall be automatically extended for all of the Parcels for successive periods of ten (10) years each, unless at least one (1) year prior to the end of the initial term of this Declaration or any such extension period an Owner executes (and causes its Mortgagee to consent to) an instrument pursuant to which such Owner elects to have this Declaration terminate with respect to such Owner's Parcel, in which case this Declaration shall terminate as to such Parcel at the end of the initial term or then-existing extension period. Notwithstanding any contrary provision hereof, no termination shall terminate the easements granted herein. No consent of any other Person, other than each Owner and such Owner's Mortgagee(s), shall be required to effectuate a termination or amendment of this Declaration. Upon termination of this Declaration, all rights and privileges derived from, and all duties and obligations created and imposed by, the provisions of this Declaration, shall terminate and have no further force or effect; provided,

however, that the termination of this Declaration shall not terminate the easements granted herein, or limit or affect any remedy at law or in equity of any Owner against any other Owner with respect to any liability or obligation arising or to be performed under this Declaration prior to the date of such termination.

## **ARTICLE 13**

### **RIGHTS OF LENDERS**

13.1 **Priority of Lien of Mortgage.** This Declaration shall be and remain senior in priority to all Mortgages hereafter executed upon the Property, any Parcel or any portion thereof; provided, however, that no breach of the covenants, conditions or restrictions set forth in this Declaration, or foreclosure of any lien herein created for the payment of money, shall affect, impair, defeat or render invalid the lien, charge or priority of any Mortgage made in good faith and for value and encumbering any Parcel. Any lien created herein for the payment of money shall be subordinate to the lien of any Mortgage made in good faith and for value and encumbering any Parcel, and such liens shall be extinguished by the foreclosure of any Mortgage as to payments which became due prior to such foreclosure. In no event shall any sale or transfer (whether by foreclosure or otherwise) relieve any Parcel from any lien rights which may be created hereunder for the payment of any money thereafter becoming due. Any Mortgagee or other Owner whose title to a Parcel is derived through foreclosure, trustee's sale or deed in lieu of foreclosure, shall take title to such Parcel subject to, and shall be bound by, all the covenants, conditions and restrictions set forth in this Declaration. Nothing in this Declaration shall be construed to release any Owner from its obligation to pay costs levied pursuant to this Declaration during the period of its ownership of the Parcel.

13.2 **Notice of Default.** Each Mortgagee, upon filing a written request for such notification with the then Owners of the Property, is entitled to written notification of any notice of breach by the Owner of the Mortgagee's Parcel in the performance of such Owner's obligations under this Declaration. Such Mortgagee shall thereafter have the right to cure such breach on behalf of its Owner within the thirty (30) day cure period following the expiration of the applicable cure period allowed to such Owner.

13.3 **Request for Notice.** No Mortgagee shall be entitled to receive any notice which this Declaration requires to be given, unless and until such Mortgagee has delivered a written request for such notice with the Owners of the Property at the time such written request is made. Such request for notice shall state which Parcel or Improvement is encumbered by its Mortgage. A Mortgagee's rights pursuant to this Declaration shall not be affected by the failure to request such notice. Any request for notice delivered to an Owner shall remain effective without any further action by the requesting Person for so long as the requesting Person continues to be the Mortgagee with respect to the Parcel or Improvement for which the request for notice was given, regardless of whether the Owner to which the request for notice was made continues to be the Owner of any Parcel.

13.4 **Curing Defaults.** Except as otherwise provided herein, a Mortgagee or the immediate transferee of such Mortgagee, who acquires title by judicial foreclosure, a deed in lieu of foreclosure or trustee sale, or otherwise, shall not be obligated to cure any breach of the provisions of this Declaration which occurred before such Mortgagee or transferee acquired the title to a Parcel if (a) such breach is

noncurable or is of a type which is not practical or feasible to cure, or (b) such Mortgagee did not have notice of such a breach at the time it acquired title to the Parcel.

13.5 **Additional Provisions.** No action to amend or terminate this Declaration by an Owner shall be effective to bind the Mortgagee of a then-current Mortgage of record encumbering the Parcel of such Owner, without the written consent of such Mortgagee.

13.6 **Conflicts.** In the event of any conflict between any of the provisions of this Article 13 and any of the other provisions of this Declaration, the provisions of this Article 13 shall control.

## **ARTICLE 14**

### **MISCELLANEOUS PROVISIONS**

14.1 **Constructive Notice and Acceptance.** Every Person who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property or any Parcel is and shall be conclusively deemed to have consented and agreed to every covenant, condition, restriction and provision contained in this Declaration, whether or not any reference to this Declaration is contained in the instrument by which such Person acquired an interest in the Property or such Parcel.

14.2 **Notices.**

14.2.1 Except as otherwise expressly provided in this Declaration or required by law, all notices, consents, requests, demands, approvals, authorizations and other communications provided for herein shall be in writing and shall be sent by personal delivery, certified mail, return receipt requested, or by recognized overnight courier service, to the intended party at its last known address. For purposes of this Section 14.2.1, "last known address" with respect to any Owner shall mean such Owner's address last supplied to the other then Owners of the Property. If no address is supplied, then such Owner's address shall be deemed to be the address of any Parcel owned by such Owner.

14.2.2 With respect to (a) any notice, consent, request, demand, approval, authorization or communication, and (b) any document or instrument given or made available to any Owner hereunder and which might concern an Occupant of such Owner's Parcel, it shall be the sole responsibility of such Owner to make a copy thereof available in a timely manner to such Occupant.

14.3 **Liberal Construction.** The provisions of this Declaration shall be liberally construed to effectuate its purpose. The failure to enforce any provision of this Declaration shall not constitute a waiver of the right to thereafter enforce such provision or the right to enforce any other provision hereof.

14.4 **Headings.** Section and Article headings, where used in this Declaration, are inserted for convenience only and are not intended to be a part hereof or in any way to define, limit or describe the scope and intent of the particular provisions to which they refer.

14.5 **Effect of Invalidation.** Each covenant, condition and restriction of this Declaration is intended to be, and shall be construed as, independent and severable from each other covenant, condition and restriction. If any covenant, condition or restriction of this Declaration is held to be invalid by any court, the invalidity of such covenant, condition or restriction shall not affect the validity of the remaining covenants, conditions and restrictions hereof.

14.6 **Estoppels.** Within twenty (20) days following a request in writing by an Owner, the other Owners of the Property shall execute and deliver to any prospective purchaser or any current or prospective Mortgagee of the requesting Owner's Parcel an estoppel certificate confirming that (i) this Declaration is in full force and effect, and has not been modified or amended (or stating any such modifications or amendments), (ii) to the best knowledge of the certifying Owner, there are no existing uncured defaults by any Owner under this Declaration, and (iii) specifying the amount of, and the date through which any charges to be paid by the requesting Owner have been paid.

14.7 **Cumulative Remedies.** Each remedy provided for in this Declaration shall be cumulative and not exclusive. The failure to exercise any remedy provided for in this Declaration shall not constitute a waiver of such remedy or of any other remedy provided herein or therein.

14.8 **Attorneys' Fees and Costs.** If any party brings an action or proceeding (including, without limitation, any cross-complaint, counter-claim, third-party claim or arbitration proceeding) against an Owner by reason of the alleged breach or violation of any provision hereof, or for the enforcement of any provision hereof, or to interpret any provision hereof, or otherwise arising out of this Declaration, the prevailing party in such action or proceeding shall be entitled to its costs and expenses of such action or proceeding, including but not limited to its actual attorneys' fees reasonably incurred, which shall be payable by the non-prevailing party whether or not such action or proceeding is prosecuted to judgment or award. For the purposes of this Declaration, the term "attorneys' fees" shall mean the actual fees and expenses of counsel to the parties hereto reasonably incurred, which shall include fees and expenses reasonably incurred with respect to post-judgment motions, contempt proceedings, garnishment, levy, debtor and third-party examinations, discovery, bankruptcy, and proceedings to enforce, perfect or collect a judgment.

14.9 **Approvals.** In the event that an Owner is requested in writing to provide its approval or consent to a matter described in this Declaration, and such Owner does not respond to such request in writing within thirty (30) days following any such request which makes reference to the provisions of this Section 14.9, and if such Owner continues to fail to respond to the request with five (5) business days after a second notice that makes reference to the provisions of this Section 14.9, then such Owner shall be deemed to have approved, or consented to, the matter as to which its approval or consent was requested.

14.10 **Leases.** Any agreement for the leasing of a Parcel, Improvement, or any portion thereof, (hereinafter in this Section 14.10 referred to as a "lease") shall provide that the terms of such lease shall be subject in all respects to the provisions of this Declaration; provided, however, that no failure of a lease to specifically provide the foregoing shall affect the fact that the lease is subject to this Declaration and all provisions set forth herein. Any Owner who leases its Parcel, Improvements, or any portion thereof, shall be responsible for assuring compliance with this Declaration by the Occupants of such Owner's Parcel. Notwithstanding any contrary term or provision of this Declaration, no Occupant or Permittee shall have any rights or remedies under this Declaration, including any rights to enforce this Declaration; provided, however, that the Owner of the Parcel on which an Occupant is located shall have the right to enforce this Declaration for the benefit of such Occupant.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Declarant has executed this Declaration as of the Effective Date.

SOUTH MOUNTAIN ADVANCEMENT, LLC, a  
Delaware limited liability company

By: CCA Acquisition Company, LLC, a California  
limited liability company, its managing  
member

By:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of

On 08/02/2023 before me, Alex Itkis, Notary Public

(insert name and title of the officer)

personally appeared Steven H. Usdan,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing  
paragraph is true and correct.

WITNESS my hand and official seal.

Signature Alex Itkis

(Seal)



**EXHIBIT A**  
**LEGAL DESCRIPTION OF PROPERTY**

The following described real property situated in the City of Riverton, Salt Lake County, Utah:

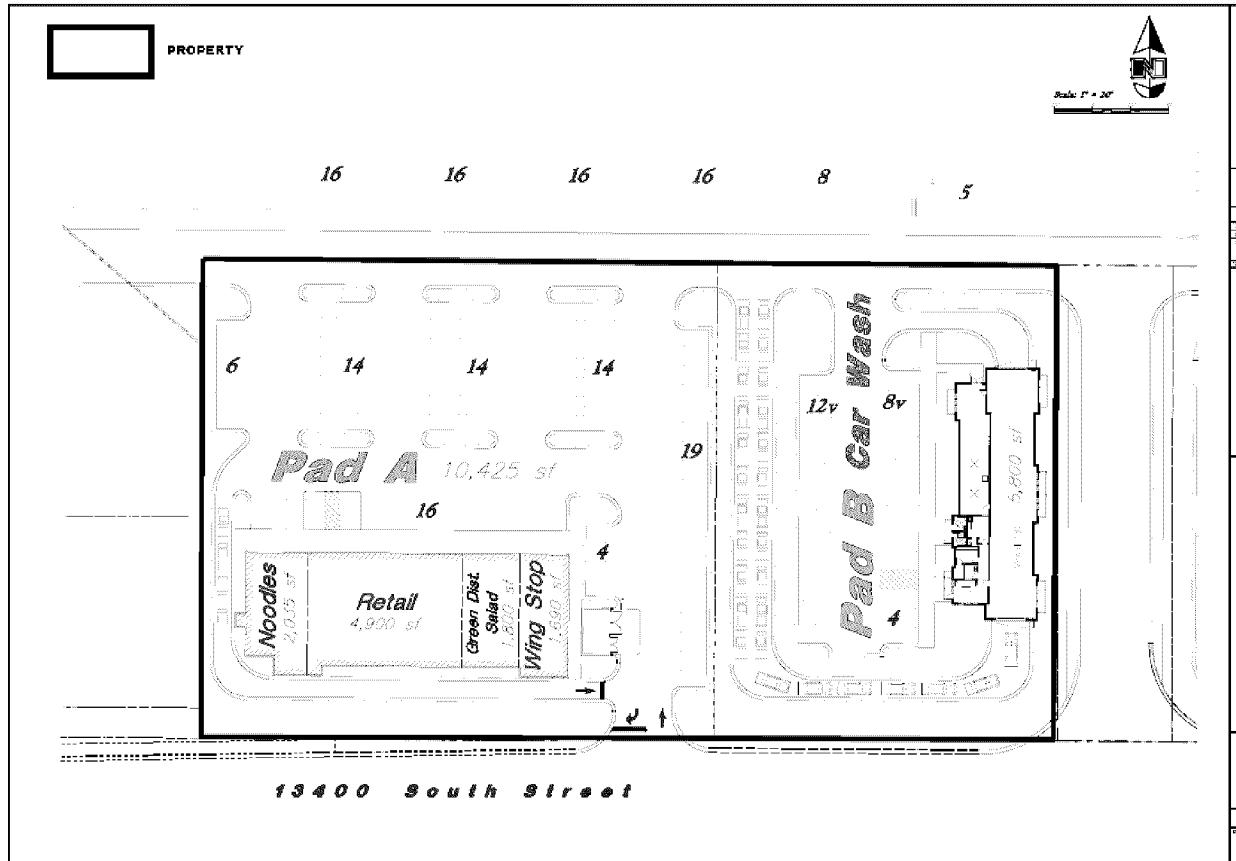
Lots 1 and 2 of "The Village at South Mountain West" subdivision to be recorded immediately following this Declaration, being a portion of the following described land:

A part of the Southeast Quarter of Section 31, Township 3 South, Range 1 West, Salt Lake Base and Meridian, U.S. Survey, in Riverton City, Salt Lake County, Utah:

Beginning at a point on the Northerly Line of 13400 South Street as defined in Record of Survey No. S2013-03-0124, Records of the Salt Lake County Surveyor, located 1302.52 feet South 89°33'28" East along the South line of said Section 31; and 57.02 feet North 0°26'32" East from a Brass Cap Monument found marking the South Quarter Corner of said Section 31; and running thence North 0°29'32" East 251.38 feet along the Westerly Line and Westerly Line extended of said Record of Survey; thence South 89°33'36" East 442.19 feet; thence North 0°26'24" East 15.88 feet; thence North 18°11'19" East 13.53 feet; thence North 0°26'24" East 9.23 feet; thence South 89°33'36" East 66.00 feet; thence South 0°26'24" West 9.23 feet; thence South 17°18'32" East 13.53 feet; thence South 0°26'24" West 15.88 feet; thence South 89°33'36" East 446.90 feet to the Westerly line of 4050 West Street as dedicated by that certain Road Dedication Plat of Riverton City Western Commercial District recorded as Entry No. 13051519 in Book 2019P of Plats at Page 225, Records of the Salt Lake County Recorder's Office; thence along said Westerly line the following two courses: South 0°26'46" West 165.12 feet; and South 8°23'52" East 26.41 feet to said Northerly line of 13400 South Street; thence along said Northerly line the following five courses: South 0°03'04" East 17.86 feet; South 45°11'40" West 56.79 feet; North 89°33'36" West 678.53 feet; South 89°10'01" West 89.05 feet; and North 89°33'28" West 160.23 feet to the point of beginning.

Contains 242,878 sq. ft.  
or 5.576 acres

**EXHIBIT B**  
**SITE PLAN FOR PROPERTY**



## **EXHIBIT C**

### **EXISTING EXCLUSIVE USE RESTRICTIONS**

Each of the following use restrictions runs for the benefit of the specific Lot referenced below of CCA Riverton Subdivision referenced in Exhibit A above.

1. **Wingstop -- Occupant of Space in the Building on Lot 1 under Lease dated November 12, 2021.**

The primary use of the operation of a restaurant serving chicken wings or a restaurant with the word "wing" as part of its tradename. The term "primary use" is defined as the sale of chicken wings exceeding twenty percent (20%) of the Occupant's total annual sales. Notwithstanding the foregoing, such foregoing restriction shall not be applicable to (a) any Occupant that occupies more than 8,000 square feet; or (b) any space occupied pursuant to a lease entered into prior to November 12, 2021, including any assignment, sublease, extension, renewal or modification of any such lease (other than a modification of the permitted use clause of such lease in conflict with the foregoing restriction) as to which the landlord under such lease does not have the legal right to restrict the Occupant's use in compliance with such use restriction.

2. **Noodles -- Occupant of Space in the Building on Lot 1 under Lease dated February 17, 2022.**

The primary purpose of a restaurant selling prepared noodles and pasta and noodle and pasta-related dishes, for on or off-premises consumption. The following restaurants operating under the listed trade names, or operating under any successor trade names, are prohibited from operating in the Property as part of such use restriction: Wild Noodles, Nothing But Noodles, Noodles, Etc. (hereafter, collectively referred to as "Prohibited Concepts", or individually as "Prohibited Concept"). Notwithstanding the foregoing, the foregoing use restriction shall not apply to (a) Occupants of the Property holding leases executed prior to February 17, 2022 and such Occupants' subtenants, successors, assigns or like-replacements under such existing leases, (b) any Occupant occupying more than 5,000 square feet of contiguous Floor Area in the Property, (c) any full service, sit-down restaurant, which for purposes hereof shall mean a restaurant where food and drink orders are taken from, and served to, seated customers at tables by waitstaff (e.g., Applebee's, Outback or Red Lobster); (d) any ethnic restaurant (e.g., French, Italian or Mexican); (e) any fast food restaurant (e.g., McDonald's, KFC and Taco Bell); (f) any so-called full service, sit-down type/styled "casual theme" restaurant, and (g) any occupant whose annual gross sales of any one or more of noodles and pasta dishes do not exceed twenty percent (20%) of their total annual gross sales.

3. **Apollo Burger -- Occupant of Lot 4 Under Lease dated January 20, 2021.**

The primary business of a fast food style restaurant with drive-through specializing in the sale of cooked hamburgers. The term "specializing" means that more than thirty-five percent (35%) of the gross sales of the Occupant at its location on the Property is derived from the sale of cooked hamburgers. Notwithstanding the foregoing, the foregoing restriction shall not be applicable to (a) any full-service, sit-down style restaurant or restaurant primarily offering wait-service to its customers as opposed to counter-service; or (b) any space occupied pursuant to a lease entered into prior to January 20, 2021, including any assignment, sublease, extension, renewal or modification of any such lease (other than a modification of the permitted use clause of such lease in conflict with the foregoing restriction).

4. **7-11 -- Occupant of Lot 5 under Lease dated May 4, 2021.**

The operation of (i) a business which provides or offers the full or self-service dispensing of gasoline from pumps to the ultimate consumer (a “Motor Fuels Facility”), (ii) a Convenience Store (as hereafter defined), or (iii) a business which offers for sale or rental, or offers for sale or rental, in connection with all or any part of its business operations, any of the following items (the “Exclusive Items”) (clauses (i), (ii) and (iii) are sometimes referred to collectively herein as the “Use Restriction”):

- (1) cigarettes, vaporizers and tobacco products, unless vended by machine;
- (2) beer and wine for off premise consumption; and
- (3) motor fuels or petroleum products.

Notwithstanding any provision hereof, the exclusive rights with respect to the Exclusive Items shall not apply to (A) an auto supply store, including, but not limited to, AutoZone, (B) a tenant that leases 10,000 square feet or more under one contiguous roof, (C) restaurants (including, without limitation, fast food restaurants), (D) retail stores that sell one or more of the Exclusive Items on an ancillary basis (i.e., not to exceed ten percent (10%) of gross merchandise sales as to each item, provided that no such retail store may be reasonably characterized generally as a Convenience Store or Motor Fuels Facility, (E) a smoothie-type business (such as, but not limited to, Jamba Juice, or (F) an automotive mechanic shop or vehicle service station, including, but not limited to, Express Oil, or Jiffy Lube, provided, however, that in no event shall such automotive mechanic shop or vehicle service station provide or offer the sale of gasoline. The Use Restriction shall also not apply to any use under a lease existing as May 4, 2021 (including any renewal, extension or modification of such lease other than a modification to amend the permitted use clause in violation of the Use Restriction) as to which the landlord under such lease does not have the right to enforce the Use Restriction against the tenant.

The term “Convenience Store” shall mean a retail store whose primary purpose is selling, renting or providing a similar mix of merchandise and/or services customarily sold, rented or provided from time to time at stores operated or franchised by Tenant within the State of Utah, or at stores such as a Cumberland Farms, Circle K, Stop N Shop, On the Run, High’s, QuickChek, Store 24, WaWa, and Kwik Stop, and other regional, ethnic or “mom and pop” convenience stores or businesses.

##### 5. Dutch Bros. -- Occupant of Lot 3 under Lease dated June 11, 2021.

The primary business of the sale of any of the following: coffee, blended drinks, smoothies, or energy drinks. “Primary business” means gross sales of coffee, blended drinks, smoothies, or energy drinks that exceed 25% or more of total gross sales. Such restriction does not apply to (a) yogurt shops, (b) ice cream shops, (c) Jamba Juice, Smoothie King, or businesses similar to Jamba Juice or Smoothie King, or (d) any tenant occupying greater than 5,000 leasable square feet, (e) other tenants that sell non-branded brewed coffee or brewed tea, or (f) tenants who operate a grocery, convenience, or specialty store that offers branded coffee or tea and whose sale of such items are incidental to that tenant’s primary use. Such restriction shall also not be applicable to an existing lease in effect prior to June 11, 2021 (as thereafter assigned, subleased, amended or extended, except for an amendment that modifies the permitted use in conflict with the exclusive use granted to Tenant by this paragraph) in which the landlord under such lease does not have the right to restrict the tenant’s use in compliance with this paragraph by withholding its consent to a change in use that would violate the use restriction in this paragraph.

6. The Dolly Llama -- Occupant of Space in the Building on Lot 1 under Lease dated March 14, 2023.

The operation of a food establishment serving primarily ice cream and waffles. Primary purpose means that more than 50% of an occupant's gross revenues are derived from the sale of ice cream and waffles. For purposes of clarification, such use restriction shall not be applicable to a business that primarily operates as a yogurt, smoothie, bakery or other dessert shop, or as a restaurant primarily serving breakfast foods. In addition, the Exclusive Use shall not apply to (a) an occupant under a lease executed prior to March 14, 2023, (b) any occupant occupying 2,500 square feet or more of floor area, (c) any occupant whose operation includes the use of a drive-thru or pick-up window, or (d) incidental uses.

7. VJ Nails -- Occupant of Space in the Building on Lot 1 under Lease dated April 14, 2023.

The primary purpose of the operation of a nail salon. The term "primary purpose" means greater than fifty percent (50%) of gross revenues are derived from nail salon services. Notwithstanding the foregoing, such use restriction shall not apply to (a) an occupant under a lease executed prior to April 14, 2023, (b) any occupant occupying more than 2,500 square feet of floor area, or (c) incidental uses.