

DOC # 20060001691

Restrictive Page 1 of 25  
Russell Shirts Washington County Recorder  
2/6/06 4:37 PM Fee \$ 58.00 By FIRST TITLE OF UTAH



RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

Irvine Investment Company, L.C.  
Attn: Robert D. Irvine  
4931 S. Fairview Drive  
Salt Lake City, Utah 84117

(Space above this line for Recorder's use)

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

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS,  
AND GRANT OF EASEMENTS ("Declaration") is made as of the \_\_\_\_\_ day of \_\_\_\_\_,  
2006, by IRVINE INVESTMENT COMPANY, L.C., a Utah limited liability company  
("Declarant").

**RECITALS**

- A. Declarant is the owner of approximately 9 acres of real property situated in Washington County, State of Utah, as shown on the Site Plan attached hereto as Exhibit A ("Site Plan") and more particularly described on Exhibit B attached hereto, which real property is referred to herein as the "Shopping Center."
- B. Declarant intends to commercially develop the Shopping Center and as a framework for such development Declarant desires to impose certain easements upon the Shopping Center, and to establish certain covenants, conditions and restrictions with respect to the Shopping Center, for the mutual and reciprocal benefit and complement of the Shopping Center and the present and future owners thereof, on the terms and conditions hereinafter set forth.

**DECLARATION**

NOW, THEREFORE, for and in consideration of the foregoing, and the terms and conditions set forth herein, and other good and valuable consideration, Declarant does hereby declare, adopt, establish and impose the following easements, covenants, conditions, and restrictions which shall be applicable to the Shopping Center, and it is hereby declared that the Shopping Center shall be held, transferred, improved, sold, and conveyed subject to the following covenants, conditions, restrictions and easements, which are for the purpose of protecting the value and desirability of the Shopping Center, and which shall run with the land and shall be binding upon, and inure to the benefit of, all the Parcels comprising the Shopping Center and all parties having rights, title or interest in or to the Shopping Center or any part thereof, and their heirs, successors, and assigns. By accepting the transfer or conveyance of title to any Parcel within the Shopping Center, such transferee accepts and agrees to the terms and conditions of this Declaration and shall have a privity relationship with Declarant under this Declaration.

1. **DEFINITIONS.**

1.1 **Common Area.** "Common Area" means all portions of the Shopping Center (as it may be expanded from time to time in accordance with the provisions of this Declaration) upon which buildings are not constructed or otherwise cannot be constructed.

1.2 **Hazardous Materials.** "Hazardous Materials" means any substance or material which is defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "extremely hazardous waste", "acutely hazardous wastes", "restricted hazardous waste", "toxic substances", or "known to cause cancer or reproductive toxicity" (or words of similar import), petroleum products (including crude oil or any fraction thereof) or any other chemical, substance or material which is prohibited, limited or regulated under any federal, state or local law, ordinance, regulation, order, permit, license, decree, common law, or treaty now or hereafter in force regulating, relating to or imposing liability or standards concerning materials or substances known or suspected to be toxic or hazardous to health and safety, the environment or natural resources ("Environmental Law").

1.3 **Improvements.** "Improvements" means the following, without limitation: (a) the construction, installation, erection or expansion of any building, structure, Signs, or other improvements, including utility facilities; (b) the demolition or destruction, by voluntary action, of any building, structure or other Improvements; (c) the grading, excavation, filling or similar disturbance to the surface of the land including, without limitation, change of grade, change of ground level, change of drainage pattern or change of stream bed; (d) landscaping, planting, clearing or removing of trees, shrubs, grass or plants; (e) the construction, installation, erection, placement or expansion of any temporary or other nonpermanent structure, improvement or facility such as, without limitation, any tent, shed, trailer, or outdoor storage area or facility; and (f) any change or alteration of any previously approved Improvement to Property including any change of exterior appearance, color or texture.

1.4 **Laws.** "Laws" means all applicable laws, rules, ordinances and regulations of every governmental body having jurisdiction over the Shopping Center.

1.5 **Manager.** "Manager" means the Declarant, as long as the Declarant is an Owner, and thereafter Manager will be an Owner or other entity as provided herein. The Manager is responsible for the maintenance and operation of the Common Area as provided in this Declaration.

1.6 **Occupant.** "Occupant" means any person, corporation, partnership, limited liability company, or any other entity, public or private, that is entitled to occupy from time to time any portion of a the Shopping Center under an ownership right or any lease, sublease, license, concession, or other arrangement or agreement.

1.7 **Owner.** "Owner" means Declarant and any other person or entity having fee record title interest to any Parcel in the Shopping Center, and their respective assigns, grantees, and successors in interest.

**1.8 Parcels.** Declarant reserves the right to subdivide the Shopping Center into multiple parcels, and each subdivided parcel shall be referred to herein as a "Parcel". The Parcels may be depicted as on the Site Plan, but the Site Plan as attached shall not be binding on Owner as to what land in the Shopping Center becomes a separate Parcel.

**1.9 Signs.** "Signs" means any pylon, monument or exterior building sign placed or constructed within the Shopping Center or upon any building within the Shopping Center and any signs visible through any window or otherwise from the exterior of any building.

**1.10 Utilities.** "Utilities" shall include without limitation, gas, electricity, storm and sanitary sewer, domestic water, fire sprinkler water, irrigation water and telephone services.

## **2. IMPROVEMENT OF PROPERTY.**

**2.1 Approval of Improvements.** No Improvements, including without limitation any Signs, may be constructed within the Shopping Center without the prior review and approval of Declarant. If any Owner desires to construct or place any Improvements within the Shopping Center, such Owner shall provide preliminary plans and exterior elevations for such Improvements and a site plan showing the location of such Improvements to Declarant for review and approval. All buildings in the Shopping Center shall be designed so that the exterior elevation of each building will be architecturally and aesthetically compatible with the others, including the height, color, materials, design and architectural theme (including Signs located thereon) as reasonably determined by Declarant. In addition, Declarant shall approve the location, footprint, and height of any buildings and other Improvements constructed within the Shopping Center, which approval shall be subject to Declarant's sole and absolute discretion. With respect to Signs, review and approval shall include, without limitation, review and approval of the size, design, materials, color, location and copy of text of signs; provided, however, that any signs within a building which are not visible from the exterior of such building shall not require the approval of the Declarant.

**2.2 Construction.** All building construction must be diligently prosecuted to completion, shall be performed in a workmanlike manner and in accordance with the requirements of all governmental authorities having jurisdiction over such work and shall be performed in a manner that does not unreasonably interfere with the operations of any business within the Shopping Center. If an Owner or an Occupant commences construction or exterior remodeling of a building within the Shopping Center, but such construction or exterior remodeling ceases prior to the completion of the building for a period exceeding one hundred twenty (120) days, and the Declarant in its reasonable discretion determines that such unfinished building or exterior remodeling creates an unsafe or unsightly condition detrimental to the Shopping Center, upon thirty (30) days' prior written notice to the Owner of the Parcel upon which such construction has ceased, the Declarant, in the case of uncompleted construction, may demolish part or all of such building or construct part or all of such building or construct a barricade around such building and, in the case of uncompleted remodeling, complete all or part of such remodeling or construct a barricade around such building. Upon completion of any such work by the Declarant, the Owner upon whose Parcel the building is located shall reimburse the Declarant upon demand for all amounts expended in connection with such work. In the event

such Owner fails to so reimburse the Declarant, the Declarant shall have the lien and other rights set forth in Article 14 herein entitled "DEFAULT."

**2.3 Construction Type.** Declarant may construct buildings within the Shopping Center using Type II-B or III-B (nonrated) construction as defined in the 2003 edition of the Uniform Building Code or its local equivalent ("Construction Type") or some other construction technique requiring sprinklering (if required by Laws) of other buildings in the Shopping Center. All other buildings constructed in the Shopping Center shall be constructed to comply with all governmental requirements (including sprinklering and setback requirements) which arise by reason of such use of the Construction Type or any other construction technique used in the buildings constructed by the Declarant within the Shopping Center.

**2.4 Liens.** No mechanic's or materialmen's liens shall be filed against any Parcel or any portion thereof in the Shopping Center as a result of work performed on, or materials provided to, any other Parcel in the Shopping Center. In the event any such liens are filed against any such Parcel or portion thereof, the Owner of the Parcel on which such work was performed or for which such materials were provided shall immediately take the necessary steps to have such lien released. In the event the Owner of the Parcel for which such work was performed or for which such materials were provided fails to so remove or release such lien against the other Owner's Parcel, and the Owner of the Parcel against which the lien is filed incurs any expenses, damages or costs, including attorneys' fees, in connection with or relating to releasing such lien, the Owner of the Parcel for which such work was performed or for which such materials were provided shall promptly reimburse all such costs, fees and expenses. Failure to reimburse such costs, fees and expenses shall provide the Owner to be reimbursed with the lien and other rights set forth in Article 14 herein entitled "DEFAULT."

**2.5 Maintenance of Parcels.** After the initial construction of the parking area and drive aisles servicing the Shopping Center, all remaining portions of each Parcel shall be free of weeds, dust and debris, and otherwise adequately maintained. The paving or landscaping and maintenance of such Parcels shall be at the sole cost and expense of the respective Owners of such Parcels, and shall not be included in the cost of maintenance of the Common Area. Notwithstanding anything to the contrary above, Declarant may develop and construct the Shopping Center in phases. If the Shopping Center is developed in phases, the foregoing paragraph shall only apply to the phases of the Shopping Center that are currently being developed. Any phases of the Shopping Center that are not currently being developed may remain in their native and natural undeveloped state.

Unless performed by the Manager pursuant to Article 4 entitled "COMMON AREA MAINTENANCE," each Owner shall maintain and repair, or shall cause to be maintained and repaired, their own Parcels (including the Common Area located thereon) in a first class condition and shall keep, or cause the same to be kept, in good condition and repair. Notwithstanding the above, each Owner shall be responsible for any maintenance, repair and/or improvement to such Owner's Parcel, the cost of which, pursuant to generally accepted accounting principles, should be capitalized, except for the repairing and resurfacing of the Parking Area which may be performed by the Manager pursuant to Article 4, entitled "COMMON AREA MAINTENANCE."

3. USE.

**3.1 General.** Each Parcel shall be used only for lawful commercial purposes and in conformance with all Laws, including, without limitation, zoning and land use laws and ordinances, parking ratios, use, building height and setback requirements, landscaping, etc. Each Parcel shall not be used in any manner so as to constitute a nuisance, and no Owner of any Parcel shall permit the accumulation of unsightly trash or debris. The Manager with Declarant's approval shall have the right from time to time to post and promulgate reasonable rules and regulations for the Shopping Center, which shall be uniformly enforced against all the Owners. The obligations set forth above shall be a restriction running with the land and shall not be affected by the status of any Owner that would otherwise exempt such Owner from complying with any municipal ordinances or Laws.

**3.2 Common Area Use.** The Common Area shall be used for vehicular access, circulation and parking, ingress and egress to and from and within the Shopping Center, and pedestrian traffic and the use of customers, invitees, licensees, agents and employees of the Owners and business occupants of the buildings constructed on the Parcels in the Shopping Center, and for the servicing and supplying of such businesses. In addition, the Common Area may be used (i) on a temporary basis as a staging area in connection with the construction and repair of any buildings, and/or Common Area in the Shopping Center so long as such use does not occupy more area than is reasonably required nor unreasonably restrict access to and from or the conduct of business within the buildings in the Shopping Center or access to and from the adjacent streets; (ii) in connection with the construction, maintenance and repair of utility lines, and water drainage and supply systems, so long as such activity is undertaken in strict compliance with the requirements of Section 5.2 entitled "Utility Systems"; and (iii) any other use required by Law. Except as specifically provided otherwise in this Declaration, no building, barricade or structure may be placed, erected or constructed within the Common Area on any Parcel, pylon and other free-standing Signs (to the extent not herein prohibited) and directional signs, bumper guards or curbs, paving, landscaping and landscape planters, lighting standards, driveways, sidewalks, walkways, parking stalls, columns or pillars supporting roof overhangs, and any other improvements as may be required by Law.

**3.3 Parking.** In addition to common parking throughout the Shopping Center, each Owner shall self park, meaning that every Parcel must have adequate parking to satisfy all applicable laws, rules or regulations (without a variance) governing or relating to parking accommodations. The number of parking spaces and the drive aisles maintained on each Parcel and the size and configuration thereof shall be as depicted on the Site Plan and approved by Declarant. Any change to the parking configuration or the drive aisles in the Shopping Center shall require the prior written approval of the Declarant. No such approval shall be deemed granted unless evidenced by an amendment to this Declaration, which amendment shall be duly recorded in the County of Washington, State of Utah. Such amendment shall attach and incorporate an amended Site Plan showing the reconfiguration of the parking spaces or drive aisles, as the case may be. The Declarant may withhold its approval of the reconfiguration of parking or drive aisles for any reason or for no reason in its sole, subjective discretion. There shall be no charge or other validation for parking in the Common Area without the prior written consent of the Declarant, which consent may be granted or withheld for any reason or for no reason in the sole, subjective discretion of the Declarant.

**3.4 Employee Parking.** Specific areas within the Common Area of the Shopping Center to be used for motor vehicle parking purposes by employees of Occupants of the Shopping Center may be designated from time to time by the Declarant. In the event employee parking areas are designated as provided herein, employees of any Owner or Occupant of any building in the Shopping Center shall use only those portions of the Common Area designated for such employee motor vehicle parking purposes. The authority herein granted shall be exercised in such manner as not to discriminate against any Owner or commercial establishment in the Shopping Center.

**3.5 Owner's Parcel.** The Owner of each Parcel shall use and cause to be used the Common Area on its Parcel exclusively for the uses specified herein and in such manner as will not unreasonably interfere with the primary purpose of the Common Area, which is to provide for parking and access for the Owners, customers, invitees, employees, agents and licensees of the businesses located within the buildings in the Shopping Center, and for the servicing and supplying of such businesses. There shall be no sale or display of merchandise of any kind in any portion of the Common Area nor on any sidewalks adjacent to any buildings without the prior written consent of the Declarant, which may be granted or withheld in Declarant's sole and subjective discretion.

#### **4. COMMON AREA MAINTENANCE.**

**4.1 Manager.** During the term hereof, the Manager shall operate and maintain, or shall cause to be operated and maintained, in a first class condition the Common Area, including the landscaping thereon, located within the Shopping Center, and shall keep the same, or cause the same to be kept, in good condition and repair. The initial Manager shall be the Declarant, and the Declarant shall serve as the Manager until it no longer has fee record title interest to any Parcel in the Shopping Center. Thereafter, the Manager shall be the Owner with fee record title interest in the largest Parcel of the Shopping Center.

In the event the Manager other than Declarant refuses to act pursuant to the provisions of this Declaration within thirty (30) days' demand of the majority of Owners therefor, the Owners may remove such Manager and appoint a replacement Manager with the consent of two-thirds (2/3) of the Owners. If a replacement Manager is not appointed, each Owner shall maintain the Common Area on its Parcel(s) in accordance with the provisions hereof.

**4.2 Maintenance Obligations of the Manager.** The Manager shall maintain the Common Area consistent with the following:

**4.2.1** Maintaining all paved surfaces of the Common Area (including the public sidewalks along public streets) in a level, smooth, evenly covered condition and cleaning, sweeping, restriping, repairing and resurfacing the Common Area as needed with the type of surfacing material originally installed or such substitute as shall in all respects be equal or superior in quality, use and durability.

4.2.2 Removing all papers, debris, filth and refuse, ice and snow, and thoroughly sweeping the Common Area to the extent reasonably necessary to keep the Common Area in a clean and orderly condition.

4.2.3 Installing, placing, maintaining repairing, and replacing any appropriate project signs, directional signs, curb stops, roadway markers, and parking stall lines or other striping.

4.2.4 Operating, repairing, and replacing, where necessary, such artificial lighting facilities as shall be reasonably required.

4.2.5 Maintaining all landscaped areas and repairing automatic sprinkler systems or water lines and replacing shrubs and other landscaping as is necessary.

4.2.6 Maintaining and repairing any and all fire loop lines or other fire protection devices, walls and fences, common storm drains, utility lines, sewers, irrigation systems and other utility systems and services which are located on, under or upon the Common Area, which are necessary for the operation and maintenance of the Common Area improvements and/or the pylon and monuments signs within the Common Area and the Shopping Center identification signs located thereon.

4.2.7 Keeping the Common Area free from obstructions not required or permitted hereunder, including, without limitation, obstructions caused by the sale or display of merchandise outside the exterior walls of the buildings located within the Shopping Center.

4.2.8 Employing all necessary personnel, contractors, subcontractors, the Managers and other persons required for operation and maintenance of the Common Area; provided, however, that if the Declarant is not the Manager, the employment of any personnel to provide security for the Common Area shall require the prior written consent of the Declarant.

4.2.9 Obtaining and maintaining a commercial general liability insurance policy insuring Manager, Declarant and the Owners, all as named insureds, against claims for personal injury, bodily injury, death and property damage occurring on, in or about the Common Areas with a "Combined Single Limit" (covering personal injury liability, bodily injury liability and property damage liability) of not less than Two Million Dollars (\$2,000,000.00) for total claims for any one (1) occurrence. The insurance limits in this Section shall be subject to increase from time to time by such amounts as the Manager and the Declarant may deem reasonable, as may be evidenced by the practice of similarly situated shopping centers.

4.3 **Annual Budget.** At least fifteen (15) days prior to the commencement of each calendar year, or such partial calendar year during the first effective year of this Declaration, the Manager shall prepare and furnish to the Owners in the Shopping Center a proposed budget for Common Area Maintenance ("CAM") (including the costs to operate, manage, maintain, and insure the Common Areas as required herein) incurred by Manager for the forthcoming calendar year or portion thereof remaining after commencement of the Term (the "**Annual Budget**"). The Annual Budget shall be based upon good faith estimates based upon actual costs and expenses, if applicable, or the projected costs and expenses of operating, managing, maintaining,

and insuring the Common Areas. The Annual Budget may contain an administrative fee not to exceed fifteen percent (15%) of the projected CAM Costs (after deducting from CAM Costs any real property taxes or insurance premiums that may be included in CAM Costs) ("Administrative Fee"). The Administrative Fee represents the Manager's administrative, labor and overhead costs associated with performing CAM, but does not include the costs, salaries, wages, benefits and related taxes of employees to the extent such employees perform CAM. In lieu of charging an Administrative Fee, the Manager may charge the reasonable fee, based upon the competitive rate of such services in Washington County, Utah, paid to a third party property manager. If Manager determines that the CAM expenses for a calendar year will vary from the amounts set forth in the Annual Budget, Manager may, by notice to the Owners, revise the Annual Budget for such year (and each Owner shall pay the accrued difference between the original and the revised Annual Budgets within fifteen (15) days after receipt of the revised Annual Budget, and thereafter pay the revised amount). Notwithstanding the above, if during any calendar year of the term of this Declaration the occupancy of the buildings located on the Shopping Center is less than one hundred percent (100%), then Manager may, in Manager's sole discretion and absolute discretion, make an appropriate adjustment of the variable components of the CAM expenses, as reasonably determined by Manager, to determine the amount of CAM expenses that would have been incurred had the buildings been fully occupied during that calendar year. This estimated amount shall be deemed the amount of CAM expenses for that calendar year. For purposes hereof, "variable components" shall include only those CAM expenses that are affected by variations in occupancy levels. Nothing in this Declaration shall be construed to limit any management fee that an Owner may charge its tenants.

#### **4.4 Payment of Each Owner's Share of the Annual Budget.**

Provided that the Manager is continuing to perform CAM as required herein, each Owner shall pay the Manager one-twelfth (1/12) of its Pro Rata Share of the Annual Budget to Manager on or before the tenth day of each calendar month for the ensuing calendar year. An Owner's Pro Rata Share of CAM expenses as set forth in the Annual Budget for any fractional calendar month shall be prorated and paid on or before the first day of the first full calendar month following such fractional month. An Owner's "Pro Rata Share" means a fraction, the numerator of which is the rentable square footage of the buildings located on an Owner's Parcel and the denominator of which is the total rentable square footage of all buildings on all Parcels within the Shopping Center.

Within one hundred twenty (120) days after the end of each calendar year, the Manager shall deliver to each Owner a written itemized statement ("CAM Statement") showing the amount of the actual CAM expenses for the preceding calendar year, the amount paid by such Owner toward CAM during the preceding calendar year, and any amounts due from such Owner to the Manager for such Owner's Pro Rata Share of such CAM expenses and/or any amounts due from the Manager to such Owner (the "Reconciliation Share"). Any Reconciliation Share due from the Manager to an Owner shall accompany such CAM Statement. Any Reconciliation Share due from an Owner to the Manager shall be paid within thirty (30) days after receipt by such Owner of the CAM Statement. Upon request, the Manager shall provide any Owner copies of all bills, payment applications, invoices and receipts for CAM performed and other reasonable supporting documentation, including the calculation of such Owner's Pro Rata Share with a breakdown of the square footage of the land in the Shopping Center. Unless an Owner raises any

objections to the CAM Statement within ninety (90) days after receipt of the same, the CAM Statement shall conclusively be deemed correct and accepted by the Owner. If an Owner does timely object to the CAM Statement, the Manager and the Owner shall negotiate in good faith to resolve any disputes. Any objection of an Owner to the CAM Statement and resolution of any dispute shall not postpone the payment of any undisputed amounts due the Manager by the Owner. Failure of the Manager to deliver the CAM Statement in a timely manner does not relieve an Owner's obligation to pay any amounts due Manager pursuant to a CAM Statement subsequently delivered.

The Manager shall provide Common Area lighting at all times and at such intensity as required by the Declarant. The Common Area lighting shall be designed so that the parking lot lighting facilities located on each Parcel are separately metered. Each Owner shall pay its Pro Rata Share of the cost of the electricity used to light the Common Area within thirty (30) days after the Manager has paid for such power and billed such Owner for its Pro Rata Share thereof. Each Owner shall also pay its Pro Rata Share of the cost of water used in connection with watering the landscaped areas within the Common Areas within thirty (30) days after the Manager has paid for such water and billed the Owners therefor. In the alternative, the costs for Common Area electricity, water and other utilities may be included in the Annual Budget. In addition at the Manager's sole election, each Owner will pay the cost of electricity metered to such Owner's Parcel.

The Manager shall maintain the books and records for the CAM costs (the "Records") for a period of at least two (2) years. Any Owner may examine or audit the Records for the previous two calendar years at any reasonable time at the Manager's place of business or where the Records are maintained and kept. The Owner performing such audit shall bear its own cost of performing such audit, unless the audit discloses a discrepancy in excess of five percent (5%) of such Owner's Pro Rata Share of the CAM expenses, in which event the Manager shall reimburse such Owner for the reasonable costs of such audit.

**4.5 Maintenance by Owners.** The Owner or Occupant of each business within the Shopping Center shall maintain, at its own expense, its own trash enclosure(s), loading dock areas, and the sidewalks located immediately adjacent to the buildings located on their respective Parcels. All Owners and Occupants shall regularly collect their shopping carts and other equipment from the Common Area.

**4.6 Discontinuance of CAM.** Notwithstanding the above, and in addition to any remedies specified in Article 14 entitled "DEFAULT," the Manager may elect to discontinue CAM on any Owner's Parcel if such Owner fails to timely pay its Pro Rata Share of the Annual Budget for three (3) consecutive months or four (4) months out of any calendar year. In the event the Manager discontinues CAM on any particular Parcel as provided above, the Owner of such Parcel shall maintain and repair its Parcel (including maintaining a Commercial General Liability insurance policy in conformance with Section 4.2.9 endorsing Manager, Declarant and the other Owners as additional insureds), at its sole cost and expense, as set forth herein, Manager shall be relieved from any responsibility whatsoever related to such Owner's Parcel, and such Owner's Parcel shall be excluded herein from the calculation of the other Owner's Pro Rata Share of CAM costs.

**4.7 Notice of Assumption.** Upon the change of the Manager, the successor Manager shall execute a notice of assumption of the duties, obligations, rights and remedies of the Manager, which notice shall provide that the successor Manager shall observe, perform and discharge each and every duty and obligation of the Manager hereunder in the place and stead of the former Manager for a specified period (which period shall in no event be for less than three (3) years and which period shall be described by calendar dates). The notice shall be recorded in the official records for Washington County, State of Utah, and delivered to all other Owners. Such successor Manager may utilize a nominee to perform its duties and obligations without relieving it, however, of any of such duties and obligations. The successor Manager, during its tenure of office as the Manager, shall have all of the rights that the initial Manager shall possess hereunder, including, but without limitation, the right, in the place and stead of the former Manager, to issue the statements above contemplated, to collect, hold, and to receive and disburse receipts on account thereof. Upon assumption by the successor Manager of the responsibility for operating and maintaining the Common Area, the former Manager shall transfer all books and records relating to the operation and maintenance of the Common Area to the new Manager and provide any and all other information and documentation to effectuate the transfer of responsibility hereunder.

**4.8 Third Party Management Agreement.** Notwithstanding the foregoing, Declarant may enter into a management agreement with a third party operating entity for the operation and maintenance of the Common Area as provided herein, in which event no management fee shall be payable to the Manager and each Owner shall pay its proportionate share of the expenses payable under the management agreement, which proportionate share shall be computed in the manner hereinabove provided in Section 4.4. Any such management agreement shall provide that the Declarant from time to time may terminate that management agreement upon thirty (30) days' written notice to the other Owners and the third party operator. In the event of such termination, the Declarant shall assume the responsibility for the operation and maintenance of the Common Area in accordance with the provisions hereof.

## **5. EASEMENTS.**

**5.1 Ingress, Egress and Parking.** Subject to the terms of Article 3 herein entitled "USE", each Owner, as grantor with respect to its Parcel, hereby grants to each other Owner, as grantee, for the benefit of each such grantee Owner, and for the use of the Owners and their respective tenants, and the employees, agents, customers and invitees of such Owner and its tenants, and for the benefit of the Parcels owned by such grantee Owner, and as a burden on the grantor Owner's Parcel, a non-exclusive easement appurtenant to each grantee Owner's Parcel for the purpose of ingress and egress by vehicular and pedestrian traffic and for vehicular parking upon, over, across and through the Common Area on such grantor Owner's Parcel. Except as to the Declarant as herein provided, the foregoing shall not create any rights in any parties other than the Owners.

**5.2 Utility Systems.** Each Owner, as grantor with respect to its Parcel, hereby grants to each other Owner, as grantee, for the benefit of each such grantee Owner and its Parcel, without the necessity for further documentation, non-exclusive easements appurtenant to the Parcel owned by the grantee Owner, under, through and across the Common Area of the Parcel owned by the grantor Owner, for the installation, maintenance, repair and replacement of water

drainage systems or structures, water mains, storm drains, sewers, water sprinkler system lines, telecommunication, electrical conduits or systems, cable lines, gas mains and other public utility facilities ("Utility Systems") necessary for the orderly development and operation of the Common Area and each building in the Shopping Center; provided, the rights granted pursuant to such easements shall at all times be exercised in such manner as to cause the least interference with the normal operation of the Shopping Center; and provided further, except in an emergency, the right of any grantee Owner to enter upon the Parcel of any grantor Owner for the exercise of any right pursuant to such easements shall be conditioned upon obtaining the prior written consent of such grantor Owner, which consent shall not unreasonably be withheld or delayed. The location of all Utility Systems shall be approved by the Declarant. All such Utility Systems shall be installed and maintained below the surface or ground level of such easements. In the event an Owner deems it necessary to cause the installation of a Utility System across the Common Area of any other Parcel subsequent to the initial paving and improving thereof, the Owner thereof agrees not to unreasonably withhold the granting of any necessary additional easements; provided, such Owner may withhold its consent if such installation would unreasonably interfere with the normal operation of any business in the Shopping Center, or with such Owner's plans for the development of its Parcel; and provided further, the Owner making or causing such installation shall, at its sole cost and expense, completely restore in the same or better condition all Common Area improvements and surfaces disrupted as a result of such installation.

In the event it should be necessary to grant any of the foregoing easements and rights to local utility companies as a condition of their providing or continuing service, such rights shall be granted provided that the Owners required to execute such instruments deem the terms and conditions of such a grant to be reasonably acceptable. In such event, the Owner requiring or causing the requirement of any such easement shall, promptly following the grant of such easement, and at its sole cost and expense, provide to the Owner granting such easement an ALTA survey (or the local equivalent thereof) of such Owner's Parcel depicting such easement.

**5.3 Building Encroachments.** Each Owner, as grantor with respect to its Parcel, hereby grants to each other Owner, as grantee, for the benefit of such grantee Owner and its Parcel, an easement for any portion of any building or structures on any Parcel (including, but not limited to, Permitted Projections and subsurface support elements required for the construction or reconstruction of any building or structure) which may encroach onto or over an adjoining Parcel; provided, the easement for, including, but not limited to, footings, piers, piles, grade beams, canopies, eaves, utility meters, roof overhangs and all other building encroachments granted herein shall not exceed two (2) feet; and provided further, the encroachment easement shall not extend to encroachments which are intentional or which materially and adversely affect the location, orientation, design or construction of buildings to be constructed on a Parcel upon which the encroachment has taken place, unless first approved in writing by the Owner of the affected Parcel. The easement granted herein shall last so long as this Declaration is in effect. In the event this Declaration expires, this easement shall last so long as the Building of which such encroachment is a part is standing.

**5.4 Emergency Exits.** Each Owner, as grantor with respect to its Parcel, hereby grants to each other Owner, as grantee and for the benefit of each other Owner and its respective Parcel: (i) an easement for any portion of any stairs and landings (including any footings and

foundations related thereto) constructed in connection with building emergency exits required by any governmental entity, which may encroach onto or over an adjoining Parcel; and (ii) an easement for emergency egress from such emergency building exits; provided, the easement for stairs and landings (and foundations and footings related thereto) granted herein shall not exceed six (6) feet in width.

**5.5 Restoration.** If any Owner damages the Common Area as a result of any construction activity or the exercise of its easement rights, such as the placement of utilities within the Common Area (excluding normal and anticipated use and wear and tear), such Owner, at its sole cost and expense, shall immediately repair such damage and restore the Common Area to the same or better condition that existed before such damage.

**6. COMMON AREA USES.** No persons other than customers, employees, agents and contractors of the Occupants of the Shopping Center shall be permitted to park in the Common Area, unless Declarant gives prior written approval thereto. No such approval shall be deemed granted unless evidenced by an amendment to this Declaration, which amendment shall be duly recorded in the official records of the County of Washington, State of Utah. In the event the Declarant determines that the Common Area is being used for purposes inconsistent with this Declaration, the Declarant shall have the right to construct a barricade around all or any portion of the perimeter of the Shopping Center to prevent such use; provided, such barricade shall not impede circulation within the Shopping Center nor prohibit access to abutting streets during such times as the Shopping Center is open for business.

**7. USE RESTRICTIONS.** None of the following uses or businesses shall be conducted within the Shopping Center: (a) massage parlors (unless otherwise agreed to by Declarant in its sole and subjective discretion), (b) any establishments with any striptease, burlesque or similar dancing, (c) "head shop", pornographic or "adult" store; (d) the manufacturing, sale, display, or distribution of pornographic, lewd, obscene, or adult-oriented books, magazines, prerecorded video cassettes, video tapes, video discs, laser discs, video game (including without limitation CD-1), digital video discs or other video software (including CD-ROM) and/or any substitutes for, or items which are, technical evolution of the foregoing items; and (e) the manufacturing, sale, display, or distribution of items that appeals to prurient interest in sex, including, without limitation, lingerie; provided that lingerie may be sold if it constitutes an incidental part of gross sales and sale space.

**8. SIGNS.**

**8.1 Building Signs.** Each Owner shall have the right to maintain such Signs on the interior of buildings located on its Parcel as it desires, provided that such signs are not visible from the exterior. Any Signs, banners, flags, or advertising objects, displays or lights visible from the exterior of any building shall require the prior approval of Declarant pursuant to the terms set forth in Section 2.1. If permitted by Law and approved by Declarant, each Owner shall have the right to erect, maintain and replace Signs on the exterior of the buildings located on its Parcel; provided, such Signs shall be constructed so as to lie flat against such exterior facia facing outward and shall not protrude more than two (2) feet from the surface thereof, and provided further, in no event shall Signs be located on the roof (excluding canopies, so long as no Sign is erected on a canopy, which Sign will extend above the height of the building canopy

or mansard roof) of any building in the Shopping Center. Other than pylon and monument signs discussed below, no Owner or Occupant may place any Sign in the Common Area, including any decorations, flags, or banners unless the Occupant occupies in excess of 30,000 square feet of ground floor building space and such decorations are approved by Declarant and will be used for a temporary period of time. No Owner may place, install or operate, any signs in any windows of any building visible from the exterior; provided that an nationally or regionally recognized Occupant with locations in multiple states with a uniform sign package, may place its standard signs on and within its building or premises, subject to the Declarant's prior approval which shall not be unreasonably withheld. Any other signs shall require the approval of Declarant, which may be granted or withheld in Declarant's sole and subjective discretion.

**8.2 Pylon/Monument Signs.** The Declarant may, at its option and expense, construct free standing pylon and/or monument signs (collectively, "**Shopping Center Signs**") within the Shopping Center at locations selected by Declarant in Declarant's sole and subjective discretion. Subject to approval by any applicable municipal authorities, the Owners may request that a sign face be placed upon the Shopping Center Signs. Declarant, at its sole and subjective discretion, shall determine the number, placement and identify of the sign faces to be placed upon the Shopping Center Signs. The cost of the Shopping Center Signs will be allocated by the Declarant or the Manager to the Owners or the Occupants that have a sign face on the pylon sign in an equitable and reasonable manner (including allocating the costs to the Owners based upon their Pro Rata Share). Each Owner shall have the right to place a monument sign or a pylon sign along the street frontage of their respective Parcels in the sign area depicted on the Site Plan so long as the placement of such sign does not impede, prevent, interfere or prohibit the placement of the Shopping Center Signs. Any pylon or monument sign shall comply with any and all sign ordinances, codes or Laws of the municipality where the Shopping Center is located and subject to normal municipal approval and to any signage criteria and standards that may be established by the Declarant from time to time, provided that such signage criteria are uniformly applied and enforced against all the Owners of the Shopping Center. Except as expressly permitted herein, there shall be no Signs in the Common Area of the Shopping Center without the prior written approval of the Declarant, which may be granted or withheld in Declarant's sole and subjective discretion.

**8.3 Sign Easement.** Each Owner, as grantor with respect to its Parcel, hereby grants to each other Owner allowed to erect or maintain Signs, sign towers or sign faces pursuant to this Article 8, as grantee, a non-exclusive easement under, through and across the Common Area of the Shopping Center for the purpose of installing and/or maintaining utility lines to service free-standing pylon or monument signs, if any, and all other signs, if any.

**8.4 Advertising.** Any and all Signs within the Shopping Center shall solely advertise the Shopping Center and the businesses and Occupants located within the Shopping Center.

## **9. INDEMNIFICATION AND INSURANCE.**

**9.1 Indemnification.** Each Owner ("Indemnifying Party") hereby indemnifies, holds harmless and agrees to defend each other Owner and the Declarant ("Indemnified Party(ies)") from and against all claims, damages, expenses (including, without limitation, reasonable attorneys' fees and reasonable investigative and discovery costs), liabilities and

judgments on account of injury to persons, loss of life, or damage to property occurring in the Shopping Center and/or on the ways immediately adjoining the Shopping Center, caused by the active or passive negligence or willful misconduct of the Indemnifying Party, its agents, servants or employees; provided, the Indemnifying Party does not indemnify the Indemnified Party against any injury, loss of life, or damage which is caused by the active or passive negligence or willful misconduct of the Indemnified Party, the other Owners in the Shopping Center, its or their agents, servants or employees. The Parties' obligations with respect to indemnification hereunder shall remain effective, notwithstanding the expiration or termination of this Declaration, as to claims arising or accruing prior to the expiration or termination of this Declaration.

The indemnification obligation herein will not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Indemnifying Party under worker's compensation acts, disability benefit acts, employee benefit acts, or otherwise. In addition, the indemnification obligation set forth herein is a contractual obligation of the Owner and will not be diminished by the any insurance coverage or any restriction, cap or other provision of governmental immunity law or similar doctrine.

**9.2 Liability Insurance Coverage and Limits.** Each Owner agrees to maintain, and cause any Occupants of any portion of such Owner's Parcel to maintain, at no cost to the other Owners, liability insurance insuring its interests against claims for personal injury, bodily injury, death and property damage occurring on, in or about their Parcel, with a "Combined Single Limit" (covering personal injury liability, bodily injury liability and property damage liability) of not less than Two Million Dollars (\$2,000,000.00) for total claims for any one (1) occurrence. The insurance limits in this Section shall be subject to increase from time to time by such amounts as the Declarant may reasonably agree is necessary or desirable, as may be evidenced by the practice of similarly situated shopping centers. Each Owner shall be endorsed as an additional insured on such insurance policy and, upon request, be entitled to receive a certificate evidencing this insurance coverage.

**9.3 Contractor's Insurance.** During the period of any construction in the Shopping Center by or at the request of any Owner, such Owner agrees to obtain or require its contractor(s) to obtain, and thereafter maintain so long as such construction activity is occurring, at least the following minimum insurance coverage:

**9.3.1** Workers' compensation - statutory limits;

**9.3.2** Employers Liability Insurance with coverage and minimum limits of the greater of: (i) bodily injury by accident (\$100,000.00 each accident); (ii) bodily injury by disease (\$500,000 policy limit); and (c) bodily injury by disease (\$100,000 each employee);, and

**9.3.3** Comprehensive General and Commercial Automobile Liability as follows: (i) "Combined Single Limit" (covering personal injury liability, bodily injury liability, and property damage liability) of not less than One Million Dollars (\$1,000,000.00) for total claims for any one occurrence; (ii) Independent Contractor's Liability or Owner's Protective Liability with the same coverage as in (i) above; (iii) Products/Completed Operations Coverage which shall be kept in effect for two (2) years after completion of work; (iv) "XCU" hazard coverage, if

applicable; (v) "Broad Form" Property Damage Endorsements; (vi) "Personal Injury" Endorsements; and (vii) "Blanket Contractual Liability" Endorsements.

If any construction activity involves the use of another Owner's Parcel, then the Owner of such Parcel shall be endorsed as an additional insured under all such insurance, and such insurance shall provide that the same shall not be canceled without at least thirty (30) days' prior written notice to the named insureds.

**9.4 Waiver of Certain Rights.** With respect to any loss or damage that may occur to the Shopping Center (or any improvements thereon) or any Parcel, arising from any peril customarily insured under a fire and extended coverage insurance policy, regardless of the cause or origin, excluding willful acts but including negligence of the Owners, their agents, servants or employees, the Owner suffering such loss hereby releases the other Owners from all claims with respect to such loss; and the Owners each agree that their respective insurance companies shall have no right of subrogation against the other Owners on account of any such loss, and each Owner shall procure from its respective insurers under all policies of fire and extended coverage insurance a waiver of all rights of subrogation against the other Owners which the insurers might otherwise have under such policies.

**9.5 Policy Requirements.** Any insurance required to be provided under this Article 9 may be in the form of blanket liability coverage, so long as such blanket policy does not reduce the limits nor diminish the coverage required herein. Upon request, each Owner shall cause certificates of insurance reasonably evidencing compliance with the requirements of this Article to be delivered to the other Owners. The insurance policies and certificates required by this Article shall require the insurance company to furnish all Owners thirty (30) days' prior written notice of any cancellation or lapse, or the effective date of any reduction in the amounts or scope of coverage.

**9.6 Performance of Indemnity Agreements.** All policies of insurance required under this Article 9 shall contain a contractual liability endorsement. Each Owner shall promptly notify the other Owners of any asserted claim with respect to which such Owner is or may be indemnified against hereunder and shall deliver to such other Owners copies of process and pleadings.

**10. DAMAGE OR DESTRUCTION.** In the event any building in the Shopping Center is damaged or destroyed by fire or other casualty or any other cause whatsoever, the Owner of the Parcel upon which such building is located may, in its sole, subjective discretion, demolish or rebuild the damaged building. In the event an Owner determines to demolish a damaged building, that Owner shall either promptly construct a new building on the same location or leave and maintain the Parcel of land on which the building was located in a smooth, level condition, free and clear of all refuse and weeds and sealed against dust by paving, landscaping or other ground cover, and otherwise maintained in a condition similar to other first-class shopping centers in Washington County, Utah. In the event an Owner determines to rebuild its building located on its Parcel in the Shopping Center, such Owner shall forthwith proceed with due diligence to remove any debris and to restore such building to substantially the same condition as immediately prior to such damage or destruction. In the event the Common Area of the Shopping Center or any portion thereof shall be damaged or destroyed by fire or other casualty

or any other cause whatsoever, the Owner of the Common Area so damaged or destroyed shall forthwith proceed with due diligence to restore such Common Area to its condition immediately prior to such damage or destruction in order to permit vehicular parking (in the manner required by this Declaration) and free and safe vehicular and pedestrian access and circulation in the Shopping Center and to and from all adjacent streets. If the Owner of the Common Area that is damaged or destroyed fails to restore the damaged or destroyed portion of the Common Area, the Manager and/or the Declarant shall have the right to restore such damaged portion of the Common Area.

## 11. EMINENT DOMAIN.

**11.1 Owner's Right to Award.** Nothing herein shall be construed to give any Owner any interest in any award or payment made to any other Owner in connection with any exercise of eminent domain, or transfer in lieu thereof, affecting any other Owner's Parcel, or to give the public or any government any rights in any Parcel. In the event of any exercise of eminent domain, or transfer in lieu thereof, of any part of the Common Area located within the Shopping Center, the award attributable to the land and improvements of such portion of the Common Area shall be payable to the Owner in fee thereof, and no claim thereto shall be made by the Owners of any other portion of the Common Area.

**11.2 Collateral Claims.** All other Owners or persons having an interest in the Common Area so condemned may file collateral claims with the condemning authority for their losses which are separate and apart from the value of the land area and improvements taken.

**11.3 Occupant Claims.** Nothing in this Article shall prevent an Occupant from making a claim against an Owner pursuant to the provisions of any lease between an Occupant and such Owner for all or a portion of any such award or payment.

**11.4 Restoration of Common Area.** The Owner of the fee of each portion of any Common Area so condemned shall promptly repair and restore the remaining portion of the Common Area so owned as near as practicable to the condition of the Common Area immediately prior to such condemnation or transfer, to the extent that the proceeds of such award are sufficient to pay the cost of such restoration and repair and without contribution from any other Owner. The plans and specifications for such repair and reconstruction shall be approved by Manager and the repair and reconstruction shall be overseen by Manager.

**11.5 Restoration of Improvements.** In the event any Improvements or any portion thereof located in the Shopping Center is condemned, the remaining portion of such Improvements shall be demolished or restored by the Owner of the Parcel on which it is located, and such Owner shall remove all debris resulting therefrom. In the event an Owner elects to rebuild or refurbish any Improvements after such condemnation action, such Owner shall proceed with due diligence to restore such Improvements to completion. In the event the remaining Improvements are removed, the Owner shall thereafter maintain such affected area on the Parcel in the manner provided for in Article 10 herein entitled "DAMAGE OR DESTRUCTION."

12. **TAXES.** Each Owner shall pay or cause to be paid directly to the appropriate taxing authority before such taxes become past due, the real property taxes and other special taxes and assessments assessed against the Parcel owned by such Owner, including the portion of the Common Area owned by such Owner.

In the event any Owner fails at any time to pay or cause to be paid before delinquency its taxes or assessments on any portion of a Parcel of which such Owner has a fee interest, and which may become a lien on any of the Common Area, then any other Owner may pay such taxes and/or assessments, together with interest, penalties, and costs, and in any such event the Owner obligated to pay such taxes and/or assessments shall promptly reimburse such other Owner for all such taxes and/or assessments, interest, penalties, and other charges and until such reimbursement has been made, the amount thereof shall constitute a lien and charge on the property herein described of the defaulting Owner. Nothing contained herein shall prevent an Owner from paying its taxes under protest or challenging the validity or amount of any assessment, so long as such Owner takes steps to prevent the delinquent taxes from becoming a lien on its Parcel or the occurrence of a tax sale of such Parcel.

In the event that Declarant is the sole Owner, and the county or municipal assessor fails or refuses to assess any individual portion of the Shopping Center as a separate tax lot, the Manager shall pay all real property taxes assessed or imposed upon the Shopping Center, but excluding the improvements to the land and building(s), and each Occupant shall pay Manager its proportionate share of all real property taxes assessed or imposed upon the Shopping Center which accrue during the respective term of occupancy; provided, however, each Occupant shall nonetheless pay all taxes, without apportionment, attributable to improvements to the land and building(s) occupied by such Occupant. Occupant's proportionate share of any such taxes assessed or imposed upon the Shopping Center shall be that portion thereof which bears the same ratio to the total of all taxes billed against the Shopping Center as the area of occupancy bears to the area of the Shopping Center. During each year of occupancy, each Occupant shall pay Manager its proportionate share of such taxes in the same frequency in which Manager is required to pay such taxes to the taxing authority.

13. **ENVIRONMENTAL LIABILITIES.** Each Owner assumes all responsibility and liability for any and all damages, costs and claims including, but not limited to remediation costs, incurred as a result of the release of any Hazardous Material from its Parcel which migrates (or has migrated) or otherwise contaminates (or has contaminated) another Parcel in the Shopping Center, including, but not limited to, leaks, spills or losses or motor fuels related to underground storage tanks, piping, dispensing systems, or other facilities or activities on or about any Parcel. Each Owner shall promptly comply with any and all clean-up requirements or any governmental authority having jurisdiction pertaining thereto, and shall indemnify the other Owners for all costs, expenses and fees incurred by any other Owners (including attorneys' fees in defending the same) resulting from any contamination or discharge of Hazardous Materials. Any and all environmental assessment and remediation work shall be performed in accordance with all applicable local, state and federal laws, ordinances, rules and regulations. Notwithstanding the foregoing, the Owners do not assume responsibility and liability for, or indemnify any other Owner for, any such damages, costs or claims resulting from any such release caused by, through or under any other Owner.

14. **DEFAULT.**

**14.1 Right to Cure.** Should any Owner ("Defaulting Owner") fail to timely perform any of its obligations hereunder (excluding Manager as to the obligations of Manager), and thereafter fail to diligently commence performing such obligation within fifteen (15) days after its receipt of a written demand therefor from the Manager or the Declarant (the "Curing Owner"), the Curing Owner shall, in addition to any other remedy provided at law, in equity, or in this Declaration, have the right (but not the obligation) to perform such obligation on behalf of the Defaulting Owner, and the Defaulting Owner shall reimburse the Curing Owner for the cost of performing such obligation within ten (10) days after receipt of billing therefor and proof of payment thereof. In the event the Defaulting Owner does not reimburse the Curing Owner within such ten (10) days, the Curing Owner shall have: (i) the right to exercise any and all rights which such Curing Owner might have at law or in equity to collect the same; and/or (ii) a lien on the property owned by the Defaulting Owner, to the extent of the amount paid by the Curing Owner but not reimbursed by the Defaulting Owner, which amount shall bear interest at a rate equal to the then published "Prime Rate" of Citibank, N.A., plus three percent (3%) per annum (or, in the event Citibank no longer publishes a Prime Rate, the Prime Rate, for purposes herein, shall be a rate agreed to by all the Owners) (the Owners acknowledging that such rate may not be the lowest or "best" rate), or the highest legal rate of interest, whichever is less, from the date of billing until paid. Such lien may be filed or recorded by the Curing Owner as a claim against the Defaulting Owner, in the form required by law, in the office wherein mortgages and liens are recorded, which lien shall contain at least the following information:

- (a) The name of the lien claimant;
- (b) The name of the Defaulting Owner;
- (c) A description of the work performed on behalf of such Owner and a statement itemizing the cost thereof; and
- (d) A description of the property being liened.

The lien so claimed shall attach from the date of recordation in the amount claimed by the Owner curing the default, and it may be enforced and foreclosed in any manner allowed by law including, but not limited to, suites to foreclose a mechanic's lien, trust deed or mortgage under applicable law. Any Owner filing such lien shall concurrently notify the defaulting Owner of such filing, and shall within sixty (60) days thereafter send to the defaulting Owner at its notice address a copy of such lien showing such recording. Such lien, when so established against the real property described in such lien, shall be prior and superior to any right, title, interest, lien or claim which may be or is acquired or attached to such real property after the time of recording the claim of lien.

Notwithstanding the above, the lien for any amount due by an Owner shall be subordinated to the lien of any bona fide security device, including but not limited to, mortgage, deed of trust and sale and leaseback obtained by an Owner of a Parcel for the purposes of the improvement thereof (or a refinancing thereof); provided, however, that such subordination shall apply only to the amounts due and owing to the Manager or a Curing Owner which have

become due and payable prior to a sale or transfer of such Parcel pursuant to or in lieu of foreclosure by the holder of such security interest. Such sale or transfer shall not relieve the Parcel from the lien for any Assessments thereafter becoming due, nor from the lien of any subsequent Assessment.

**14.2 Injunctive Relief.** In the event of any violation or threatened violation of any provision of this Declaration, the Manager and the Declarant shall have the right, in addition to any other remedies herein or by law or equity provided, to enjoin such violation or threatened violation.

**14.3 Breach Shall Not Permit Termination.** No breach of this Declaration shall entitle any Owner to cancel, rescind or otherwise terminate this Declaration, but such limitation shall not affect in any manner any other rights or remedies which such Owner may have hereunder by reason of any breach of this Declaration.

**14.4 No Limitation of Remedies.** The various rights and remedies herein contained and reserved to the Owners, except as otherwise provided in this Declaration, shall not be considered as exclusive of any other right or remedy, but shall be construed as cumulative, and shall be in addition to every other remedy now or hereafter existing at law, in equity or by statute. No delay or omission of the right to exercise any power or remedy shall impair any such right, power or remedy or be construed as a waiver of any default or nonperformance or as acquiescence therein.

**15. NOTICES.** Any notices, requests, demands, and other communications hereunder shall be in writing and shall be given (i) by Federal Express (or other established express delivery service which maintains delivery records), (ii) by hand delivery, or (iii) by certified or registered mail, postage prepaid, return receipt requested, to the Parties at the following addresses, or at such other address as the Parties may designate by written notice in the above manner:

To Declarant: Irvine Investment Company, L.C.  
Attn: Robert D. Irvine  
4931 S. Fairview Drive  
Salt Lake City, Utah 84117  
Telephone: (801) 278-0897  
Facsimile: (801) 278-0896

With a copy to: KIRTON & McCONKIE  
Attn: Robert C. Hyde  
60 E. South Temple Street, Suite 1800  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3600  
Facsimile: (801) 321-4893  
Email: [rhyde@kmclaw.com](mailto:rhyde@kmclaw.com)

Such communications may also be given by facsimile transmission; provided, any such communication is concurrently given by one of the above methods. Notices shall be deemed effective upon receipt, or upon attempted delivery if delivery is refused by the intended recipient

or if the delivery is impossible because the intended recipient has failed to provide a reasonable means for accomplishing delivery.

**16. ATTORNEYS' FEES.** In the event any Owner or the Declarant brings or commences legal proceedings to enforce any of the terms of this Declaration, the prevailing Party in such action shall have the right to recover reasonable attorneys' fees and costs from the other Party, to be fixed by the court in the same action. The phrase "legal proceedings" shall include appeals from a lower court judgment, as well as proceedings in the Federal Bankruptcy Court, whether or not they are adversary proceedings or contested matters. The phrase "prevailing party" as used in the context of Federal Bankruptcy Court shall mean the prevailing Party in an adversary proceeding or contested matter, or any other actions taken by the non-bankrupt party which are reasonably necessary to protect its rights under the terms of this Declaration. The phrase "prevailing Party" as used in the context of any court other than the Federal Bankruptcy Court shall mean the Party that prevails in obtaining a remedy or relief which most nearly reflects the remedy or relief which the Party sought.

**17. DURATION.** Except as otherwise provided herein, this Declaration shall remain in full force and effect for a term of sixty-five (65) years from the date hereof. Notwithstanding the foregoing, the Declarant shall have the right to extend the term of this Declaration for successive ten (10)-year periods upon written notice to the other Owners served prior to the expiration of the then current term, and recordation in the official records of a notice extending the term of this Declaration. Upon written request, all other Owners shall sign such and acknowledge such notice.

**18. MODIFICATION.** Until seventy-five percent (75%) of the proposed building square footage within the Shopping Center is improved and occupied, this Declaration (including, without limitation, the Site Plan) may be amended by the Declarant in its sole and absolute discretion. When more than seventy-five percent (75%) of the proposed building square footage within the Shopping Center is improved and occupied this Declaration (including, without limitation, the Site Plan) may only be modified by a written document executed by Declarant and the Owners of seventy-five percent (75%) of the land comprising the Shopping Center. The Declarant reserves the right to enlarge and add additional land to the Shopping Center, whereupon such additional land shall be subject to this Declaration. The Shopping Center shall not be enlarged or added to nor integrated with any other lands or premises without the prior written consent of the Declarant. The Declarant may assign its rights, duties and obligations as Declarant hereunder to any Owner of any Parcel or to any other person or entity. The Declarant will notify the Owners in writing of any assignment of such rights, duties and obligations.

**19. GENERAL PROVISIONS.**

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

**19.2 Severability.** If any term or provision of this Declaration or the application of it to any person or circumstance shall to any extent be invalid and unenforceable, the remainder of

this Declaration or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each term and provision of this Declaration shall be valid and shall be enforced to the extent permitted by law.

**19.3 Pronouns.** When required by context, the singular shall include the plural, and the neuter gender shall include a person, corporation, firm, association, or other business arrangement.

**19.4 Captions.** The captions in this Declaration are for convenience only and do not constitute a part of the provisions hereof.

**19.5 No Partnership.** The provisions of this Declaration are not intended to create, nor shall they be in any way interpreted to create, a joint venture, a partnership, or any other similar relationship between the Owners.

**19.6 Governing Law.** This Declaration shall be construed and enforced in accordance with, and governed by, the law of the State of Utah.

**19.7 No Presumption.** This Declaration shall be interpreted and construed only by the contents hereof and there shall be no presumption or standard of construction in favor of or against the Declarant.

**19.8 Inurement.** This Declaration and the easements, covenants, benefits and obligations created hereby shall inure to the benefit and be binding upon each Owner and their respective successors and assigns; provided, if any Owner conveys any portion or all of its interest in any Parcel owned by it, such Owner shall thereupon be released and discharged from any and all further obligations under this Declaration as it had in connection with the property conveyed by it if the buyer assumes in writing all of such obligations; and provided further, no such sale shall release such Owner from any liabilities, actual or contingent, existing as of the time of such conveyance.

**19.9 Estoppel Certificate.** Each Owner agrees that, upon request by any other Owner ("Requesting Owner"), it will issue to a prospective lender of the Requesting Owner or to a prospective purchaser the Requesting Owner's interest, an estoppel certificate stating:

(a) whether the Owner to whom the request has been directed knows of any default by the Requesting Owner under this Declaration, and, if there are known defaults, specifying the nature thereof;

(b) whether this Declaration has been assigned, modified or amended in any way (and if it has, then stating the nature thereof); and

(c) that to the Owner's knowledge this Declaration as of that date is in full force and effect.

Such statement shall act as a waiver of any claim by the Owner furnishing it to the extent such claim is based upon facts contrary to those asserted in the statement and to the extent the claim is asserted against a bona fide encumbrancer or purchaser for value without knowledge of facts to the contrary of those contained in the statement, and who has acted in reasonable reliance upon the statement; provided, no Owner shall incur any liability whatsoever for any misstatement or wrong information unless the same is the result of the gross negligence or willful act of the Owner furnishing such information.

**19.10 Merchant's Association.** Declarant reserves the right to establish a merchant's association. If a merchant's association is formed, each Owner agrees to become a member of, contribute to, or participate in the activities of (including advertising) the merchant's association established for the Shopping Center.

**19.11 Contractual Obligations.** All of the terms and conditions contained herein represent contractual obligations of the Owners. The purchase of any Parcel by any governmental entity shall be deemed a proprietary act with full authority granted therefor from any and all legislative bodies. The presentment of any claim or action against any Owner pursuant to this Declaration (such as through the indemnification provision) shall be presentment and tender of a contractual obligation. Under no condition shall any Owner be limited or restricted (including any waiver due to the passage of time except for the statute of limitation period set forth in Laws of the State of Utah) in its ability to tender any claim or matter to an Owner in accordance with the terms of this Agreement.

**19.12 Force Majeure.** Each Owner will comply with the time periods set forth in this Declaration to the extent such provisions are applicable to them; provided each and every period referred to in Article 4 herein entitled "COMMON AREA MAINTENANCE" and Article 10 herein entitled "DAMAGE OR DESTRUCTION" shall be extended for a period or periods of time equal to any period or periods of delay preventing the performance of any Owner's obligations, which delays are caused by fire or other casualty, acts of god, acts of nature, weather, refusal or failure of governmental authorities to grant necessary approvals or permits (the Owner responsible thereof agreeing to use reasonable diligence to procure the same), war, riot, or insurrections, or any other cause (except financial) beyond the reasonable control of such Owner. In the event of any such delay, the Owner suffering such delay shall seek and use to the extent available economically reasonable and comparable substitutes or alternatives and shall promptly give written notice to the other Owners of the occurrence of such delay and, upon termination thereof, notice of the termination of such delay. In the event an Owner suffers such a delay and fails to give notice of the occurrence of and termination of such delay, as provided herein, such Owner shall be deemed to have waived its right to an extension hereunder on account of such delay.

**19.13 Consent and Approvals.** Wherever the consent, approval, judgment or determination of Declarant is required or permitted under this Lease and no express standard is specified (e.g., "reasonableness"), Declarant shall exercise Landlord's business judgment in good faith in granting or withholding such consent or approval or in making such judgment or determination. If it is determined that Declarant failed to give its consent where it was required to do so under this Declaration, an Owner affected by such denial of consent shall be entitled to injunctive or declaratory relief but shall not to be entitled to monetary damages or to terminate

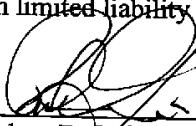
this Lease for such failure. The review and/or approval by Declarant of any item or matter to be reviewed or approved by Declarant under the terms of this Declaration shall not impose upon Declarant any liability for the accuracy or sufficiency of any such item or matter or the quality or suitability of such item for its intended use. Any such review or approval is for the sole purpose of protecting Declarant's and other Owner's interest in the Shopping Center, and no third parties shall have any rights as a consequence thereof.

**19.14 Successors and Assigns.** This Declaration shall be binding upon and inure to the benefit of the Owners and their successors and assigns. Declarant shall have the right to designate any successor to Declarant's rights and interests under this Declaration by recording a notice in the records of Washington County, Utah. If Declarant is no longer an Owner, Declarant shall be deemed to be the Owner of the largest Parcel within the Shopping Center.

**19.15 Exhibits.** Exhibits A and B, attached hereto are incorporated herein by this reference.

IN WITNESS WHEREOF, this Declaration has been executed as of the date first above written by Declarant.

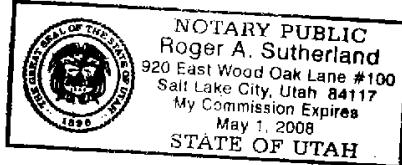
Irvine Investment Company, L.C.,  
a Utah limited liability company

By:   
Robert D. Irvine  
Its: Manager

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

The foregoing instrument was acknowledged before me this 27<sup>th</sup> day of January,  
2006, by Robert D. Irvine, Manager of Irvine Investment Company, L.C., a Utah limited  
liability company.

  
Notary Public





20060001691 02/06/2006 04:36:55 PM

25 of ~~EXHIBITS~~ Washington County

**Red Cliffs Square**

The following description has been rotated to the City HCN:

Basis of Bearing is South 89°03'43" East, between the Northwest corner of Section 22, and the North Quarter Corner of Section 22, Township 42 South, Range 15 West, Salt Lake Base and Meridian.

Beginning at a point being 424.91 feet South 89°03'43" East along the Section line and 165.90 feet South 00°56'17" West from the Northwest corner of Section 22, Township 42 South, Range 15 West, Salt Lake Base and Meridian; said point being on a Southerly boundary of the "Red Cliffs Drive" Right of Way (St. George Commercial Center Subdivision, Entry No. 737111 Book: 1428 Page: 2649); and running thence along said "Red Cliffs Drive" the following three (3) courses: North 54°39'25" East, 162.67 feet to a point on a 1400.00 foot radius curve to the right; thence 164.88 feet along said curve through a central angle of 06°44'52" (chord bears North 58°01'51" East, 164.78 feet); thence North 61°24'17" East, 162.88 feet to a point on a 30.00 foot radius curve to the right; thence 48.88 feet along said curve through a central angle of 93°20'45 (chord bears South 71°55'20" East, 43.65 feet); thence South 25°14'58" East, 162.71 feet to a point on a 997.00 foot radius curve to the right; thence 451.50 feet along said curve through a central angle of 25°56'48" (chord bears South 12°16'34" East, 447.65 feet); thence South 00°41'50" West, 339.62 feet to a point on the Northerly boundary the "850 North Street" Right of Way boundary; thence along said Right of Way Boundary the following two (2) courses: 28.32 feet along a 18.00 foot radius curve to the right through a central angle of 90°08'05" (chord bears South 45°45'53" West, 25.49 feet); thence North 89°10'05" West, 449.26 feet; thence North 31°08'38" West, 188.62 feet to a point on a 69.49 foot radius curve to the left; thence 85.67 feet along said curve through a central angle of 70°37'56" (chord bears North 20°53'08" East, 80.34 feet); thence North 59°05'29" East, 152.68 feet; thence North 30°49'29" West, 260.08 feet; thence North 59°00'51" East, 10.44 feet; thence North 30°59'58" West, 170.36 feet to the point of beginning.

Contains: 432,739 SQ. FT.

9.93 Acres