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COMMON OPERATION  
AND RECIPROCAL EASEMENT AGREEMENT

(SEC Constitution Avenue and Marksheffel Road, County of El Paso, Colorado)

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## COMMON OPERATION AND RECIPROCAL EASEMENT AGREEMENT

THIS COMMON OPERATION AND RECIPROCAL EASEMENT AGREEMENT (this "Agreement") is made as of the 20 day of January, 2016, by EVERGREEN-CONSTITUTION & MARKSHEFFEL, L.L.C., an Arizona limited liability company ("Declarant"), whose address is c/o Evergreen Devco, Inc., 2390 East Camelback Road, Suite 410, Phoenix, Arizona 85016.

### RECITALS

A. Declarant is the owner and developer of certain real property situated in El Paso County, Colorado, located at the southeast corner of Constitution Avenue and Marksheffel Road, more particularly described on Exhibit A attached hereto (the "Development").

B. The Development is a portion of a larger shopping center (the "Shopping Center") that includes adjoining real property owned by third parties.

C. The Shopping Center is subject to a Declaration of Covenants, Conditions and Restrictions for Claremont Ranch Marketplace dated and recorded concurrently with this Agreement in the Official Records of El Paso County, Colorado (the "Declaration"). Capitalized terms used in this Agreement and not otherwise defined have the meanings ascribed to such terms in the Declaration as they pertain to the Development only.

D. The Shopping Center is also subject to an Agreement for Operation and Maintenance for Common Areas for Claremont Ranch Marketplace dated and recorded concurrently with this Agreement in the Official Records of El Paso County, Colorado (the "CAMA").

E. This Agreement is subject and subordinate to the Declaration and the CAMA. In the event of conflict between this Agreement and the Declaration or CAMA, the Declaration or CAMA, as applicable, governs. This Agreement is intended to encumber only the Development.

F. A conceptual site plan for the Development and all or portions of the Shopping Center is attached hereto as Exhibit B (the "Site Plan").

G. Declarant intends to cause the Development to be developed as an integrated shopping center on the terms and conditions herein set forth.

H. Fee simple title to all or portions of the Development may from time to time hereafter be transferred to third parties, and prior thereto, Declarant desires (i) to establish and subject each and every portion of the Development to the easements, covenants, conditions, restrictions, reservations, servitudes, assessments, liens, charges and development standards herein set forth, (ii) to provide for the use and maintenance of the Development as an integrated shopping center, and (iii) to enhance and protect the value and desirability of the Development by promoting attractive improvements at appropriate locations, preventing haphazard or inharmonious development, assuring adequate pedestrian and vehicular ingress, egress and

circulation throughout the Development and to and from adjacent public rights-of-way, providing for adequate on-site parking, loading and drainage facilities, assuring the installation and maintenance of attractive landscaping, assuring appropriate lighting, and otherwise regulating the development, use and operation of the Development.

NOW, THEREFORE, Declarant hereby declares, on behalf of all present and subsequent Owners (as hereinafter defined), that the Development and all portions thereof are now held and will hereafter be acquired, held, conveyed, hypothecated, encumbered, leased, used, occupied and improved subject to the easements, covenants, conditions, restrictions, reservations, servitudes, assessments, liens, charges and development standards set forth herein, all of which are declared to be in furtherance of a plan for the mutual and reciprocal benefit, common use and enjoyment, improvement and sale of the Development, and which are established for the purpose of enhancing and protecting the value of the Development, as follows:

## AGREEMENTS

### ARTICLE 1 - DEFINITIONS

When used in this Agreement, the following capitalized terms have the following meanings:

1.1 **"Building"** means a building or other structure intended for occupancy and constructed or to be constructed from time to time on a Parcel.

1.2 **"Building Envelope"** means that area of a Parcel within which Buildings are permitted to be constructed, i.e. the "building area", as shown on the Site Plan or in Secondary CC&Rs.

1.3 **"Circulation Drive Lights"** means the lights, including light poles, bases and standards, upon or in the vicinity of and primarily intended to illuminate the Circulation Drives as determined from time to time by Declarant.

1.4 **"Circulation Drives"** means those driveway corridors intended for vehicular and pedestrian access, ingress and egress designated as Circulation Drives on the Site Plan including, without limitation, any appurtenant sidewalks, walkways, curbs, gutters and similar Improvements. Evergreen reserves the right to designate which portions of the Development constitute Circulation Drives, or to withdraw all or a portion of a Circulation Drive previously so designated, as to all or any portion of the Development then owned in fee by Evergreen.

1.5 **"Common Areas"** means those portions of the Development (outside exterior walls of Buildings) that are available under this Agreement for the nonexclusive use, convenience and enjoyment of all Owners and their Permittees, including the Circulation Drives and those portions of the Development intended from time to time for use as parking areas (subject to the prohibitions against cross-parking set forth in subparagraph 2.1(b) below), landscaped areas, sidewalks, walkways, roadways, City-mandated pedestrian plazas or public seating, if any, and ingress and egress to and from public rights-of-way. Common Areas do not include the following Improvements: loading, docking, delivery or service areas or facilities; drive-up or drive-through lanes or facilities; exterior areas for dispensing automotive fuel located

beneath a canopy; secured exterior areas of a public-storage facility; fenced exterior play-yard areas of an educational or child-care facility; exterior storage areas for rental vehicles or equipment, or propane dispensing tanks, or fenced or partially fenced garden areas of a hardware store; patio seating or similar exterior areas for outside dining; exterior sales areas; or any portion of a Parcel expressly excluded from Common Areas on the Site Plan or in Secondary CC&Rs.

1.6 **"County"** means El Paso County, Colorado and its duly authorized departments and agencies.

1.7 **"Declarant"** means Evergreen-Constitution & Marksheffel, L.L.C., an Arizona limited liability company, as the holder of all rights, privileges and easements granted or reserved in favor of Declarant as the original signer and declarant under this Agreement, and/or its duly-authorized successor(s) under this Agreement. Any right, privilege or easement granted or reserved in favor of Declarant also runs in favor of the agents, employees and contractors of Declarant designated by Declarant.

1.8 **"Design Guidelines"** means a design that is architecturally compatible with the design theme of the buildings originally constructed in the Shopping Center (allowing for reasonably integrated accent, trademark or corporate colors that may differ from that design theme), as approved by Dillon under the Declaration, Declarant under this Agreement, and applicable governmental authority.

1.9 **"Development"** means the real property described on Exhibit A attached hereto, subject to Declarant's right to annex or deannex as further provided in paragraph 14.5 below. The Development does not include the **"Dillon Parcel"** (as defined in the Declaration) owned by Dillon.

1.10 **"Dillon"** means Dillon Companies, Inc., a Kansas corporation, doing business in Colorado as King Soopers, or its duly authorized successor and assign as the Owner of the Dillon Parcel under the Declaration.

1.11 **"Drainage Improvements"** means the master surface and subsurface drainage system, including without limitation, catch basins, pipes, swales, and associated Improvements and facilities serving the drainage requirements of the Shopping Center.

1.12 **"Evergreen"** means Evergreen-Constitution & Marksheffel, L.L.C., an Arizona limited liability company, only, and not its successors or assigns in the absence of a written assignment and assumption complying with the requirements of Article 14 below of the rights expressly reserved to Evergreen in this Agreement.

1.13 **"Improvements"** means, as applicable, the Buildings, parking areas, loading areas, refuse, storage or collection areas, fences, walls, paving, sidewalks, landscaping, light poles and bases, lighting, signs, utility installations, bridges, and other structures or improvements, constructed or to be constructed on a Parcel.

1.14 **"Manager"** means the Person responsible for maintenance under Article 6 below. Declarant is the Manager until Declarant either (a) assigns its rights and obligations as Manager

to another Person in accordance with paragraph 14.1 below, or (b) resigns and withdraws as Manager in accordance with paragraph 14.2 below.

1.15 **"Manager-Maintained Detention Basin"** means Tract A as shown on the Site Plan.

1.16 **"Owner"** means the holder(s) of fee simple title to a Parcel, whether by sale, assignment, inheritance, operation of law, trustee's sale, foreclosure, or otherwise; provided, however, the term "Owner" does not include the holder of any lien or encumbrance on a Parcel, or any tenant or occupant of all or a portion of the Parcel or a Building constructed or to be constructed thereon, who is not also vested with fee simple title. Subject to any express exception elsewhere provided herein, Declarant is an Owner for all purposes of this Agreement as to Parcel(s) owned in fee by Declarant.

1.17 **"Parcel"** has the meaning ascribed to such term in the Declaration (excluding the Dillon Parcel); provided, however, a Parcel may not be further subdivided or aggregated with another Parcel or Parcels without the prior written consent of Declarant; and provided further, upon dedication by an Owner to applicable governmental authority of a portion of such Owner's Parcel for public right-of-way or other public purposes, and so long as such dedicated portion is used solely for such purposes, such dedicated portion will no longer be considered a part of the Parcel, but will thereupon automatically be excluded from the operation and effect of this Agreement as fully as though the legal description of such dedicated portion were not included in the description of the Parcel originally subjected to this Agreement.

1.18 **"Permittees"** means the tenant(s) or lawful occupant(s) of a Parcel (other than the Owner thereof), and the respective employees, agents, contractors, customers, invitees, and licensees of (i) the Owner of the Parcel, and (ii) such tenant(s) or occupant(s).

1.19 **"Person"** means an individual, corporation, partnership, limited liability company, association, trust, governmental entity, or other legal entity, or combination of them.

1.20 **"Private Water and Sewer Mains"** means water or sewer mains, lines and appurtenant facilities (including lift stations, if any) installed in the Development and serving one or more Owners, as designated by Declarant from time to time.

1.21 **"Recorded"** means recorded in the official public records of the County.

1.22 **"Secondary CC&Rs"** means an instrument signed and Recorded by Declarant against a Parcel while Declarant is the Owner of the Parcel, or by Declarant and the Owner of the Parcel after Declarant is no longer the Owner of the Parcel, which instrument may be a supplement to this Agreement, or separate and distinct from this Agreement, and may include, without limitation, easements, covenants, conditions or restrictions in addition to those set forth in this Agreement. Secondary CC&Rs are subject and subordinate to this Agreement. In the event of any conflict or inconsistency between this Agreement and Secondary CC&Rs, the instrument containing the more stringent requirements governs, unless Declarant determines to the contrary. Secondary CC&Rs may be amended in accordance with the provisions for amendment expressly contained therein, or in the absence thereof, in accordance with the provisions for amendment of this Agreement contained in Article 17. The term of any

Secondary CC&Rs may not exceed the term of this Agreement, and if this Agreement is terminated for any reason, all Secondary CC&Rs likewise terminate without the necessity of further action by any party.

1.23 **"Self-Maintained Landscaping"** means the landscape plantings, trees, shrubs, irrigation systems and other landscaping-related Improvements on or adjacent to a Self-Maintained Parcel, the operation, maintenance, repair and replacement of which will be recircuited to and become the responsibility of the Owner of the Self-Maintained Parcel as herein provided.

1.24 **"Self-Maintained Lighting"** means the exterior lighting systems and fixtures, including light standards, wires, conduits, lamps, ballasts and lenses, time clocks and circuit breakers on or adjacent to a Self-Maintained Parcel, the operation, illumination, maintenance, repair and replacement of which will be recircuited to and become the responsibility of the Owner of the Self-Maintained Parcel as herein provided.

1.25 **"Self-Maintained Parcels"** means Lot 2, Block 1, Claremont Ranch Filing No. 9, and Tracts B, C, D, and E, Claremont Ranch Filing No. 9 as shown on the Site Plan.

1.26 **"Shopping Center Monument Signs"** means each free-standing sign labeled as such and located or to be located as shown on the Site Plan, all of which are collectively referred to herein as **"Shopping Center Monument Signs."** Each Shopping Center Monument Sign may be shared by Dillon and/or one or more Owner(s), as determined by Declarant and designated in Secondary CC&Rs. Except as otherwise expressly permitted by Declarant, Shopping Center Monument Signs may only be used for purposes of the identification of Dillon and businesses operated in the Development from time to time, as further provided in paragraphs 2.1(h) and 9.2 below.

1.27 **"Site Plan"** means the conceptual site plan attached hereto as **Exhibit B**, as the Site Plan may be subsequently revised or amended in accordance with this Agreement. Declarant reserves the right to revise the Site Plan as to any permitted annexation or deannexation, as to the number and location of Shopping Center Monument Signs, and as to all or any portion of the Development then owned in fee by Declarant, subject to any express limitations expressly set forth in this Agreement or in any Recorded Secondary CC&Rs.

## ARTICLE 2 - EASEMENTS

2.1 **Grant of Easements.** Intending to benefit and burden each Parcel now or hereafter existing in the Development, Declarant grants and reserves the following easements for the Development:

(a) Easements in favor of Declarant, the Manager, the Owners and their Permittees for reasonable access, ingress and egress over all Circulation Drives, driveways, roadways, walkways and sidewalks surfaced with pavement or concrete as now or hereafter constructed and constituting a part of the Common Areas, so as to provide for the passage of pedestrians and motor vehicles (including trucks and delivery vehicles) between all portions of the Common Areas intended for such purposes, and to and from all abutting public streets or rights-of-way furnishing access to the Development (i.e., Constitution Avenue or Marksheffel Road);

(b) An easement for the reasonable parking of motor vehicles by Declarant, the Manager, the Owners and their Permittees in parking stalls or spaces in the Common Areas of the Development intended for such purposes; provided, however, this easement does not permit cross-parking by the employees of an Owner or the employees of such Owner's Permittees on the Parcel of another Owner, and each Owner agrees to take reasonable steps to limit to its Parcel parking by such employees (unless otherwise agreed under subparagraph 3.4(b) hereof). As to any Parcel then owned by Declarant, Declarant reserves the right, in Secondary CC&Rs, to terminate the easement for cross-parking contained herein as between the Parcel and the balance of the Development, whereupon each Owner agrees to use reasonable efforts to enforce the prohibition against cross-parking between the Parcel and the balance of the Development;

(c) (i) Easements in favor of Declarant, the Manager, and such Owner(s) or other Person(s) served by the easement(s) in each specific instance as Declarant may designate in a separate easement or in Secondary CC&Rs, upon, over, under, above and across the Development for the purpose of the construction, use, operation, maintenance, removal, and replacement of Private Water and Sewer Mains, water (domestic, irrigation and fire), gas, electric, telephone, sewer (storm and sanitary, including lift stations), fiber optic and cable television lines, conduits or systems, and similar reasonable and necessary utilities or services, together with reasonable rights of ingress and egress thereto; provided that all such Improvements, systems, and structures installed or constructed on another Owner's Parcel must be installed and maintained below the ground or surface of that Parcel (except as expressly provided below); and, provided further, that the written approval of the Owner of the burdened Parcel as to the location of any such easement must first be obtained. Such approval may not be unreasonably withheld so long as the location of such easement is at least ten (10) feet from any existing or contemplated Building on the burdened Parcel (including for this purpose any loading or drive-through areas appurtenant to the Building), or if the burdened Parcel is a Parcel then owned by Declarant, so long as the location of such easement is upon or within a Circulation Drive or within fifteen (15) feet of the right-of-way line of Constitution Avenue or Marksheffel Road, as the case may be. Any such Improvements, systems and structures required or requested to be placed above ground on another Owner's Parcel are subject to the prior written approval of the Owner of the burdened Parcel, such approval not to be unreasonably withheld with respect to reasonable transformers, utility cabinets or panels, and risers that do not obstruct access or visibility or reduce the number of parking spaces on such Owner's Parcel. Each Owner agrees at the request of Declarant to execute, acknowledge and deliver in recordable form reasonably acceptable to Declarant a specific written easement in favor of Declarant, the Manager, any Owner or other Person designated by Declarant who is served by the easement, and/or any utility provider or governmental or quasi-governmental authority as to specific Improvements installed pursuant to the easement;

(ii) At any time and from time to time the Owner of a Parcel has the right to relocate on its Parcel any utility line or facility installed pursuant to a grant of easement described in this subparagraph 2.1(c) that is then located on such Owner's Parcel, provided that such relocation (1) may be performed only after the Owner proposing to undertake such relocation gives at least thirty (30) days' prior notice to the Owner of each Parcel served by the utility line or facility, (2) may not unreasonably interfere with or diminish utility service to the Parcel(s) served by the utility line or facility, (3) may not reduce or unreasonably impair the usefulness or function of the utility line or facility, (4) must be performed without cost or



expense to the Owner of any other Parcel, (5) must be performed with due diligence so as to minimize any disruption, and (6) must include restoration of the surface of all affected areas to a condition equal to or better than the condition that existed prior to such relocation. The Owner performing such relocation agrees to provide within thirty (30) days following the date of completion of such relocation as-built plans for all such relocated utility lines and facilities to the Owner(s) of all Parcel(s) served by such utility lines and facilities. Upon completion of such relocation, any specific easement Recorded under this subparagraph 2.1(c) will be amended by the necessary parties to conform to the relocation of the Improvements;

(iii) Except in cases of emergency, the right of Declarant, the Manager, or any Owner to enter upon the Parcel of another Owner pursuant to easements granted in this subparagraph 2.1(c), or of any Owner to prosecute work on such Owner's own Parcel if the work interferes with utility easements or easements of ingress, egress or access to or in favor of another Owner's Parcel, may be undertaken only after giving the Owner of the adversely affected Parcel not less than thirty (30) days' prior written notice of the scope and nature of the work, the duration of the work, and the area in which the work is to be performed, and obtaining the advance written approval of the Owner of the adversely affected Parcel to the work; provided, however, Declarant or the Manager, acting reasonably, is exempted from giving such notice to or obtaining such consent from another Owner. The Owner of the adversely affected Parcel may not withhold or delay such written approval when reasonable arrangements are made to perform any work required in a manner and at times calculated to cause minimal disruption to the use and occupation of the adversely affected Parcel, and no affirmative monetary obligation is imposed upon the Owner thereof. The Owner undertaking such work agrees with due diligence to repair at its own cost and expense any and all damage caused by such work and to restore the affected portion of the Parcel upon which such work is performed to a condition equal to or better than the condition that existed prior to the commencement of such work. All such work must be performed in a good and workmanlike manner, free and clear of all liens. Except as otherwise expressly provided herein, the Owner undertaking such work agrees to pay all costs and expenses associated therewith and agrees to indemnify, defend and hold harmless Declarant, the Manager, all Owners and their respective Permittees for, from and against all damages, losses, liens or claims (including reasonable attorneys' fees and costs) attributable to the performance of such work; and

(iv) In addition to the foregoing provisions of this paragraph 2.1(c), each Owner agrees to cooperate in the granting of appropriate easements within the Common Areas of such Owner's Parcel to any governmental or quasi-governmental entity or utility company for underground utilities to serve other portions of the Development.

(d) Easements in favor of the Owners for footings, screen walls, retaining walls, curbing, and light pole bases or standards which may encroach by no more than one (1) foot into or upon the Common Areas of another Owner's Parcel, excluding the Circulation Drives; provided, however, the Owner of the Parcel upon which an Improvement encroaches but for this easement may require by advance written notice to the encroaching Owner that in the event of damage, destruction, demolition, exterior renovation or remodeling, or other removal by any means of all or any significant portion of the encroaching Improvement so identified, the encroaching Improvement must be removed in its entirety from the notifying Owner's Parcel, at the encroaching Owner's sole expense;

(e) An easement in favor of the Owners for purposes of the construction, use, operation, maintenance, removal and replacement of any portion of any landscape planters, light poles, bases and standards, curbing, sidewalks and drive aisles that encroach into or upon the Common Areas of an adjoining Parcel, excluding the Circulation Drives, in locations approved by Declarant, subject to the written approval of the Owner of the burdened Parcel as to the location of the easement, which approval may not be unreasonably withheld so long as such location does not unreasonably impair the use, enjoyment and operation of the Common Areas of the burdened Parcel or adversely affect the conduct of business thereon;

(f) A temporary easement in favor of Declarant, the Manager and the Owners upon, over, under, above and across the Common Areas of each Parcel (excluding the Circulation Drives) for the sole purpose of constructing, maintaining, repairing, or reconstructing with due diligence any Improvements on a Parcel that may most advantageously be constructed, maintained, repaired or reconstructed from the Parcel of another Owner, including construction and installation of Buildings and other Improvements, subject to the written approval of the Owner of the burdened Parcel as to the nature, extent and duration of any proposed use of the easement, which approval may not be unreasonably withheld so long as the use of the easement does not unreasonably impair the use, enjoyment and operation of the Common Areas of the burdened Parcel or adversely affect the conduct of business thereon; provided, however, it is reasonable for an Owner to withhold approval to the use of developed portions of its Parcel pursuant to this easement for purposes of construction staging or the parking of construction vehicles. Without limiting the generality of the foregoing, this easement is also for the maintenance, repair and service of any portion of the Common Areas that the Manager or any Owner is obligated or permitted to perform hereunder, subject to the provisions hereof. Use of this easement must be minimized to the extent reasonably practicable;

(g) An easement in favor of Declarant, the Manager and the Owners to enter upon a Parcel pursuant to the self-help provisions of paragraph 12.2 hereof for the purpose of performing any obligation that the Owner of the Parcel is required to perform under this Agreement but fails or refuses to perform within the applicable time period provided in said paragraph 12.2;

(h) An easement in favor of Declarant and the Manager upon, over, under, above and across the Common Areas of a Parcel upon which a Shopping Center Monument Sign is situated, for purposes of the construction, use, operation, lighting, maintenance, removal and replacement of the Shopping Center Monument Sign, including necessary utilities, and in favor of each Owner permitted by Declarant to place sign panels thereon, for purposes of the maintenance, removal and replacement of such sign panels, as further provided in Article 9 below;

(i) Easements in favor of Declarant, the Manager and the Owners upon, over, under, above and across the Common Areas of the Development for the incidental diversion of storm water runoff consistent with drainage plans approved by Declarant. Except as otherwise expressly provided in subparagraph (j) below, any retention or detention of storm water runoff from one Parcel onto another is permitted only with the prior written consent of the Owner of the burdened Parcel;

(j) An easement in favor of Declarant, the Manager, and such Owner(s) served by the easement in a specific instance as Declarant may designate, under the Circulation Drives and upon, over, under, above and across the Common Areas of the respective Parcels within ten (10) feet of the Circulation Drives, and within any landscaped area along public right-of-way frontage of the Development, for purposes of the installation, use, operation, maintenance, repair, removal and replacement in locations originally approved by Declarant of (i) the Circulation Drive Lights and associated utilities, for illumination of the Circulation Drives, (ii) electrical panels and transformers, utility meters, landscape sprinkler controls and similar facilities, if any, deemed necessary or desirable by Declarant to serve all or portions of the Development, and (iii) Private Water and Sewer Mains; and

(k) An easement in favor of Declarant and the Manager upon, over, under and across the Common Areas of the Development for the purposes of performing the maintenance obligations described in Article 6 below.

## 2.2 Reasonable Use of Easements.

(a) Each Owner and its Permittees may only use the easements granted herein in such a manner as not to unreasonably interfere with, obstruct or delay the conduct and operations of the business of any other Owner or its Permittees at any time conducted on its Parcel, including, without limitation, public access to and from said business, and the receipt or delivery of merchandise in connection therewith. Each Owner undertaking work on the Parcel of another Owner pursuant to an easement granted herein agrees with due diligence to repair in a good and workmanlike manner at its own cost and expense any and all damage caused by such work and to restore the affected portion of the Parcel upon which such work is performed to a condition equal to or better than the condition that existed prior to the commencement of such work.

(b) The easements granted herein are nonexclusive, and each Owner has the right to use and occupy all or any portion of the Common Areas of such Owner's Parcel for any use or purpose not inconsistent with such easements and this Agreement.

2.3 Easements Perpetual. Except as otherwise expressly provided herein, all easements granted in this Agreement are perpetual in duration.

2.4 No Implied Easements. Nothing contained in this Agreement creates any implied easements not otherwise expressly granted herein.

## ARTICLE 3 - COMMON AREAS

3.1 Use and Configuration of Common Areas. Common Areas may only be used for purposes of ingress, egress and vehicular and pedestrian access and circulation between the Parcels and adjacent public rights-of-way, for vehicular parking, for loading and unloading of commercial and other vehicles and the servicing and supplying of businesses in the Development, for the comfort and convenience of Owners and their Permittees, and for any other use expressly permitted by Declarant, this Agreement or in Secondary CC&Rs, or required by any governmental authority having jurisdiction over the Development. Except as otherwise provided in this Agreement or in Secondary CC&Rs, the size, configuration and arrangement of the Common Areas and all Improvements and facilities constructed thereon, including, without

limitation, Circulation Drives, Circulation Drive Lights, parking areas and spaces, patterns of traffic flow, entrances and exits, and location of trash enclosures, are subject to the prior written approval of Declarant as to the initial construction thereof, or as to any reconfiguration, rearrangement or remodeling thereof.

3.2 No Obstructions. Except as otherwise expressly shown on the Site Plan or approved by Declarant as to the initial construction thereof or any reconfiguration, rearrangement or remodeling thereof, no bumper guard, curb, lighting standard, landscape planter, sidewalk, fence, wall, rail, division or any other permanent Improvement that could constitute a barrier may be constructed or placed by an Owner in the Common Areas of such Owner's Parcel or upon or along any of the common boundary lines thereof, if it interferes with the Circulation Drives or otherwise materially adversely affects the parking configuration, vehicular and pedestrian circulation, or access in and through the Common Areas of the Development. Temporary structures and barricades may be installed on portions of the Development in connection with the construction of permanent Improvements on the Parcels or the maintenance or repair of the Circulation Drives, subject to the prior written consent of Declarant. All temporary barricades and structures must be maintained in a safe, neat and clean condition by the Owner installing them, and promptly removed when the construction, maintenance or repair is complete. Use of extruded curb is strictly temporary within the meaning of this paragraph 3.2 and may not be used as a permanent Improvement without Declarant's express written consent.

3.3 Possession of Common Areas. Declarant, the Manager, the Owners and their respective Permittees jointly enjoy possession of the Common Areas under and subject to this Agreement. Declarant reserves the right to remove, exclude or restrain by appropriate means any Person who is using or occupying the Common Areas in a manner contrary to this Agreement or applicable law, as determined by Declarant. If such unauthorized use is by an Owner or its Permittees, such Owner agrees to immediately cease and cause its Permittees to immediately cease such unauthorized use upon notice from Declarant. Declarant also reserves the right to restrict access to Common Areas not intended for use by Owners and their Permittees, including, without limitation, washes and natural open spaces, if any.

3.4 Parking.

(a) All motor vehicles of Owners and Permittees must be parked in the Common Areas in parking spaces and within lines and stripes intended for parking purposes. Except as may be required by applicable governmental authority, no charge or other validation for parking in the Common Areas may be made unless agreed upon by all Owners and permitted by applicable law. No portion of the parking facilities upon the Common Areas of a Parcel may be designated as "reserved" by the Owner thereof without the prior written consent of Declarant (excluding parking reserved for the handicapped if required by applicable governmental authority). This subparagraph 3.4(a) does not prohibit a valet parking operation conducted by an Owner solely on its own Parcel, provided that the prior written consent of Declarant is obtained.

(b) As further provided in subparagraph 2.1(b) above, each Owner agrees to use reasonable efforts to restrict to such Owner's Parcel parking by the employees of such Owner and its Permittees. Notwithstanding the foregoing, specific area(s) within the Common Areas of

the Development to be used for motor vehicle parking by employees of Owners and their Permittees ("**Employee Parking**") may be designated from time to time by Declarant while it owns any interest in the Development, and thereafter by unanimous written consent of all Owners of the Development. If Employee Parking is so designated, employees of Owners and their Permittees must use only those portions of the Common Areas designated for Employee Parking purposes.

(c) The authority granted in this paragraph 3.4 to any Owner to designate "reserved" parking (with the consent of Declarant if required under subparagraph 3.4(a) above), and of Declarant or all Owners to designate Employee Parking on Common Areas of the Development may not be exercised in a manner that discriminates against any Owner or business in the Development.

(d) Overnight parking of semi-trucks or trailers in the Development without Declarant's prior written consent is expressly prohibited. Parking by one vehicle or vehicle/trailer combination in more than one parking space, or in a manner that blocks or partially blocks a Circulation Drive or drive aisle is expressly prohibited. Declarant reserves the right to enforce this subparagraph 3.4(d) by such means as Declarant deems appropriate, including, without limitation, towing or "booting" improperly parked vehicles or trailers.

(e) Unless otherwise approved by Declarant and the County, each Parcel, when improved, must contain a sufficient number of parking spaces to satisfy both minimum and maximum County code parking requirements for the use to be made of the Parcel. However, if the County and Declarant expressly permit a reduced number of parking spaces on a Parcel (or combination of Parcels under common ownership), the reduced number of parking spaces satisfies the foregoing minimum parking requirement.

3.5 Waste or Nuisance. No rubbish or debris of any kind may be placed or permitted to accumulate upon any portion of the Development for an unreasonable length of time, and no obnoxious or offensive odor is permitted to arise from any portion of the Development. No nuisance is permitted in any portion of the Development. Without limiting the generality of the foregoing, no horn, whistle, bell, speaker, sound system or other exterior sound device may be located, used or placed upon, or audible from, exterior portions of the Development other than (i) those used to broadcast music commonly used in the operation of an Owner's business (e.g., Muzak or similar commercial music service), provided that such music is not played in a loud or offensive manner or in a manner that adversely affects the operation of the business of another Owner or its Permittees as reasonably determined by such other Owner, (ii) security devices or fire alarms used solely for such purposes, (iii) exterior speakers and sound systems for outdoor dining areas and for drive-up or drive-through facilities, (iv) exterior bells, paging or sound systems normal and customary for an educational facility, or (v) any other exterior sound system or device expressly permitted in Secondary CC&Rs.

3.6 Rules and Regulations. Declarant may by written notice to all Owners establish and thereafter supplement, modify or amend, reasonable and nondiscriminatory rules and regulations for the use of the Common Areas, which must be complied with by all Owners and their Permittees, and which may include, but not be limited to, the temporary closure of all or any portion of the Common Areas as may be legally necessary, in the opinion of Declarant or its

legal counsel, to prevent a dedication of the Common Areas or the accrual of any prescriptive rights therein to any Person or the public, but may not otherwise adversely affect vehicular parking, ingress or egress. Declarant is also expressly granted the right during the prosecution of construction on an Owner's Parcel to require the Owner and its contractor(s) and workmen to restrict materials and equipment storage, construction-related deliveries, and construction traffic and parking, to times and areas designated by Declarant.

3.7 Commercial Use of Common Areas Restricted. Except as expressly permitted by this Agreement, Secondary CC&Rs or with Declarant's prior written consent, no sale, lease, or display of merchandise may be made, conducted or permitted in the Common Areas or otherwise outside the exterior walls of any Building in the Development, no portion of such areas may be used for commercial purposes by any Owner or Permittee, and no traveling carnivals, fairs, rides, auctions, shows, performances, kiosks, booths or lots for the sale of fireworks or Christmas trees, sales by transient merchants from vehicles or booths, fund-raisers or other charitable events, are permitted in the Common Areas. No Owner may cause, permit or undertake any posting of advertisements on vehicles or Buildings other than advertisements placed by an Owner or its Permittees on the Buildings located upon its own Parcel related to the business purposes conducted thereon and in compliance with this Agreement and all applicable law. No political demonstration or rally, political advertising or campaigning, promotions outside of Buildings, sidewalk sales or similar activities are permitted in the Development without the prior written consent of Declarant. Shopping carts may only be stored in Common Areas within locations approved by Declarant and the County, and no exterior overnight storage of shopping carts is permitted except within storage corrals approved by Declarant and the County. No maintenance or repair of vehicles is permitted in the Common Areas without the prior written consent of Declarant.

3.8 Vending Machines. Except as expressly permitted by Secondary CC&Rs, no vending machines, ATM/Banking facilities, or other retail fixtures or equipment of any kind may be located in the Common Areas or on any sidewalk within the Development (whether the sidewalk is considered a part of Building Envelope or Common Areas), without the prior written consent of Declarant.

#### ARTICLE 4 - DEVELOPMENT CONTROL

4.1 Building Envelopes. Buildings may only be constructed or placed upon the respective Parcels within Building Envelopes. All construction within Building Envelopes must conform with this Agreement and all applicable law. Nothing contained in this paragraph 4.1 prohibits the construction by an Owner within a Building Envelope of Improvements commonly found in Common Areas, in which event such areas will thereupon be deemed Common Areas for purposes of this Agreement during such time as such Improvements are located therein. Canopies, canopy support columns and associated subsurface installations may encroach from the Building Area of a Parcel into the Common Areas of the Parcel (so long as the normal use of the Common Areas is not impaired), in which event such Improvements will constitute part of the Buildings to which they are attached and not part of the Common Areas.

4.2 Maximum Building Coverage and Building Height. Notwithstanding the size of any Building Envelope indicated on the Site Plan, the total square footage of floor area and

maximum height (measured in accordance with County ordinances and guidelines) of all Buildings to be constructed within the Building Envelope on a Parcel may not exceed the "Allowable Gross Square Feet" shown on the Site Plan or otherwise set forth in the Declaration, this Agreement or in Secondary CC&Rs. Subsurface installations on a Parcel for a tire service center or other automotive service repair facility are excluded from the calculation of Building Area of the Parcel.

4.3 Review and Approval of Plans. In order to achieve and maintain a harmonious and uniform quality of development for all Parcels within the Development, Evergreen reserves the right to review and approve construction and development plans of each Owner in advance of construction on a Parcel.

4.4 Submission of Preliminary Plans. Prior to construction or placement of any Building or other Improvement on a Parcel, including, without limitation, exterior alterations or additions to existing Buildings, or reconstruction following casualty, the Owner thereof agrees to submit to Evergreen for approval, prior to or concurrently with a similar submission to the County, preliminary plans for all proposed Improvements to such Owner's Parcel, including, without limitation, two (2) full sets of the following: site plan (including, without limitation, an indication of Building footprint, parking, exterior lighting and other proposed Improvements in Common Areas), grading and drainage plan, Building elevations (including, without limitation, a color and material sample board and a colored rendering of all sides of all Buildings), landscape plan, and signage plan (collectively, "**Preliminary Plans**"). If expressly required by Evergreen, submission of Preliminary Plans, to be complete, must also be accompanied by a \$500 architectural review and processing fee to defray the costs of architectural review. All Preliminary Plans for Buildings and other Improvements upon the Parcels must at a minimum conform to the requirements of this Agreement and the Design Guidelines, but Evergreen expressly reserves the right to impose design standards and requirements that are in addition to or that vary from the Design Guidelines. All Buildings and other Improvements constructed upon the Parcels must be of first-quality construction and be architecturally designed so that the exterior elevations of Buildings (including, without limitation, color, materials, texture and signage) and Common Area Improvements will be architecturally compatible and harmonious with all other Buildings and Improvements constructed or to be constructed in the Development, as determined by Evergreen in its sole and absolute discretion.

4.5 Approval/Final Plans. If, within thirty (30) days following Evergreen's actual receipt from an Owner of a submission of Preliminary Plans satisfying the requirements of paragraph 4.4 above, Evergreen does not object to or make a proposal that would add to or modify the Preliminary Plans, the submitting Owner must give written notice to Evergreen making reference to this Agreement and this paragraph 4.5, and advising Evergreen that Evergreen's failure to respond within an additional ten (10) days after such notice is given will result in the Preliminary Plans being deemed approved by Evergreen. If Evergreen does not object to or make a proposal that would add to or modify the Preliminary Plans within such additional 10-day period, the Preliminary Plans will be deemed approved and satisfactory for further development, provided that they otherwise comply with this Agreement and the Design Guidelines (the "**Approved Preliminary Plans**"). If Evergreen does timely object to or make a proposal that would add to or modify the Preliminary Plans, the submitting Owner will modify the Preliminary Plans accordingly and resubmit them until they are approved or deemed

approved. Two (2) sets of final working drawings, plans and specifications (the "**Final Plans**") must be completed and submitted to Evergreen prior to commencement of construction and must conform to the Approved Preliminary Plans. Such Final Plans are subject to Evergreen's review and approval on the same basis as is set forth above in this paragraph 4.5 with respect to the Preliminary Plans. The Final Plans as approved in writing by Evergreen are herein referred to as the "**Approved Final Plans**." In no event does Evergreen's approval of any Owner's drawings, plans, specifications, calculations or work constitute an implication, representation or certification of any kind by Evergreen that said items are in compliance with all applicable law, and Evergreen is not liable for any defect in any structure constructed in accordance therewith, whether or not in accordance with the Approved Final Plans. The Owner assumes all risk and responsibility with respect to the plans and other drawings and specifications submitted to Evergreen and agrees to indemnify, defend and hold harmless Evergreen for, from and against any and all losses, claims, damages, obligations or liabilities (including attorneys' fees and costs) arising therefrom or related thereto.

4.6 No Alterations. Once Evergreen has reviewed and approved the Approved Final Plans for the construction of Buildings and other Improvements on a Parcel, such Buildings and other Improvements must be constructed in accordance therewith, and any further modification thereof requires the prior written approval of Evergreen; provided, however, the foregoing does not require the submission to Evergreen for approval of "minor modifications" to the Approved Final Plans. For the purposes of this paragraph 4.6, "minor modifications" are modifications that (i) do not affect the exterior appearance of the Buildings and other Improvements on a Parcel, (ii) do not result in an increase or decrease in construction cost of more than Twenty-Five Thousand Dollars (\$25,000.00), (iii) do not result in the Approved Final Plans, as modified, no longer being in substantial conformance with the Final Plans as originally approved by Evergreen, and (iv) do not result in the Approved Final Plans, as modified, no longer being in conformance with the Design Guidelines. Once constructed, any alteration, addition, repainting, remodeling or reconstruction to or of any existing Building that involves any change in the exterior appearance thereof, and any material alteration of the Common Areas including, but not limited to, alteration of the layout of driveways or parking spaces, requires the prior written consent of Evergreen. No changes or alterations to the Circulation Drives or Circulation Drive Lights as originally designated by Declarant and constructed on any Parcel (excluding any Parcel then owned in fee by Declarant) may be made without the prior written consent of those Persons necessary to effect an amendment of this Agreement under Article 17 below.

4.7 Sprinklers/Fire Rating. Unless otherwise approved by Declarant, each Building constructed in the Development must either (a) be equipped with such automatic sprinkler systems as meet all requirements of the Fire Insurance Rating Authority (or other similar organization having jurisdiction), (b) be constructed, maintained and used so as to be fire-rated as a separate and distinct unit from every other Building constructed in the Development, or (c) be constructed, maintained and used in compliance with a so-called 60-foot yard agreement entered into with applicable governmental authority.

4.8 Party Walls. No party walls (in which the Owners of Buildings share a common wall along the boundary of their respective Parcels) are permitted in the Development except with the prior written consent of Declarant and the Owners of the affected Parcels. Any agreements between such Owners regarding party walls may be contained in Secondary CC&Rs.



4.9 Other Review. Compliance with the requirements of this Article 4 is in addition to, not in lieu of, compliance with the requirements of the County, including, without limitation, any site plan or design review process of the County, which is the responsibility of each Owner. In addition, compliance with the requirements of this Article 4 is in addition to, not in lieu of, compliance with the Declaration, including, without limitation, obtaining the approval of Dillon to plans and specifications showing the Building's exterior design, color, building materials and elevations, which is the responsibility of each Owner. If the requirements of the County or Dillon conflict with the requirements of this Agreement, the more restrictive requirements are controlling.

## ARTICLE 5 - PARCEL CONSTRUCTION

5.1 Initial Construction of Improvements. Except as otherwise provided in paragraph 5.2 below or as otherwise agreed by Declarant, once construction is commenced (following written approval by Declarant of the Approved Final Plans for the initial construction of Building(s) and other Improvements on a Parcel), the Owner of the Parcel agrees to proceed to construct or cause to be constructed such Building(s) and other Improvements with reasonable diligence, at such Owner's sole cost and expense, in a good and workmanlike manner, in accordance with the Approved Final Plans and free and clear of all liens and encumbrances. Such construction may not unreasonably interfere with the use of the Common Areas by any other Owner or its Permittees. All such construction must in any event be completed within twelve (12) months following the date of commencement of such construction, unless otherwise agreed by Declarant.

5.2 Right of Declarant to Complete. If any Owner fails to complete construction of Buildings and other Improvements within the time period required under paragraph 5.1 above, upon thirty (30) days' written notice to such Owner, Declarant is entitled, but not obligated, to enter upon such Owner's Parcel and cause the completion of all or portions of such construction in accordance with the Approved Final Plans, at such Owner's sole cost and expense.

5.3 Initial Construction of Common Areas. Notwithstanding the foregoing provisions of this Agreement to the contrary, in order to achieve architectural harmony, uniformity of appearance and coordination of the initial construction of Improvements to the Common Areas of the Development in connection with the initial construction of Building(s) and other Improvements (including Common Elements) on a Parcel by an Owner, Declarant may undertake the responsibility for the construction of all or any portion of the Common Area Improvements for the Parcel on such terms and conditions as Declarant and such Owner mutually agree in writing.

5.4 General Provisions Regarding Construction. All construction, alteration or repair work undertaken by an Owner must be accomplished expeditiously, in accordance with all applicable law, and in a good and workmanlike manner using first-class materials, free and clear of liens and encumbrances. All construction work must be accomplished in such a manner as to minimize any damage or adverse effect that might be caused by such work to any other Owner or its Permittees.

## 5.5 Covenant to Maintain.

(a) Each Owner agrees, at its expense, to maintain all unimproved portions of such Owner's Parcel in a clean and neat condition, to take such measures as are necessary to control grass, weeds, blowing dust, dirt, sand, mud, storm water runoff, litter and debris, and to otherwise maintain such unimproved portions of its Parcel in compliance with all applicable law.

(b) Each Owner agrees to operate, maintain, repair and replace, at its sole cost and expense, all Buildings, other Improvements, and Common Areas located on its Parcel, in good order, condition and repair, in a manner consistent with first-class neighborhood retail and office developments in metropolitan Colorado Springs, Colorado. An Owner's obligations hereunder include, without limitation, maintaining, repairing and keeping illuminated lighting on such Owner's Parcel as further provided in subparagraph 5.5(c) below, repairing broken curbs and sidewalks, and maintaining and repairing landscaping, signage, paved areas (including sealing and restriping), sidewalks and planters contiguous to Buildings, retaining walls, and Drainage Improvements. For purposes hereof, the Common Areas of a Parcel include any neighboring property or Improvements contiguous to the Parcel or in the public rights-of-way adjacent to the Parcel that are required by the County or any other governmental authority to be maintained by the Owner of the Parcel. Each Owner further agrees, at its sole cost and expense, and subject to paragraph 2.2 above, to construct, operate, maintain, repair and replace in good order and condition, all private utility lines, systems and facilities serving the Parcel of such Owner. Without limiting the generality of this subparagraph 5.5(b), the Owner of a Self-Maintained Parcel is solely responsible at its expense for the operation, maintenance, repair, replacement and illumination of its entire Parcel, including all Buildings, other Improvements and Common Areas thereon, and the Self-Maintained Lighting and Self-Maintained Landscaping applicable thereto. In addition, should Dillon elect to assume responsibility for snow removal solely from the Dillon Parcel in accordance with the terms of the CAMA, then the Owners shall remove, as and when needed, snow and ice from the Common Areas (including removal from the building sidewalks) in an expeditious fashion and in accordance with a snow removal plan approved by Declarant.

(c) Circulation Drive Lights, if any, located on Self-Maintained Parcels constitute Self-Maintained Lighting. The Circulation Drive Lights will be illuminated from dusk until dawn or such other hours as are required by the CAMA or Declarant. All other lighting in the Common Areas of the Development must be illuminated during such hours as the Manager requires in rules and regulations established under paragraph 3.6 above. Subject to the foregoing, all exterior lighting on a Parcel must be separately metered to the Parcel and the Owner of the Parcel agrees to maintain, repair and illuminate as required herein, and to timely pay all utility charges relating to, such other lighting.

(d) Declarant intends to initially install the Self-Maintained Landscaping and the Self-Maintained Lighting, which the County may require to be installed on otherwise undeveloped portions of the Development as a condition to the construction of Improvements on other portions of the Development. At any time after the earlier to occur of (i) the expiration of six (6) months after the conveyance of a Self-Maintained Parcel by Declarant to an unrelated Person, or (ii) substantial completion of a Building on the Self-Maintained Parcel (as conclusively evidenced by issuance of a temporary or permanent certificate of occupancy), Declarant reserves the right, but not the obligation, upon 30 days' written notice, to require the

Owner of the Self-Maintained Parcel to recircuit the utilities to the Self-Maintained Landscaping and Self-Maintained Lighting (including water and electric) for which the Self-Maintained Parcel is responsible, to separate utility meters applicable only to the Self-Maintained Parcel, after which the Owner of the Self-Maintained Parcel will be solely responsible at its expense to illuminate, maintain, repair, and replace as necessary said Self-Maintained Landscaping and Self-Maintained Lighting and to pay all utility charges relating thereto.

(e) Each Owner agrees to regularly inspect the Building(s) and other Improvements, if any, located on its Parcel for the presence of graffiti and each Owner must promptly, and in any event not later than two (2) business days after written notice from the Manager or the County, remove any graffiti from its Building(s) and other Improvements. If an Owner fails to remove graffiti from its Building(s) and other Improvements within such 2-business-day period, which failure is not cured within two (2) business days after a second written notice from the Manager or the County, the Manager is entitled, but not obligated, to remove such graffiti at the expense and for the account of such Owner.

(f) If the business operated on a Parcel involves a restaurant or other food service operation, the Owner of the Parcel must cause to be installed and periodically inspected and cleaned (not less often than once every six (6) months) grease interceptors as reasonably necessary to accommodate the requirements of the business and prevent the emanation of noxious odors from the Parcel. The Owner of the Parcel agrees promptly upon request to furnish to the Manager copies of reports and invoices evidencing such periodic inspection and cleaning.

(g) If any Owner fails to perform any operation, maintenance, repair, replacement or illumination of the Building(s), other Improvements, or Common Areas located on such Owner's Parcel, or any recircuiting of Self-Maintained Landscaping or Self-Maintained Lighting, for which such Owner is responsible as required herein, the Manager may, at its option, give the Owner written notice of such failure. If such Owner fails to commence the required performance within twenty (20) days from the date of such written notice or thereafter fails to diligently prosecute such performance to completion, or if such Owner fails to complete the required performance within thirty (30) days from the date of the notice (provided, however, if the nature of the performance is such that it cannot reasonably be completed within thirty (30) days, provided that the Owner so noticed has commenced within such 30-day period to render the required performance and is diligently pursuing such performance to completion without interruption, such Owner has a reasonable period of time within which to complete such performance), the Manager is entitled, but not obligated, to enter upon the Parcel during reasonable hours and perform such operation, maintenance, repair, replacement or illumination at such Owner's sole cost and expense. Notwithstanding the foregoing to the contrary, if such Owner's failure to maintain its Building or other Improvements presents an immediate risk of damage to property, injury to persons, or loss or obstruction of access, the prior notice requirement of this paragraph does not apply, and the Manager is entitled, but not obligated, to take immediate steps to minimize or eliminate such risk, at the cost and expense of such Owner. In such event, notice of such action will be given to such Owner as soon as reasonably practicable under the circumstances.

5.6 Trash Facilities. Each Owner agrees to construct within the Common Areas of such Owner's Parcel in a location approved by Declarant, trash facilities and receptacles ("**Trash**

**Facilities**”) for the exclusive use and benefit of the Parcel and the containment of garbage, trash and refuse generated by the business conducted on the Parcel. The location of the Trash Facilities on each Parcel must be approved in writing by Declarant and situated so as to comply with all applicable law and not to obstruct or unreasonably interfere with the use and enjoyment of neighboring Parcels. In no event may the concrete apron of the Trash Facilities on a Parcel be located in a Circulation Drive unless expressly approved by Declarant. All Trash Facilities on a Parcel must be completely screened with a masonry screen wall and metal gate approved by Declarant pursuant to the provisions of Article 4. Each Owner is solely responsible for all maintenance and clean-up of such Owner’s Trash Facilities and agrees to pay all direct costs for refuse service. The Trash Facilities must be maintained in a safe, clean and operating condition at all times, and all rubbish, trash and garbage must be regularly removed and may not be allowed to accumulate. All rubbish, trash and garbage must be kept in rodent-proof containers. Rubbish, trash and garbage that emits odor must be kept in air-tight containers. If an Owner defaults in its use or operation of its Trash Facilities, the Manager may, upon ten (10) days’ prior written notice, but without obligation to do so, take such steps as are necessary to properly maintain such Trash Facilities at the sole cost and expense of the Owner in default.

5.7 Damage or Destruction of Buildings. If all or a portion of a Building on a Parcel is damaged or destroyed, the Owner of the Parcel agrees with all due diligence, and at its sole cost and expense, to either (a) repair, restore and rebuild such Building to its condition existing prior to such damage or destruction, subject to the provisions hereof, or with such changes, alterations or additions as conform with Article 4 above, or (b) tear down and remove all portions of such damaged or destroyed Building and related Improvements, including the debris resulting therefrom, and otherwise clean and restore the area affected by such casualty to a level and clean condition. If any Owner fails to repair, restore or rebuild the Building or tear down and remove the Building as set forth above, the Manager may, at its option, give the Owner written notice of such failure. If such Owner fails to commence the required performance within thirty (30) days from the date of such written notice or thereafter fails to diligently prosecute such performance to completion within twelve (12) months from the date of such notice, the Manager is entitled, but not obligated, to enter upon the Parcel during reasonable hours and perform such repair, restoration, rebuilding or removal at such Owner’s sole cost and expense.

5.8 Damage or Destruction of Common Areas. If all or any portion of the Improvements within the Common Areas of a Parcel is damaged or destroyed, the Owner of the Parcel agrees with all due diligence, at its sole cost and expense, to restore, repair and rebuild said Improvements substantially in accordance with the original plans therefor, or with such changes, alterations or additions as conform with Article 4 above. If any Owner fails to make such repairs or restoration or to rebuild as required above, the Manager may, at its option, give the Owner written notice of such failure. If such Owner fails to commence the required performance within ten (10) days from the date of such written notice or thereafter fails to diligently prosecute such performance to completion within thirty (30) days from the date of such notice (or such longer period not to exceed ninety (90) days as is reasonably necessary to complete such performance), the Manager is entitled, but not obligated, to enter upon the Parcel and perform such repair, restoration or rebuilding at such Owner’s sole cost and expense.

5.9 Right to Reimbursement. All reasonable costs and expenses incurred by Declarant or the Manager in connection with any operation, maintenance, repair, replacement,

restoration, rebuilding, removal or illumination on an Owner's Parcel undertaken by Declarant or the Manager, and all reasonable costs and expenses incurred by Declarant in connection with the completion of construction under paragraph 5.3 above following an Owner's failure of performance under Article 4 or this Article 5 (which failure was not cured within the time frames provided), plus an administrative fee for overhead and supervision equal to twenty percent (20%) of such costs, are due and payable by such Owner upon demand of Declarant or the Manager and constitute an assessment in favor of Declarant or the Manager with respect to which Declarant or the Manager has the rights and remedies set forth in Article 7 below.

## ARTICLE 6 - MANAGEMENT

6.1 Maintenance Obligations of Manager. Except as otherwise expressly provided herein, the Manager, at the cost and expense of the Owners as provided in this Article 6, will perform or cause the Manager-Maintained Detention Basin and the Shopping Center Monument Signs to be maintained in a manner consistent with requirements of the Declaration and CAMA. Notwithstanding the foregoing, each Owner must maintain and repair, at its sole cost, in a clean, sightly and safe condition, any exterior shipping/receiving dock area, any truck ramp or truck parking area, any underground storage tanks (if permitted by Declarant), any paved area beneath a canopy, any "recycling center" (if permitted by Declarant) for the collection of items intended for recycling, such as newspapers, bottles, and aluminum cans, any drive-through lanes or drive-up facilities, and any other exterior areas of the Owner's Parcel excluded from the definition of Common Areas. Each Owner is also obligated to supply at its expense all utilities (power and water) necessary for the proper operation of lighting and irrigation Improvements separately metered to such Owner's Parcel.

6.2 Common Area Expenses. All reasonable costs and expenses incurred by the Manager for the benefit of the Manager-Maintained Detention Basin and/or the Shopping Center Monument Signs under this Agreement and/or the CAMA that are not otherwise allocated specifically to one or more Owners, including, without limitation, the costs and expenses incurred by the Manager under paragraphs 6.1 and 8.5 hereof are herein referred to as "**Common Area Expenses.**" Common Area Expenses also include, without limitation, reasonable and customary reserves, miscellaneous expenses for checks, bank charges, bookkeeping and accounting, reasonable legal fees, and similar administrative costs paid to third parties and directly related to the duties performed by the Manager under this Article 6, and a reasonable management fee (whether payable to the Manager and/or to a third party designated by the Manager) for supervision and overhead in no event to exceed fifteen percent (15%) of the total of such costs and expenses (exclusive of taxes and insurance premiums) or such greater amount as is normally and customarily paid to third-party property managers of first-class shopping centers in the metropolitan Colorado Springs area. The Manager may hire companies affiliated with it to perform all or any portion of the maintenance and operation of the Manager-Maintained Detention Basin and/or the Shopping Center Monument Signs, but only if the rates charged by such companies are competitive with those of other companies furnishing similar services in the metropolitan Colorado Springs area.

6.3 Assessments. Common Area Expenses are a continuing lien and assessment against the Parcels governed by Article 7 below, and will be assessed against each Owner in accordance with the terms of the CAMA.

6.4 Delegation of Manager's Rights and Obligations. The Manager reserves the right at any time, by written notice to all Owners, to delegate all of its rights and obligations under this Article 6 (collectively, "**Property Management**") to an Owner (provided that the Owner to whom the rights and obligations of the Manager are delegated accepts and assumes such rights and obligations in writing), or to the Association (defined in paragraph 14.5 below). Upon such delegation and transfer of Property Management to another Owner or to the Association, the delegating Manager is forever relieved of all rights and obligations relating to Property Management thereafter arising, and the Manager to whom Property Management has been delegated and transferred agrees to thereafter perform Property Management in accordance with this Agreement. If Declarant assigns all rights and obligations of Declarant to a successor under Article 14 below, the rights and obligations of Declarant's successor will include the rights and obligations of the Manager (to the extent not previously assigned). Any Manager (other than Evergreen) then serving may be removed, or a new Manager may be designated to fill a vacancy, by the unanimous written consent of the Owners.

## ARTICLE 7 - ASSESSMENTS

7.1 Covenant to Pay. Declarant, for and on behalf of each Owner within the Development, hereby agrees, and each subsequent Owner by acceptance of a deed to a Parcel (whether or not such obligation is specifically expressed therein), agrees, to pay Declarant all sums due and owing to Declarant under this Agreement and/or the CAMA, and to pay to the Manager all sums due and owing to the Manager under this Agreement and/or the CAMA, which are deemed assessments whether or not specifically so characterized elsewhere in this Agreement or in the CAMA. In addition, in connection with a Site Development Agreement or similar agreement (an "SDA"), if any, executed by an Owner (an "SDA Owner") and Declarant, any amounts that may be owing from such SDA Owner to Declarant under the SDA are declared to be "assessments" for the purposes of this Agreement, payable by such Owner.

7.2 Continuing Lien. Each assessment established by this Agreement or the CAMA in favor of Declarant or the Manager, together with any interest, costs and reasonable attorneys' fees, is a charge and continuing lien upon the Parcel against which, or against the Owner of which, such assessment is made, until paid. Each such assessment, together with any interest, costs and reasonable attorneys' fees, is also the personal obligation of the Owner of the Parcel at the time the assessment is declared. Said personal obligation for assessments does not pass to an Owner's successors in interest unless expressly assumed by them, but the Owner of the Parcel at the time the assessment is declared continues to remain personally liable to Declarant or the Manager for such assessment.

7.3 Delinquent Assessment. Failure to pay an assessment within the time period provided for such payment, which failure continues for ten (10) days after written notice thereof from Declarant or the Manager to the Owner constitutes a default by the Owner of the Parcel to which such assessment relates. Declarant or the Manager is authorized and empowered to proceed in the event of such default to collect such delinquent assessment, together with interest

at the rate of eighteen percent (18%) per annum from the date such assessment is due and payable, until it is fully paid, together with all recording costs and expenses and reasonable attorneys' fees. In this regard, in addition to any and all other remedies permitted at law or in equity, Declarant or the Manager has the right to enforce payment of the delinquent assessment or other amount due against the Owner and/or its Parcel by taking either or both of the following actions, concurrently or separately (and by exercising either of the remedies set forth below, Declarant or the Manager does not prejudice or waive its right to exercise the other remedy or such other additional rights or remedies as may be available under applicable law):

(a) Bring an action at law against the Owner personally obligated to pay the assessment or other sum of money; and/or

(b) Foreclose the lien against such Owner's Parcel(s) under then-prevailing Colorado law relating to the foreclosure of realty mortgages (including, to the extent available, the right to recover any deficiency).

In addition to any and all other remedies permitted at law or in equity, Declarant or the Manager reserves the right to include in Common Area Expenses any delinquent assessment or other amount due from a defaulting Owner, together with all costs of collection or attempted collection, including, without limitation, filing fees, attorney's fees and court costs, to be allocated among and paid by the non-defaulting Owners, subject to a pro rata credit or reimbursement of amounts subsequently collected.

7.4 Liability for Assessments. No Owner may waive or otherwise escape liability for the assessments provided for herein by nonuse or abandonment of its Parcel or its interest therein. The lien for assessments provided for in this Article 7 is superior to all liens and encumbrances other than liens for taxes and other public charges which by applicable law are expressly made superior. The sale or transfer of a Parcel does not affect the lien for assessments provided in this Article 7.

7.5 Recordation. If any assessment or any portion of an assessment becomes delinquent, a notice of lien against the Parcel to which such assessment relates for the unpaid amount of such assessment and the costs and expenses described above may be Recorded by Declarant or the Manager. The notice of lien will be signed and acknowledged by Declarant or the Manager, and will contain the following:

- (a) an itemized statement of all amounts due and payable;
- (b) a description sufficient for identification of the Parcel to which the notice relates;
- (c) the name of the Owner or reputed Owner of the subject Parcel; and
- (d) the name and address of the Person causing the notice to be Recorded (Declarant or the Manager as applicable).

Such notice of lien is additional evidence of the lien against the interest in real property described in such notice, in the amount specified therein. Upon the curing of any default for which a notice of lien was Recorded by Declarant or the Manager, an appropriate release of such

notice will be Recorded by Declarant or the Manager upon payment by the defaulting Owner of a reasonable fee determined by Declarant or the Manager to cover the costs of preparing and recording such release together with the payment of such other costs, including, without limitation, legal fees and court costs, interest or charges, as Declarant or the Manager has incurred.

## ARTICLE 8 - INDEMNIFICATION AND INSURANCE

### 8.1 Indemnification.

(a) Each Owner agrees to indemnify, defend and hold harmless Declarant, including, without limitation, Declarant's agents, employees, directors, officers, partners, members, managers and contractors, the Manager, and all other Owners within the Development, and their respective Permittees, for, from and against any and all claims and all costs, expenses and liabilities (including reasonable attorneys' fees and costs) incurred in connection with all claims, including any action or proceeding brought thereon, arising from or as a result of any accident, injury, death, loss or damage whatsoever to any Person, or to the property of any Person, proximately caused by the acts or omissions of such Owner or its Permittees and occurring on such Owner's Parcel, except to the extent caused by the negligence or intentional misconduct in whole or in part of an indemnified party.

(b) Each Owner having rights with respect to an easement granted hereunder agrees to indemnify, defend and hold harmless Declarant, including, without limitation, Declarant's agents, employees, directors, officers, partners, members, managers and contractors, the Manager and the Owner whose Parcel is subject to the easement for, from and against any and all claims and all costs, expenses and liabilities (including reasonable attorneys' fees and costs) incurred in connection with all claims, including any action or proceeding brought thereon, arising from or as a result of any accident, injury, death, loss or damage whatsoever to any Person, or to the property of any Person, proximately caused by the acts or omissions of the indemnifying Owner or its Permittees in the use of any such easement granted hereunder, except to the extent of the negligence or intentional misconduct in whole or in part of the indemnified party whose Parcel is subject to the easement or its Permittees.

(c) Declarant, the Manager, and their respective agents, employees, directors, officers, partners, members, managers or contractors are not liable to any Owner or such Owner's Permittees for any mistake or error in judgment or for any other act or omission under this Agreement if it is not fraudulent, grossly negligent or in bad faith, and each Owner expressly waives and relinquishes any and all claims against Declarant, the Manager, and their respective agents, employees, directors, officers, partners, members, managers and contractors on account thereof.

8.2 Insurance by Owners. Each Owner (or Permittee of such Owner responsible for carrying insurance) agrees to provide and maintain, or cause its Permittees to provide and maintain, such policies of property insurance (written on a "**Special Form**" or equivalent basis) on all Building(s) and other Improvements located on such Owner's Parcel (in an amount not less than eighty percent (80%) of the full replacement value thereof), and commercial general liability insurance insuring against claims for bodily injury, personal injury, death or property



damage (including contractual liability arising under the indemnities contained in paragraph 8.1 above), occurring on or about such Owner's Parcel and the easement areas that are subject to use and enjoyment by such Owner and its Permittees hereunder, with combined single limit coverage of not less than Three Million Dollars (\$3,000,000) per occurrence, or such higher amounts of coverage as the Manager may from time to time reasonably designate (but without obligation to do so) based on insurance coverage carried by reasonable and prudent owners of like property in metropolitan Colorado Springs, Colorado. Each policy of commercial general liability insurance procured and maintained by an Owner or its Permittees must be primary and not contributing with any policy or policies of insurance maintained by Declarant, the Manager or any other Owner or its Permittees, and must name Declarant, any person designated in writing by Declarant, the Manager (if other than Declarant) and all other Owners as additional insureds (using ISO Endorsement CG 20 26, or its equivalent), provided that the Owner obtaining such insurance has been supplied with the name(s) of the other Owner(s) in the event of a change therein. Any insurance required under this Agreement may be brought within the coverage of so-called blanket or master policies of insurance, provided that such blanket or master policies contain a so-called "per location aggregate" endorsement (or equivalent) preventing the coverages required by this Agreement from being reduced or diminished by reason of the use of such policies. All insurance must be issued by insurance companies authorized to do business in the State of Colorado rated with a Financial Strength Rating of not less than A- (Excellent) and a Financial Size Category of not less than IX by A. M. Best Company, must be written on an occurrence basis and must include coverage for contractual liability and broad form property damage.

8.3 Self-Insurance. Any Owner (or Permittee of such Owner responsible for carrying insurance) having a tangible net worth calculated in accordance with generally accepted accounting principles consistently applied, in excess of Three Hundred Million Dollars (\$300,000,000) and net current assets in excess of Seventy-Five Million Dollars (\$75,000,000) may self-insure. By self-insuring, an Owner (or Permittee of such Owner responsible for carrying insurance) is deemed to have agreed to make payment in the event of loss at such times, in such amounts, and to such person(s) as would an insurance company authorized to do business in the State of Colorado having the minimum Financial Strength Rating and Financial Size Category described in paragraph 8.2 above, it being the intention in permitting self-insurance hereunder that such self-insurance be equivalent to the third-party insurance coverage otherwise required under this Article 8. In no event, however, may the scope of any self-insurance be deemed to be greater than the scope of the third-party insurance coverage otherwise required under this Article 8. The election by an Owner (or Permittee of such Owner responsible for carrying insurance) to self-insure does not reduce or diminish the indemnification or waiver of subrogation to which any Owner would otherwise be entitled under this Agreement.

8.4 Evidence of Insurance. Upon the request of any Owner or Declarant, an Owner agrees to furnish to the requesting party certificates of insurance and, with respect to the additional insured obligations referenced in this Article 8, a copy of ISO Endorsement CG 20 26 (or its equivalent), and other reasonable evidence indicating that insurance meeting the requirements hereof has been obtained and is in full force and effect. In the case of self-insurance, reasonable evidence substantiating the tangible net worth and net current assets requirements set forth in paragraph 8.3 above must be provided (e.g., audited financial statements prepared by a reputable national accounting firm in accordance with generally

accepted accounting principles, consistently applied, but if such Owner or Permittee is publicly traded on a national securities exchange, substantiation of net worth need not be made, as such information is a matter of public record).

8.5 Insurance of Common Areas by Owners of Self-Maintained Parcels. Each Owner of a Self-Maintained Parcel must procure and maintain property insurance coverage (to the extent reasonably insurable) for the Common Areas of its Parcel, to include such endorsements and additional coverages as such Owner reasonably determines based on insurance coverages carried by reasonable and prudent owners of like property in metropolitan Colorado Springs, Colorado. Such insurance must be maintained by the Owner in an amount equal to not less than eighty percent (80%) of the full replacement value (to the extent reasonably insurable) thereof, with a deductible not to exceed five percent (5%) of the full replacement value. The proceeds of the property insurance maintained hereunder by the Owner payable in the event of a loss will be used solely to restore, replace, reconstruct and rebuild the insured property to the condition existing immediately prior to the occurrence of the loss. The Owner will upon request provide evidence meeting the requirements of paragraph 8.4 above as to the insurance maintained by the Owner under this paragraph 8.5.

8.6 Mutual Waiver. The Owner of each Parcel in the Development, for itself, and, to the extent legally permissible, on behalf of its Permittees and insurance carriers, hereby waives the right of recovery against Declarant, the Manager and any other Owner for (a) any loss or damage to the property of the waiving Owner located in the Development, (b) any loss or damage to the Buildings or other Improvements in the Development or the contents thereof, and (c) any other direct or indirect loss or damage caused by fire or other risks, which loss or damage is or would be covered by the property insurance (including self-insurance) required to be carried pursuant to this Article 8. Each Owner agrees to obtain for the benefit of Declarant, the Manager and each other Owner a waiver of any right of subrogation that the insurance carrier(s) of the waiving Owner may acquire against Declarant, the Manager or any other Owner by virtue of the payment of any such loss covered by such property insurance.

## ARTICLE 9 - SIGNS

9.1 General. No exterior sign may be installed or maintained by an Owner on its Parcel without first obtaining (a) the approval of such sign by Declarant under Article 4 hereof, including, without limitation, the design and location of such sign, and (b) all necessary approvals and permits from the County.

### 9.2 Shopping Center Monument Signs.

(a) Subject to the requirements of governmental authority and the Declaration, Declarant will cause to be constructed all Shopping Center Monument Signs in the approximate locations shown on the Site Plan. The location, design, type, size, method of illumination, color, dimensions and total available sign area of Shopping Center Monument Signs will be determined by Declarant subject to conformance with applicable law and the Declaration. Subject to the Declaration and the requirements of governmental authority, Declarant may grant to any Owner the right to place sign panels on Shopping Center Monument Signs, which grant may be contained in this Agreement or in Secondary CC&Rs. Following completion of initial

construction of a Shopping Center Monument Sign, modifications thereto (excluding sign panels), including, without limitation, any increase or decrease in the total available sign area thereon, require the prior written consent of the Manager and all Owners granted the right to place sign panels on such Shopping Center Monument Sign, and to the extent required by the Declaration, Dillon. Each Owner of a Parcel upon which a Shopping Center Monument Sign is located agrees not to install any landscaping or other obstruction on its Parcel that interferes with the reasonable visibility of all sign panels on the Shopping Center Monument Sign from the adjacent public right-of-way, and the Manager reserves the right, at the expense of such Owner, to thin, prune and trim any landscaping that interferes with such visibility.

(b) Each Shopping Center Monument Sign will be illuminated from dusk until dawn or such fewer hours as are unanimously approved by Dillon, the Manager and all Owners having panels on such Shopping Center Monument Sign, subject to applicable law.

(c) The design of each Owner's sign panel(s) must be approved by the Manager. Each Owner (or such Owner's designee) granted rights to maintain sign panel(s) on Shopping Center Monument Signs is solely responsible for the costs of fabrication, installation, maintenance and repair in good and operating condition of its panel(s) in accordance with the Design Guidelines, any comprehensive sign plan applicable to the Shopping Center and applicable law. If any Owner fails to properly maintain or repair its Shopping Center Monument Sign panel(s) (including, without limitation, leaving a Shopping Center Monument Sign exposed to the elements during sign panel fabrication), the Manager, the Owner of any other Parcel with a panel on the Shopping Center Monument Sign, or the Owner of the Parcel upon which the Shopping Center Monument Sign is located (the "Notifying Owner") may, at its option, give the non-performing Owner written notice of such failure. If such Owner fails to commence the required performance within five (5) days from the date of such written notice or thereafter fails to diligently prosecute such performance to completion, or if such Owner fails to complete the required performance within thirty (30) days after the date of such notice, the Manager or the Notifying Owner is entitled, but not obligated, to perform such maintenance and repair at the defaulting Owner's sole cost and expense.

(d) If the business of any Owner (including such Owner's Permittees) identified on a Shopping Center Monument Sign or a Building permanently closes, upon thirty (30) days' notice from the Manager or a Notifying Owner, the Owner whose business has closed is obligated to replace all panels on the Shopping Center Monument Sign identifying such business with blank panels of a color approved by the Manager, and to remove its Building signage and repair the Building fascia, failing which the Manager or the Notifying Owner has the right, but not the obligation, to do so at the expense of the Owner whose business has closed.

(e) Costs and expenses incurred by the Manager pursuant to subparagraph (c) or (d) above will be assessed to and paid by the defaulting Owner under paragraph 5.9 above, and costs and expenses so incurred by a Notifying Owner may be recovered under Article 12 below.

9.3 Governmental Regulations. All signs within the Development must conform with all applicable law, including, without limitation, all necessary approvals and permits from the County and the comprehensive sign plan, if any, for the Shopping Center.

## ARTICLE 10 - CONDEMNATION

If all or any part of the Development is taken by eminent domain, condemnation or similar process by a duly constituted authority, the entire award for the value of the land and Improvements so taken belongs only to the Owner of the Parcel so taken (and to such Owner's mortgagees and tenants, as their interests may appear), and no other Owner has a right to claim any portion of the award by virtue of any interest created by this Agreement. Any Owner of a Parcel that is not the subject of such taking (and such Owner's mortgagees and tenants, as their interests may appear) may, however, file a separate claim with the condemning authority (but not against the Owner of the Parcel so taken) for the loss of easement or other rights to the extent of any damage resulting from the severance of the land or Improvements so taken. In the event of a partial taking, the Owner of the portion of the Development so taken agrees to restore the Improvements located on the Common Areas of such Owner's Parcel as nearly as possible to the condition existing prior to the taking to assure the continued ingress and egress to, from and between all areas of the Development to the extent reasonably feasible, without contribution from any other Owner.

## ARTICLE 11 - RESTRICTIONS

11.1 General Limitation on Uses. All Parcels within the Development may only be used for lawful purposes in conformance with all restrictions imposed by all applicable law and the Declaration. Without the consent of Declarant, which may be withheld in its sole and absolute discretion, no Owner may use or permit the use of all or any portion of such Owner's Parcel for any of the following businesses or purposes: cocktail lounge, bar, disco, night club, dance hall, tavern, bowling alley, pool hall, billiard parlor, skating rink, roller rink, amusement arcade, theater of any kind, children's play or party facility, adult book store, adult theatre, adult amusement facility, facility selling or displaying pornographic materials or having such displays, second-hand store, odd-lot, closeout or liquidation store, auction house, pawn shop, flea market, educational or training facility (including, without limitation, a beauty school, barber college, school or other facility catering primarily to students or trainees rather than customers), gymnasium, sport or health club or spa, aerobics studio, blood bank, massage parlor, mortuary, funeral home, sleeping quarters or lodging, the outdoor housing or raising of animals (except that a pet store or veterinary clinic is permitted so long as no animals are housed outdoors and no pet waste is permitted to accumulate in the Common Areas), the sale, leasing or storage of automobiles, boats or other vehicles (excluding parking or storage of vehicles or trailers in areas of a Parcel specifically approved by Declarant and designed, screened and designated for such purposes), junk yard, any industrial use (including, without limitation, any manufacturing, smelting, rendering, brewing, refining, chemical manufacturing or processing, or other manufacturing uses), mining or mineral exploration or development except by non-surface means, car wash, carnival, amusement park or circus, recreational center, assembly hall, off-track betting establishment, bingo hall, any use involving the use, storage, disposal or handling of hazardous materials or underground storage tanks (except in strict compliance with applicable environmental laws, and as necessary to comply with any remediation required under applicable environmental laws), church, temple, synagogue, mosque, or other house of worship, facility for the sale of sexually explicit products or paraphernalia for use with illicit drugs, facility for the on-premises consumption of alcoholic beverages (except as an incidental part of the operation of

an otherwise permitted restaurant), medical marijuana facility or store selling recreational marijuana, or any use that creates a nuisance.

11.2 Drive-Through Facilities. Unless otherwise expressly approved in writing by Declarant, facilities, if any, constructed on a Parcel for vehicular drive-up or drive-through in which the stopping or standing of motor vehicles in line at a location for drop-off or pickup is intended (as, for example, at a restaurant, bank or pharmacy), must be designed, constructed, used and operated in such a manner that motor vehicles in line at such facility do not stop or stand in or across a Circulation Drive, or onto any portion of another Parcel (including, without limitation, parking areas of another Parcel), or otherwise interfere with the normal pattern and flow of pedestrian or vehicular traffic on and across the Parcels.

11.3 Environmental Restrictions and Covenants.

(a) Each Owner agrees that such Owner's Parcel and any and all facilities located or operations conducted on the Parcel will not be used to generate, manufacture, refine, transport, treat, store, handle, dispose of, transfer, produce or process hazardous, toxic or regulated substances or solid wastes of any kind, except in compliance with all applicable law. Each Owner agrees to indemnify, defend, and hold harmless Declarant, the Manager, and each and every other Owner for, from and against any and all actions, causes of action, claims, liabilities, damages, costs, expenses and losses of any nature whatsoever (including reasonable attorneys' fees), arising from a breach by the indemnifying Owner of this covenant.

(b) The Owner of any Parcel used for the storage or dispensing of motor fuels agrees to promptly observe and comply with all present and future laws ordinances, requirements, orders, directives, guidelines, rules and regulations of all governmental authorities having or claiming jurisdiction over its Parcel or any part thereof and of all insurance companies writing policies covering its Parcel or any part thereof (collectively, "**Hazardous Materials Laws**"), pertaining to the generation, manufacture, refinement, transport, treatment, storing, handling, disposal, transfer, production or processing of hazardous, toxic or regulated substances or solid wastes of any kind (collectively, "**Hazardous Materials**"). Without limiting the generality of the foregoing, the Owner of a Parcel described herein agrees to procure each and every permit, license, certificate or other authorization required in connection with the lawful and proper use of its Parcel as an automotive refueling facility for the retail sale of motor fuels so long as the Parcel is used for such purposes. The Owner of such Parcel further agrees, at its expense, to remediate any Hazardous Materials that originate and migrate from its Parcel onto or under the Parcel of any other Owner in the Development, and to indemnify, defend, and hold harmless each and every other Owner in the Development for, from and against any and all claims, demands or causes of action of any nature whatsoever (including reasonable attorneys' fees) in favor of third parties for damages or injuries directly arising from a breach of the covenant contained in the first sentence of this subparagraph 11.3(b). Notwithstanding the foregoing, if any Owner in the Development initiates an action based on contamination, the burden of proof for liability shall be upon the Owner initiating the action.

11.4 Future Additional Use Restrictions. To promote and protect a diversity of uses within the Development, in connection with the development of any Parcel for a particular use (the "**Benefited Parcel**"), Evergreen reserves the right to impose future additional use

restrictions on all or any portion of the remainder of the Development to prohibit the same or similar uses; provided, however:

(a) if at any time after the imposition of future additional use restrictions in favor of the Benefited Parcel, the Benefited Parcel is thereafter not used and operated for such purposes for a continuous period of eighteen (18) consecutive months or more for any reason other than (i) strike, lockout or other labor difficulty, fire or casualty, condemnation, war, riot, insurrection, act of God, or other temporary closure beyond the reasonable control of the Owner of the Benefited Parcel, (ii) temporary closure due to the restoration, reconstruction, expansion, alteration or remodeling of the Building or other Improvements located on the Benefited Parcel, or (iii) governmental restrictions, then the future additional use restrictions imposed for the benefit of the Benefited Parcel are void and of no further force or effect at the expiration of said 18-month period. Notwithstanding the foregoing to the contrary, Evergreen reserves the right in Secondary CC&Rs to modify the application of this provision to specific future additional use restrictions (whether by tolling, delaying the commencement of, lengthening or shortening, the 18-month period described above, reinstating future additional use restrictions after they have expired, or otherwise);

(b) no future additional use restrictions may be imposed on a Parcel under this paragraph 11.4 at a time when the Parcel is then being used for a purpose that would otherwise be expressly prohibited thereby;

(c) future additional use restrictions imposed under this paragraph 11.4 may be perpetual, or limited to a term of years following the imposition thereof (after which such future additional use restrictions will expire and be of no further force or effect), as determined by Evergreen and set forth in the instrument pursuant to which the future use restrictions are imposed, as described in subparagraph 11.4(d) below; and

(d) future additional use restrictions imposed by Evergreen will be effective as against all or any portion of the Development other than the Benefited Parcel when one or more supplements to this Agreement (whether Secondary CC&Rs or otherwise) setting forth such future additional use restrictions are Recorded by Evergreen.

## ARTICLE 12 - ENFORCEMENT

12.1 Remedies. If an Owner or its Permittees breaches or threatens to breach this Agreement, Declarant, the Manager, and any one or more of the other Owners are entitled to any or all remedies available at law or in equity including, without limitation, the right to collect damages, the right to enjoin such breach or threatened breach in any court of competent jurisdiction, and the right of specific performance.

12.2 Self-Help. In addition to all other remedies available at law or in equity, upon the failure of a defaulting Owner to cure a breach of this Agreement by such Owner or its Permittees within thirty (30) days following written notice of such default given by Declarant, the Manager or another Owner (unless, with respect to any such breach the nature of which cannot reasonably be cured within such 30-day period, the defaulting Owner commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion), Declarant, the Manager

or any nondefaulting Owner has the right to perform such obligation contained in this Agreement on behalf of such defaulting Owner and be reimbursed by such defaulting Owner upon demand for the reasonable costs thereof (including, without limitation, attorneys' fees and court costs) together with interest at the rate of eighteen percent (18%) per annum, not to exceed the maximum rate of interest allowed by law, from the date such costs are incurred until paid.

12.3 Lien Rights. Any claim for reimbursement, including interest as aforesaid, and all costs and expenses including reasonable attorneys' fees awarded to Declarant, the Manager or any Owner, as applicable, in enforcing any payment in any suit or proceeding under this Article 12 may be assessed against the defaulting Owner in favor of the prevailing party and constitutes a lien (the "**Assessment Lien**") against the Parcel of the defaulting Owner until paid, effective when a notice of lien with respect thereto is Recorded; provided, however, that any such Assessment Lien is subject and subordinate to (i) liens for taxes and other public charges which by applicable law are expressly made superior, (ii) all liens Recorded prior to the date of recordation of said notice of lien, (iii) any lien for assessments arising under Article 7 hereof, and (iv) all bona fide leases with third parties (regardless of whether Recorded) entered into prior to the date the notice of lien is Recorded. The Assessment Lien may be foreclosed under then-prevailing Colorado law relating to the foreclosure of realty mortgages (including the right to recover any deficiency). Declarant and the Manager have the option, in lieu of exercising or enforcing any lien rights arising under this paragraph 12.3, to proceed under Article 7 of this Agreement as if the amount owing to Declarant or the Manager hereunder were a delinquent assessment described therein.

12.4 Remedies Cumulative. The remedies specified herein are cumulative and in addition to all other remedies permitted at law or in equity.

12.5 No Cancellation. Notwithstanding anything to the contrary contained herein, no breach of this Agreement entitles Declarant, the Manager or any Owner to cancel, rescind or otherwise terminate this Agreement, but such limitation does not affect in any manner any of the other rights or remedies that Declarant, the Manager or any Owner may have by reason of a breach of this Agreement.

### ARTICLE 13 - TRANSFER

13.1 No Assignment or Transfer. The rights, powers and obligations conferred upon each Owner under this Agreement (excluding Declarant or the Manager) may not at any time be transferred or assigned by such Owner except through a transfer of its Parcel complying with the requirements of paragraph 13.2 below. (The foregoing does not, however, prohibit an Owner from delegating or passing through any such rights, powers or obligations to a Permittee occupying such Owner's Parcel, which is expressly permitted, but does not release such Owner from liability by reason thereof.)

13.2 Sale by Owner. Upon the sale, transfer, conveyance or assignment by an Owner (other than a transfer by Declarant) of fee title in such Owner's Parcel, the following apply:

(a) The transferring Owner agrees to give written notice of the sale, transfer, conveyance or assignment to the Manager on or before the date that the instrument effecting the transfer is Recorded.

(b) On or before the effective date of the transfer, the transferee agrees to execute and deliver to the Manager a written statement containing the name and address of the transferee and the signed agreement of the transferee to be bound by this Agreement and to perform all obligations hereof applicable to such Owner and its Parcel. Failure to deliver any such written statement does not affect the running of any easements, covenants, conditions, restrictions, reservations, servitudes, assessments, liens, charges and development standards contained herein with the land, nor does any such failure negate, modify or otherwise affect the liability of any Owner or transferee pursuant to this Agreement, but such failure constitutes a default of this Agreement by the transferee.

(c) The transferring Owner is released from all obligations under this Agreement arising from and after the effective date of the transfer of its entire interest in the Development and the receipt by the Manager of the written statement of the transferee described in subparagraph 13.2(b) above, provided that such transferring Owner is not then in default in the performance of this Agreement or in the payment of any amounts due and owing hereunder.

(d) In no event is any transferee of an Owner personally liable for any default of the transferring Owner under this Agreement which arose prior to the effective date of the transfer; provided, however, nothing contained in this paragraph 13.2 affects the existence, priority, validity or enforceability of any lien placed upon the transferred Parcel under Article 7 or Article 12 above.

13.3 Fractionalized Interests. If any Owner acquires, transfers or conveys its interest in its Parcel in such manner as to vest ownership of fractionalized interests in more than one Person, then the several owners of such fractionalized interests must designate one of their number to act on behalf of all such owners in the performance of this Agreement, which designation the Manager is entitled to rely upon until notice of a new designation signed by all such owners or an order of a court of competent jurisdiction is received by the Manager to the contrary; provided, however, all such owners are jointly and severally liable under this Agreement. This paragraph 13.3 does not apply to subdivisions of a Parcel, which are governed by the definition of "Parcel" set forth in Article 1 hereof.

#### ARTICLE 14 - DECLARANT'S RIGHTS

##### 14.1 Declarant's Rights and Obligations.

(a) Declarant reserves the right to assign, in whole or in part, to one or more Persons, any or all of the rights and obligations of Declarant set forth in this Agreement (including, without limitation, for purposes of this Article 14, any or all of the rights and obligations of the Manager), whereupon such Person(s) succeed to the rights and obligations so assigned. Such assignment must be in writing, must expressly refer to this Agreement and this subparagraph 14.1(a), must specify the rights and obligations being assigned, must contain an express assumption by such Person or Persons of the rights and obligations being assigned and must be



executed by Declarant and its successor or assignee and Recorded. Promptly after such assignment is Recorded, such successor or assignee of Declarant will provide a copy of such assignment to each Owner. Any such successor or assignee of Declarant has the right to similarly further assign such rights and obligations to its successors and assigns. The term "Declarant" or "Manager" (as applicable) as used herein includes all such specific assignees, as to the rights or obligations so assigned. Declarant reserves the right to engage agents, employees and contractors to exercise and perform on behalf of Declarant all or any of the rights and obligations of Declarant under this Agreement, but none of them will be deemed an assignee of Declarant's rights or obligations in the absence of a Recorded assignment as described above. In addition to or in combination with an assignment described above in this subparagraph 14.1(a), Declarant reserves the right to assign to the Owners Quorum (defined in paragraph 14.2 below) any or all of Declarant's rights set forth in this Agreement (but not Declarant's obligations) by a written assignment executed by Declarant and Recorded, whereupon the Owners Quorum will succeed to the rights so assigned without the necessity of an express assumption of such rights.

(b) Declarant (including for purposes of this subparagraph 14.1(b) and any successors or assigns) reserves the right at any time to unilaterally resign and withdraw as to any or all of its rights and obligations as Declarant under this Agreement, by executing and causing to be Recorded a written notice of such resignation and withdrawal expressly referring to this Agreement and this subparagraph 14.1(b). A copy of such notice will be given to all Owners; provided, however, such resignation is effective when Recorded as provided above, and receipt by all Owners of such notice is not a condition to effectiveness.

(c) Notwithstanding anything to the contrary contained in this Agreement, and regardless of any transfer or assignment by Declarant of all or any portion of the Development, Declarant retains in gross all rights and obligations of Declarant set forth in this Agreement with respect to which Declarant has neither made an assignment under subparagraph (a) above nor a resignation and withdrawal under subparagraph (b) above. Declarant is released from further obligation or liability under this Agreement as to rights and obligations of Declarant thereafter accruing with respect to which an assignment under subparagraph (a) above or a resignation and withdrawal under subparagraph (b) above is applicable. At such time as a full assignment, resignation or withdrawal as to all rights and obligations of Declarant under this Agreement has occurred, Declarant thereupon and thereafter has no further right, power or authority to act, and no further obligation or liability thereafter accruing, as Declarant under this Agreement.

(d) While Evergreen is Declarant, all rights of Evergreen or Declarant set forth in this Agreement may be exercised by Evergreen or Declarant in its sole and absolute discretion, and no exercise by Evergreen or Declarant of any such right may be challenged or set aside as being arbitrary, capricious, unreasonable or in bad faith. However, in the absence of specific language to the contrary in the assignment from Declarant, any successor or assignee of Declarant (but not Evergreen) is obligated to exercise the rights so assigned reasonably and in good faith.

(e) Declarant may grant in Secondary CC&Rs such waivers of the provisions of this Agreement with respect to an individual Parcel or Owner thereof as Declarant deems appropriate, so long as any such waiver, in the sole discretion of Declarant (i) does not result in an unsafe, unsanitary or aesthetically displeasing condition, (ii) does not result in a substantial departure from the common plan of development contemplated by this Agreement, and (iii) has

no adverse effect on the easement rights or use restrictions in favor of any Owner or its Parcel otherwise contained herein. The granting of any such waiver does not automatically entitle any Owner to the same waiver or to any subsequent or additional waiver, it being understood that each such waiver, if any, will in every instance be considered on its own merits.

14.2 Designation of Persons to Assume Declarant's Rights or Obligations. As to any rights or obligations of Declarant under this Agreement with respect to which Declarant (including its successors or assigns) has resigned and withdrawn without making an assignment to one or more successors under subparagraph 14.1(a) above, including, without limitation, the rights and obligations of the Manager, the Owners of fifty-one percent (51%) or more of the total square feet of land area in the Development (herein referred to as the "**Owners Quorum**") may at any time and from time to time thereafter designate a Person or Persons to succeed to any such unassigned rights or obligations of Declarant. Likewise, the Owners Quorum may at any time and from time to time remove a Person (other than Evergreen) then exercising any or all of the rights or obligations of Declarant and designate a Person or Persons to succeed to such rights and obligations of Declarant. To be effective, any such designation must be in writing, must expressly refer to this Agreement and this paragraph 14.2, must specify the rights and obligations being assigned and the Person(s) succeeding to such rights and obligations, must contain the signed assumption by such Person(s) of such rights and obligations, and must be executed by the requisite Owners and Recorded. During any time that no Person is entitled by this Agreement to exercise specific rights or obligations of Declarant, without otherwise affecting the validity and enforceability of the remainder of this Agreement (a) no Owner has the right to exercise or enforce any such unassigned rights or obligations of Declarant, (b) if rights of consent or approval by Declarant are unassigned, any action by an Owner otherwise requiring such consent or approval may be taken without the necessity of obtaining such consent or approval, and (c) during such time, if any, as no Manager is then serving, each Owner is responsible for maintaining and insuring at its expense all Common Areas and Improvements located on its Parcel, except to the extent otherwise provided in the CAMA and/or Declaration.

14.3 Evergreen's Rights. Certain rights set forth in this Agreement ("**Evergreen's Rights**") are expressly reserved to Evergreen rather than Declarant. Unless all or a portion of Evergreen's Rights are specifically assigned by Evergreen in a manner similar to the assignment by Declarant of its rights under subparagraph 14.1(a) above, Evergreen's Rights are personal to Evergreen, automatically terminate at such time as Evergreen no longer owns any interest in the Development and no longer has any rights or obligations as Declarant under this Agreement, and may not be exercised by a successor or assignee Declarant. If at such time or thereafter rights of consent or approval by Evergreen are unassigned, any action by an Owner otherwise requiring such consent or approval may be taken without the necessity of obtaining such consent or approval.

14.4 Exculpation of Declarant and Evergreen. Notwithstanding anything to the contrary contained in this Agreement, Evergreen and Declarant (including any authorized successor of Declarant) have absolutely no liability whatsoever for mistakes or errors in judgment or for any other act performed or omitted under this Agreement, in the absence of fraud, gross negligence or bad faith on the part of Evergreen or Declarant, and each Owner expressly waives and relinquishes any and all claims against Evergreen or Declarant on account thereof.

14.5 Formation of Property Owner's Association. So long as Evergreen owns any interest in the Development, Evergreen reserves the right, but not the obligation, at the expense of the Owners, to form a property owners' association (the "**Association**") for the benefit of the Development. The Association must be a nonprofit Colorado corporation having articles of incorporation, bylaws, a board of directors and such other rights and attributes as are customary for developer-controlled commercial property owners' associations in first-class neighborhood retail and office developments in metropolitan Colorado Springs, Colorado, as reasonably determined by Evergreen's legal counsel. Membership by all Owners in the Association, if formed, will be mandatory. If formed, Evergreen may assign to the Association any or all of the rights and obligations of Evergreen or Declarant set forth in this Agreement. Evergreen will retain effective control of the Association until Evergreen no longer owns any interest in the Development, when control of the Association will be transferred to the Owners in the same proportions as the gross square footage of land area of each Owner's Parcel bears to the total gross square footage of land area of all Parcels in the Development. If no Association has been formed at such time as Evergreen no longer has an interest in the Development, formation of the Association requires the unanimous written consent of the Owners.

14.6 Annexation and Deannexation.

(a) Declarant reserves the right, at any time and from time to time, to annex contiguous real property into the Development and subject such property to this Agreement by causing to be Recorded an instrument to such effect signed by Declarant (and the Owner of the annexed property, if other than Declarant).

(b) Declarant reserves the right to deannex and remove from the Development and from the effect and operation of all or a portion of this Agreement real property then owned by Declarant in fee (but not then subject to a lease or ground lease unless the tenant or ground lessee joins therein); provided, however, as an express condition to the deannexation and removal by Declarant of property from the Development and the effect and operation of this Agreement (i) all then-existing use restrictions, if any, imposed against the property to be removed, whether under Article 11 of this Agreement, under Secondary CC&Rs or otherwise; and (ii) all then-existing easements, if any, upon, over, above, under or across the property to be removed that are materially necessary for the reasonable use and benefit of another Parcel in the Development, must be preserved in a manner that will not permit the termination or amendment of such restrictions or easements except by such action as is necessary to amend this Agreement. It is expressly acknowledged that easements on the property to be removed for cross-parking or for vehicular or pedestrian access, ingress and egress over Common Areas that are not Circulation Drives, are not materially necessary for the reasonable use and benefit of other Parcels in the Development.

ARTICLE 15 - PLATTING

Following the date that this Agreement is Recorded, Declarant reserves the right to obtain the approval of applicable governmental authority to the recordation of one or more subdivision plats for the Development, including any subsequent amendments thereto (collectively, the "**Plat**"). In connection with recordation of the Plat, each Owner agrees (a) to cooperate with Declarant in accomplishing the recordation of the Plat so long as such Owner incurs no material

third-party expense in connection therewith, and no rights or benefits otherwise arising under this Agreement in favor of such Owner are materially and adversely affected thereby, (b) to reasonably consent to a change in the record legal description of such Owner's Parcel, so long as the description shown on the Plat is the legal equivalent of the metes and bounds legal description contained in the original conveyance from Declarant to such Owner (less portions, if any, previously dedicated or to be dedicated to applicable governmental authority), and (c) to reasonably consent to the dedication of all or any portion of the Circulation Drives, additional public right-of-way in Constitution Avenue or Marksheffel Road if required by the County or the Colorado Department of Transportation, or of public utility and facility easements and other normal and customary easements shown on the Plat, so long as they are otherwise consistent with this Agreement. Each Owner agrees to execute the Plat within fifteen (15) days following written request from Declarant, failing which Declarant is irrevocably designated as such Owner's authorized agent, coupled with an interest, to execute the Plat for and on behalf of such Owner.

#### ARTICLE 16 - TERM OF AGREEMENT

This Agreement and the easements, covenants, conditions and restrictions contained herein are effective commencing on the date that this Agreement is Recorded, and continue in perpetuity except to the extent that this Agreement is modified, amended, canceled, terminated or rescinded in whole or in part under Article 17 hereof.

#### ARTICLE 17 - AMENDMENT

This Agreement may not be modified or amended in any respect, or canceled, terminated or rescinded, in whole or in part, except by a written instrument duly Recorded, fully executed and acknowledged by Declarant, the Owners of seventy-five percent (75%) or more of the total square feet of land area in the Development. Notwithstanding the foregoing to the contrary, the number and location of Shopping Center Monument Signs in the Development, and/or all or any portion of the Development then owned in fee by Declarant and shown on the Site Plan attached hereto as Exhibit B, including, without limitation, Circulation Drives, parking layout, ratio and traffic flow pattern, and the location and extent of Building Envelopes, if any, depicted thereon, may be modified and amended from time to time by Declarant's executing and causing to be Recorded a supplement to this Agreement (whether Secondary CC&Rs or otherwise) amending Exhibit B (subject to any restrictions or limitations with respect thereto imposed by the Declaration or applicable governmental authority); provided, however, no such modification may materially increase an Owner's obligations or liabilities hereunder, without such Owner's written consent. It is intended that any modification, amendment, cancellation, termination, rescission or supplementation of this Agreement, in whole or in part, made in compliance with the requirements of this Article 17 by Declarant and/or the requisite Owners described above is binding and effective immediately, any custom or law to the contrary notwithstanding.

## ARTICLE 18 - MISCELLANEOUS

### 18.1 Notices.

(a) Any notice to be given by any Owner hereunder must be given in writing and delivered in person, or by reputable nationwide overnight courier (e.g., Federal Express), or forwarded by certified or registered mail, postage prepaid, return receipt requested, at the address indicated below, unless the party giving such notice has been notified, in writing, of a change of address:

Declarant: Evergreen-Constitution & Marksheffel, L.L.C.  
c/o Evergreen Devco, Inc.  
Suite 410  
2390 East Camelback Road  
Phoenix, Arizona 85016  
Attention: Ms. Laura Ortiz

With Copy to: Evergreen Devco, Inc.  
Suite 201  
200 North Maryland Avenue  
Glendale, California 91206  
Attention: Mr. Bruce D. Pomeroy

Other Owners: Unless designated in a supplement to this Agreement, in Secondary CC&Rs, or otherwise advised to the contrary by notice given in accordance herewith, to the address for mailing tax bills set forth in the latest real property tax rolls available

Any such notice is effective on the date on which such notice is delivered, if notice is given by personal delivery, on the next-succeeding business day after deposit with an overnight courier for next-day delivery, or if notice is sent through the United States mail, on the date of actual delivery as shown by the addressee's receipt or upon the expiration of three (3) days following the date of mailing, whichever first occurs.

(b) Each Owner agrees to give a copy to an Owner's lender of any notice of default given to the Owner, provided that the lender has previously requested the right to receive the notice by submitting an address to which the notice must be delivered and by giving all Owners and the Manager a copy of the following certification:

The undersigned, whose address is \_\_\_\_\_ hereby certifies that it is the holder of a first lien upon the real property described on **Exhibit A** attached hereto which lien encumbers Parcel \_\_\_\_\_ in (real estate description/shopping center) and is a mortgagee holding a security interest in said Parcel. If any notice is given of the default of the Owner upon whose Parcel this lien applies, a copy thereof must be delivered to the undersigned who will have all rights of the Owner to cure the default pursuant to the Common Operation and Reciprocal Easement Agreement ("COREA"). Failure to deliver a copy of such

notice to the undersigned in no way affects the validity of the notice of default as respects such Owner, but tolls any applicable time period for cure by the undersigned or the taking by the undersigned of any other action required under the COREA, until such notice is properly delivered to the undersigned.

Any such notice to an Owner's lender must be given in the same manner as provided in subparagraph 18.1(a) above. The lender of the defaulting Owner is entitled to the same right, to be exercised, if at all, concurrently with such defaulting Owner, to cure such default, and failure to deliver a copy of such notice to the lender in no way affects the validity of the notice of default as respects the defaulting Owner, but tolls any applicable time period for cure by the lender or the taking by the lender of any other action required under this Agreement, until such notice is properly delivered to the lender. Giving any notice of default or the failure to deliver a copy to any lender of a notice of default in no way creates any liability on the part of Declarant, the Manager or the Owner so declaring a default.

18.2 Attorneys' Fees. If Declarant, the Manager or any Owner institutes a legal action or proceeding for the enforcement of any right or obligation contained in this Agreement, the prevailing party in such action or proceeding is entitled to recover its costs and reasonable attorneys' fees incurred in the preparation and prosecution of such action or proceeding.

18.3 Consents. Wherever in this Agreement the consent or approval of an Owner is required, unless otherwise expressly provided herein, such consent or approval may not be unreasonably withheld.

18.4 No Waiver. No waiver of any default of any obligation by an Owner may be implied from any omission by Declarant, the Manager, or another Owner to take any action with respect to such default. Notwithstanding the foregoing to the contrary, Declarant may elect to waive on behalf of all Owners the enforcement of any provision contained in this Agreement, upon a determination that such waiver is in the best interests of the Development as a whole.

18.5 No Agency. Nothing in this Agreement creates the relationship of principal and agent or of limited or general partners or of joint venturers or of any other association among the Owners or any of them.

18.6 Covenants to Run with Land. All of the easements, covenants, conditions, restrictions, reservations, servitudes, assessments, liens, charges and development standards set forth herein run with the land and create equitable servitudes in favor of the entire Development, bind every person having any fee, leasehold, lien or other interest therein and inure to the benefit of Declarant, the Owners, and their respective successors, assigns, heirs, and personal representatives. All agreements set forth herein are deemed covenants regardless of whether expressly so designated.

18.7 Grantee's Acceptance. The grantee of any Parcel or any portion thereof, by acceptance of a deed conveying title thereto or the execution of a contract for the purchase thereof, whether from Declarant or from a subsequent Owner of the Parcel, accepts such deed or contract upon and subject to each and all of the easements, covenants, conditions, restrictions, reservations, servitudes, assessments, liens, charges and development standards contained herein.

By such acceptance, any such grantee for himself and his successors, assigns, heirs, and personal representatives, is deemed to covenant, consent, and agree to and with Declarant, the Manager and the other Owners, to keep, observe, comply with, and perform the obligations and agreements set forth in this Agreement with respect to the property so acquired by such grantee.

18.8 Rights and Obligations of Lenders. The charges and burdens of this Agreement are, and at all times will be, prior and superior to the lien or charge of any mortgage or deed of trust affecting any Parcel or any part thereof, or any Improvements now or hereafter placed thereon; provided, however, a breach of any of the provisions of this Agreement or the enforcement of any lien rights herein granted does not defeat or render invalid the lien or charge of any mortgage or deed of trust given in good faith and for value.

18.9 No Rights in Public. Nothing contained in this Agreement creates any rights in the general public or dedicates for public use all or any portion of the Development.

18.10 Taxes and Assessments. Each Owner agrees to pay all taxes, assessments, and charges of any type levied or made by any governmental authority or agency with respect to its Parcel. If an Owner fails to pay said taxes and assessments prior to delinquency, which failure continues for fifteen (15) days after written notice by the Manager to such Owner, the Manager has the right, but not the obligation, to pay said taxes and assessments, and the costs thereof, together with interest thereon at the rate of eighteen percent (18%) per annum (not to exceed the maximum rate of interest allowed by law) until paid in full, will be a charge and continuing lien upon the Parcel until paid, subject to foreclosure by the Manager in the manner set forth in Article 7 above.

18.11 Separability. Each provision of this Agreement is declared to be independent of and severable from the remainder of this Agreement. If any provision contained herein is held to be invalid or to be unenforceable or not to run with the land, such holding does not affect the validity or enforceability of the remainder of this Agreement. If the validity or enforceability of any provision of this Agreement is held to be dependent upon the existence of a specific legal description, the Manager will promptly cause such legal description to be prepared, at the cost and expense of the Owners.

18.12 Time of Essence/Force Majeure Delay. Time is of the essence of this Agreement. However, no Person is liable for any failure or delay in performance under this Agreement (other than for failure or delay in the payment of money due and payable) to the extent such failure or delay is proximately caused by an event that (a) is not reasonably foreseeable, (b) is beyond the reasonable control of the Person, and (c) occurs without the fault or negligence of the Person (a "**Force Majeure Delay**"). Upon the occurrence of a Force Majeure Delay, the time for performance will be extended for a period equal to the duration of the Force Majeure Delay.

18.13 Entire Agreement. This Agreement (including all Exhibits attached hereto, which are incorporated herein by this reference) contains the complete declaration, understanding and agreement of Declarant with respect to all matters referred to herein.

18.14 Captions. The underlined captions preceding the various paragraphs and subparagraphs herein and the headings of the Articles, are for convenience of reference only, and

may not be used as an aid to the construction or interpretation of any provision of this Agreement. Whenever applicable, the singular form includes the plural, and the masculine gender includes the feminine and neuter, and vice versa.

18.15 Declarant's Disclaimer. Declarant makes no warranty or representation whatsoever that the plans envisioned for the Development at the time this Agreement is Recorded can or will be carried out, or that the Development is or will be committed to, or developed for, a particular (or any) use, or that if the Development or any portion thereof is once used for a particular use, such use will continue. Declarant makes no representation or warranty that the use of the Development or any portion thereof will not be changed in the future.

18.16 Ownership of Development. The validity and binding effect of this Agreement is not affected or impaired by reason of the ownership of the entire Development by the same Person.

18.17 Prescriptive Easements/Adverse Possession. No title, easement or use pertaining to the Development or any portion thereof may be established by prescription or adverse possession, the statute of limitations for such purposes being expressly hereby waived.

18.18 Perpetuities Savings Clause. It is the intention of Declarant that any interest in real or personal property created under this Agreement that violates the rule against perpetuities be minimally reformed to cure the violation, rather than terminated. In this regard, if a court of competent jurisdiction determines that an interest created under this Agreement violates the rule, upon the petition of any interested Person, the court will reform the interest to either vest, if at all, or terminate, twenty-one (21) years after the death of the last survivor of all lineal descendants of the 40th President of the United States, Ronald Wilson Reagan, living at the date of that this Agreement is Recorded. In determining whether an interest violates the rule and in reforming the interest, the period of perpetuities will be measured by actual rather than possible events.

18.19 Incorporation of Recitals. The Recitals of this Agreement are incorporated herein and made a part of this Agreement by this reference.

18.20 Cross Access or other Easements with Neighboring Property. Declarant reserves the right to enter into separate agreement(s) with owner(s) of real property adjacent to or in the vicinity of the Development (but not constituting a part thereof), for purposes of granting or obtaining vehicular and/or pedestrian cross access rights or easements over all or portions of such adjacent real property or the Common Areas of the Development intended for such purposes, or for purposes of granting or obtaining other reasonable easements, on such terms and conditions as Declarant determines in its discretion. Contributions, if any, by such adjacent owner(s) toward the costs of maintenance of the Common Areas will be credited in reduction of Common Area Expenses otherwise payable by the Owners under Article 6 of this Agreement.

18.21 Estoppel Certificate. The Manager and each Owner agree to issue within twenty (20) days following receipt of a written request (made not more frequently than three (3) times during any calendar year) from any other Owner or the Manager, to the requesting Person or its existing or prospective lender or successor, an estoppel certificate stating to the issuer's actual



knowledge as of such date (a) whether it knows of any default under this Agreement and if there are known defaults, specifying the nature thereof, (b) whether this Agreement has been assigned, modified or amended in any way by it and if so, stating the nature thereof, (c) whether any sums are currently due and payable under this Agreement from or to the requesting Person, and (d) whether this Agreement is in full force and effect. Such statement constitutes a waiver of any claim by the issuer 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 lender or purchaser/assignee 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.

18.22 Consent to Assignment and Obligations of Declarant's Mortgagee. Each Owner consents to any assignment by Declarant to any mortgagee ("**Mortgagee**") holding a lien granted by Declarant pursuant to any mortgage or deed of trust ("**Mortgage**") on all or any portion of the of Declarant's interest in the Development of Declarant's rights and obligations as "Declarant" under this Agreement, subject to the terms of this paragraph. If Mortgagee succeeds to the rights of Declarant pursuant to an exercise of its rights under any Mortgage, Mortgagee will be bound by the terms of this Agreement and the Owners will have the same rights and remedies against Mortgagee for a breach of this Agreement as the Owners would have against Declarant but for the assignment; provided, however, that Mortgagee will not be liable to the Owners for any act or omission of Declarant including, without limitation, Declarant's failure to pay any amounts owing or to be paid hereunder or to perform any act or obligation required to be performed by Declarant hereunder, arising prior to the date Mortgagee succeeds to Declarant's rights and takes possession of all or any portion of the Development. Mortgagee will be deemed to have assumed the obligations and be liable to each of the Owners under this Agreement only for matters and obligations arising or to be performed from and after the date Mortgagee succeeds to Declarant's rights hereunder and takes and holds possession of all or any portion of the Development, and any further or additional liability terminates upon the transfer by Mortgagee of all of its interest in the Development; provided, however, Mortgagee has no personal liability for any obligations under this Agreement except to the extent of, and Mortgagee's liability is limited to, Mortgagee's estate and interest in the Development.

18.23 Development Agreements. Evergreen (including any affiliate designated by Evergreen) reserves the right, whether before or after this Agreement is Recorded, to enter into a governmental development agreement, economic development agreement or similar agreement with applicable governmental authority (any or all of which are herein referred to as a "Development Agreement"). If Evergreen enters into a Development Agreement, whether before or after this Agreement is Recorded, the following provisions apply:

(a) Any economic benefit arising under a Development Agreement belongs solely to Evergreen, free of any claim by Declarant (if other than Evergreen), the Manager, any Owner, Permittee or other Person. Evergreen reserves the right to assign all or any portion of such economic benefit to a Person or Persons of Evergreen's choosing.

(b) Each Owner and Permittee agrees to report store sales and sales taxes to Evergreen and applicable governmental authority, as directed by Evergreen, in order to satisfy the sales tax reporting requirements, if any, contained in or arising under a Development Agreement.

(c) A Recorded Development Agreement is a permitted exception to title, and is prior and superior to the right, title and interest of all Owners and Permittees and Persons claiming through them. Owners and Permittees are advised to familiarize themselves with the terms of any Development Agreement that is Recorded or under negotiation by Evergreen, and agree to take title subject to and to be bound by any obligation, burden or restriction contained in a Recorded Development Agreement (whether Recorded before or after the date that this Agreement is Recorded).

(d) A Development Agreement may not be modified, amended or terminated without the prior written consent of Evergreen and applicable governmental authority.

18.24 Governing Law. The law of the State of Colorado governs the interpretation, validity, performance, and enforcement of this Agreement.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK  
SIGNATURE & NOTARY PAGES FOLLOW]**

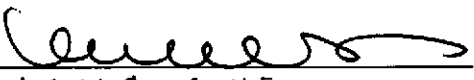
IN WITNESS WHEREOF, Declarant has executed this Common Operation and Reciprocal Easement Agreement as of the date first written above.

**DECLARANT**

EVERGREEN-CONSTITUTION &  
MARKSHEFFEL, L.L.C., an Arizona limited  
liability company

By: Evergreen Development Company-2015,  
L.L.C., an Arizona limited liability company  
Its: Manager

By: Evergreen Devco, Inc., a California  
corporation  
Its: Manager

By:   
Name: Laura Ortiz  
Its: Executive Vice President

STATE OF Arizona )  
 ) ss:  
County of Maricopa )

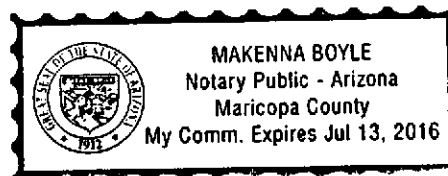
The foregoing instrument was acknowledged before me this 18<sup>th</sup> day of January, 2016, by Laura Ortiz, the Executive Vice President of Evergreen Devco, Inc., a California corporation, Manager of Evergreen Development Company-2015, L.L.C., an Arizona limited liability company, Manager of Evergreen-Constitution & Marksheffel, L.L.C., an Arizona limited liability company, on behalf said entities.

WITNESS my hand and official seal.

Makenna Boyle  
Notary Public

My Commission Expires:

July 13, 2016



**EXHIBIT A**

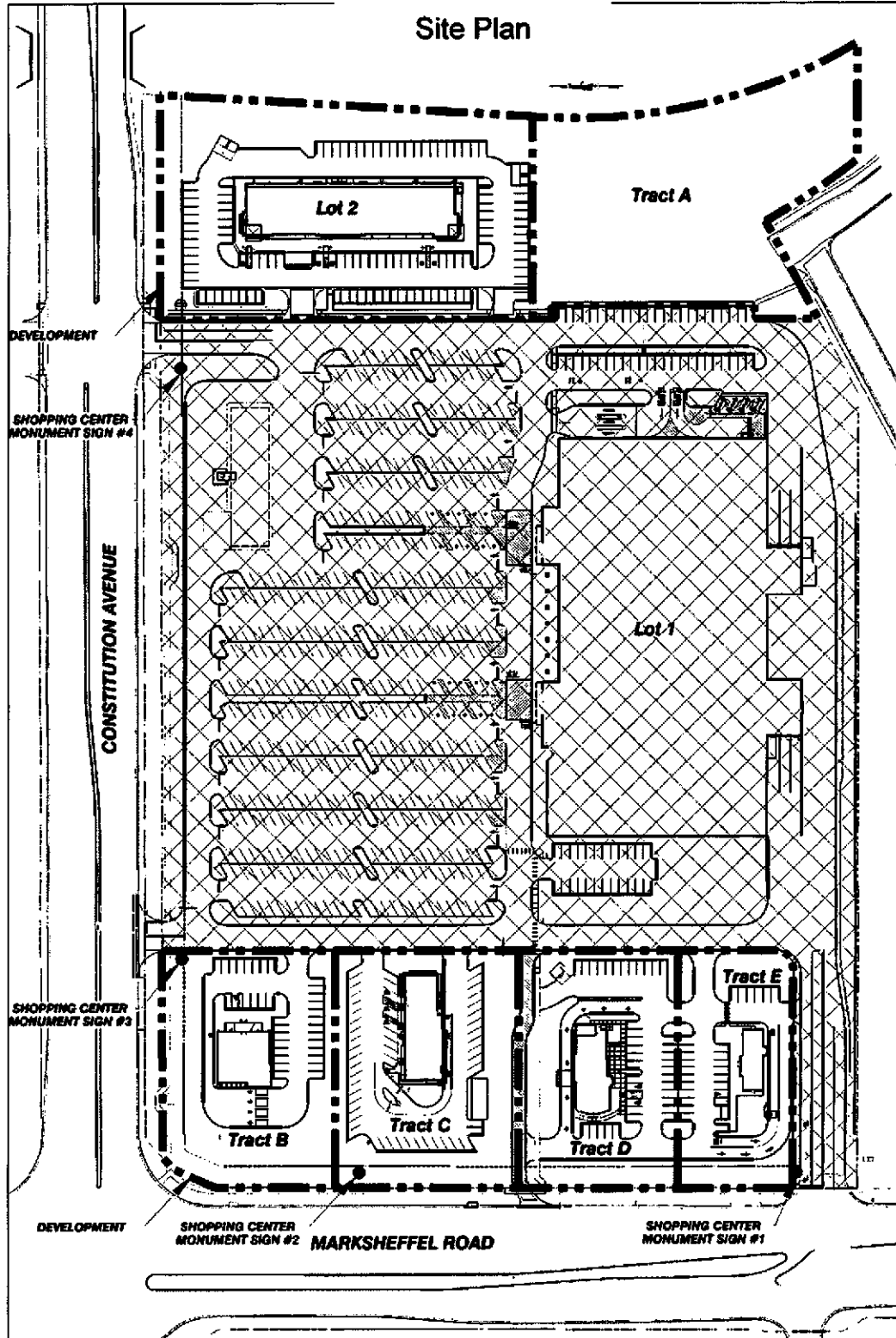
**LEGAL DESCRIPTION OF DEVELOPMENT**

TRACTS A THROUGH E, INCLUSIVE, AND LOT 2, BLOCK 1, CLAREMONT RANCH  
FILING NO. 9, ACCORDING TO THE PLAT THEREOF RECORDED JANUARY 14, 2016  
AS DOCUMENT NUMBER 216713717 IN THE RECORDS OF EL PASO COUNTY,  
COLORADO.

**EXHIBIT B**

**SITE PLAN  
(see attached)**

# Exhibit B Site Plan



**LEGEND**  
 CIRCULATION DRIVE   
 NOT A PART 