

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

THIS ***DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS, AND RESTRICTIONS, WITH JOINDER*** (this "Declaration") is made, established, and declared as of the \_\_\_\_ day of \_\_\_\_\_, 2022, by **VIA Real Estate, LLC, a Wyoming limited liability company** ("VIA" or the "Declarant"), having its principal business address at **13105 Dover Avenue, Lubbock, Texas 79424.**

## **W I T N E S S E T H:**

**WHEREAS**, Declarant is the present owner of the fee interest, including all equitable and executory interests, of that certain real property located in the northwest corner of the intersection of Douglas MacArthur Rd NW and 4<sup>th</sup> St NW, in or near the City of Albuquerque, Bernalillo County, New Mexico, which certain parcel is more particularly described as follows, to-wit:

**SEE EXHIBIT A, ATTACHED HERETO, MADE A PART HEREOF, AND INCORPORATED HEREIN FOR ALL PURPOSES;**

the said parcel hereinabove described shall hereinafter be referred to as the "**Declarant Tract**"; all as substantially shown on **Exhibit B** (the "**Conceptual Site Plan**");

**WHEREAS**, VIA has tentatively entered into a lease agreement with **Champion Xpress Car Wash, LLC, a Wyoming limited liability company ("CX")**, wherein CX, and/or its permitted successors or assigns, shall lease the Declarant Tract from VIA under those certain terms, conditions and provisions as found in said lease agreement (the "**CX Lease**"). Reference to the CX Lease is hereby made, and same is incorporated herein the same as if reproduced herein *in toto*;

**WHEREAS**, VIA desires to cooperatively plan for the future beneficial use and development of the Declarant Tract, including, among other things, i) providing for perpetual, non-exclusive easements and rights-of-way for ingress and egress for pedestrians and vehicular traffic to and from the public right-of-way of Douglas MacArthur Road NW and 4<sup>th</sup> Street; and, ii) providing for an easement for the use by, and certain maintenance required of, VIA as to

drainage, utilities, and construction (as presently exists or as may be permitted from time to time by the governmental or quasi-governmental authorities having jurisdiction over the Declarant Tract) situated or to be situated upon the Declarant Tract for the benefit of VIA, its successors or assigns, and any future tenants or other lawful occupants of the Declarant Tract; and, otherwise, declaring and setting forth certain restrictions and conditions which are intended to enhance property use and/or maintain property values and visual appeal, desirability, and attractiveness;

**NOW, THEREFORE, PREMISES NOW HAVING BEEN CONSIDERED**, and in consideration of TEN DOLLARS (\$10.00 U.S.) cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of all of which acknowledged and confessed, Declarant does hereby declare, agree, set forth, and establish that the Declarant Tract, and any part or parcel thereof, shall be held, sold and conveyed subject to the following easements, covenants, conditions and restrictions which are for the purpose of protecting the value and desirability of the Declarant Tract, as well as all or any portions of either.

1. Recitals; Interpretation. All recitals hereinabove set forth are true and correct and are hereby incorporated as substantive provisions of this Declaration. Each party acknowledges that the other party is relying on the truthfulness of such statements and averments as are hereinabove set forth as partial consideration for the agreements and promises and forbearances set forth below.

## **ARTICLE I**

### **PERPETUAL NON-EXCLUSIVE ACCESS EASEMENTS**

2. Access Easement. Declarant hereby declares for the benefit of VIA and its successors, assigns, and legal representatives, including any leasehold tenant(s) thereof, a perpetual nonexclusive easement for ingress and egress, from that portion of the Declarant Tract that adjoins and abuts the right-of-way of Douglas McArthur Road NW through the Declarant Tract, to that portion of the Declarant Tract that adjoins and abuts the right-of-way of 4<sup>th</sup> Street by pedestrian and vehicular traffic upon, over, and across the variable width areas identified by the "Access Drive" substantially as shown on **Exhibit B** attached hereto and made a part hereof, and same being more particularly described by metes and bounds as follows, to-wit:

**SEE EXHIBIT C, ATTACHED HERETO, MADE A  
PART HEREOF, AND INCORPORATED HEREIN FOR ALL PURPOSES.**

The establishment of said variable width access easement and all rights thereunder and appurtenant thereto shall hereinafter be referred to as the " **Access Easement**". The real property burdened by the Access Easement shall be referred to from time to time hereinafter as the "**Access Easement Tract**".

Such "Access Rights" shall include vehicular and pedestrian access rights in favor of the Declarant Tract over, upon and across the driveways and access ways, sidewalks and walkways, and exits and entrances as may hereinafter exist on over and within the Access Easement Tract.

Expressly set forth, declared, established, and reserved for VIA is the right to grant other rights, by easement or otherwise, to other persons as to the Access Easement Tract so long as any such subsequent grant shall not interfere with the access rights set forth, established, reserved, declared, and/or granted herein.

3. Construction Easement. Upon the Declarant Tract, VIA shall have the right to perform all grading, demolition, site work, staging of equipment and materials, utility installation, and construction as is reasonably necessary to construct the improvements proposed on Exhibit B (the "Improvements").

4. Drainage. Upon the Declarant Tract, VIA shall have drainage rights across those portions of the Declarant Tract that have been or will be approved by any of the required local jurisdictional authority to complete the proposed to act as drainage and detention upon completion of the proposed Improvements and during construction. Additionally, VIA shall have the right, from time to time, enter upon and maintain, repair, and replace proposed grading and drainage facilities located on the Declarant Tract

5. Utilities. Upon the Declarant Tract, VIA shall have the right to install, construct, maintain, repair and replace all utilities, as be necessary and as approved by the local jurisdictional authorities for CX to obtain a Certificate of Occupancy and operate under the terms of the CX Lease upon the Declarant Tract. Said utilities include but are not limited to: i) water, ii) sewer, iii) storm sewer, iv) gas, v) electric, and, vi) fiberoptic / telephone.

4. Maintenance, Repair, and Replacement. Subject to Section 3, 4, and 5 above, upon completion of the Improvements, the Declarant shall thereafter have the duty and the right to enter onto the Declarant Tract to maintain, repair, and replace all drainage facilities, grading, utilities, and the Access Easement Tract.

5. Rights; Responsibilities. Declarant, and Declarant's legal representatives, successors, and assigns, including any leasehold tenants of the Declarant Tract, and its or their patrons, invitees, vendors, employees and other parties permitted by Declarant, have the right to use the surface of the Access Easement Tract for all purposes that do not unreasonably interfere with or interrupt the use by VIA and VIA's successors and assigns, including holders of leasehold interests upon the Declarant Tract, of the Access Easement Tract.

Whenever any party shall perform any construction, maintenance, repairs, reconstruction, or replacements as required or desired or as otherwise permitted herein, such work shall be done expeditiously and in a good and workmanlike manner and in accordance with all applicable laws, codes, rules, statutes and regulations of governmental authorities

having jurisdiction thereof. Any such work shall be carried out in such a manner so as to cause the least amount of disruption to any business operations being conducted on the Declarant Tract as is reasonably practicable. Further, any such work shall carry with it the standard one-year (1-yr) construction builder's warranty for defective workmanship or materials.

## **ARTICLE VI**

### **MISCELLANEOUS**

26. Successors and Assigns; Limitation on Release; No joint venture or partnership. Except as may be expressly set forth herein, this Declaration, and the easements and covenants set forth, established and declared hereby, are appurtenant to and shall run with the land, and shall bind and inure to the benefit of Declarant, and its successors and assigns.

27. Term and Enforcement. Each of the rights created hereunder may be enforceable in a court of equity by (i) the owner of any portion of the Declarant Tract, (ii) any mortgagee of any portion of the Declarant Tract; and, (iii) CX, or its lawful successor or assign as to its leasehold interest in and to the Declarant Tract; however, enforcement hereunder shall be sought solely against the then owner(s) of the respective Tracts (or the owner of an interest in or portion of the respective Tracts) alleged to be in default. Except as otherwise provided herein, the term of this Declaration shall be for perpetuity from the date hereof.

28. Severability. In the event any provision or portion of this Declaration is held by any court of competent jurisdiction to be invalid or unenforceable, such holding will not effect the remainder hereof, and the remaining provisions shall continue in full force and effect at the same extent as would have been the case had such invalid or unenforceable provision or portion never been a part hereof.

29. Breach. In the event of a breach or threatened breach of this Declaration, the owner of any portion of the Declarant Tract shall be entitled to institute proceedings for full and adequate relief from the consequences of such breach or threatened breach, including without limitation, the right to enjoin such violation or threatened violation. In the event that a party shall institute any action or proceeding against another party relating to the provisions hereof, or any default hereunder, then, and in that event, to the extent permitted by applicable law, the unsuccessful party in such action or proceeding shall reimburse the prevailing party therein the reasonable expenses of attorneys' fees, court costs and other costs incurred therein by the prevailing party through all levels of proceedings.

The "prevailing party" in the context of proceedings in any court other than Federal Bankruptcy Court shall mean that party which comes closest to obtaining the remedy or relief sought; so that, for example, the prevailing party may be that party which is ordered to pay \$100.00 where the obligation to pay \$80.00 was undisputed and the claiming party alleged that it was entitled to recover \$1,000.00

30. Amendment to Declaration. This Declaration shall not be amended, terminated or modified without the prior written consent of all then-owners of the Declarant Tract and CX, except as otherwise provided, notwithstanding anything contained in this Declaration to the contrary.

31. No Public Dedication. Nothing contained in this Declaration shall be deemed a gift or dedication of any portion of the Declarant Tract to the general public, or for any public use or purpose whatsoever, it being the intention of the Declarant that this Declaration shall be strictly limited to and for the purposes herein expressed.

32. Notices. All notices given pursuant to this Agreement shall be in writing and shall be given by facsimile, by personal delivery by United States Mail or United State express mail postage delivery charge prepaid, return receipt requested, or by an established overnight express delivery service (such as Federal Express or United Parcel service), or by electronic mail, sent to the person and address or electronic mail address designated below. It shall be expressly understood that notices given by attorneys on behalf of their client's in the manner provided in this subsection are effective and recognized notice pursuant to this Agreement. All notices to shall be sent to the person and address set forth below:

VIA: VIA Real Estate, LLC  
13105 Dover Avenue  
Lubbock, Texas 79424  
Attn: Contracts Manager  
Email Address: kordell@7bdev.com

With Copy to: VIA Real Estate, LLC  
13105 Dover Avenue  
Lubbock, Texas 79424  
Attn: J. Keith Shelton, Chief Legal Officer

CX: Champion Xpress Car Wash  
13105 Dover Avenue  
Lubbock, Texas 79424

The person and address to which notices are to be given may be changed at any time by any Party upon written notice to the other Parties. All notices given pursuant to this Declaration shall be deemed given upon receipt and may be given via email. Any notices required to be served upon successors or assigns or those persons who may hereafter acquire title to Declarant's Remaining Property, or any portion thereof, or to the Declarant Tract, or any portion thereof, shall be served upon the party at the address shown in the instrument which gave effect to any such assignment, succession, transfer, or other conveyance.

33. Waiver. The failure of any interested person to insist upon strict performance of any of the Restrictions or other terms and provisions contained herein shall not be deemed a waiver of any rights or remedies that said person may have and shall not be deemed a waiver of any subsequent breach or default in the performance of any of the Restrictions or other terms and provisions contained herein by the same or any other person.

34. Captions and Headings. The captions and headings in this Declaration are for reference only and shall not be deemed to define or limit the scope or intent of any of the terms, covenants, conditions or agreements contained herein.

35. Recordation; Jurisdiction. This Declaration may be recorded in the official public land records of Bernalillo County, New Mexico. This Declaration shall be construed under and governed by the laws of the State of New Mexico.

36. Lienholder Protection: This Declaration and the easements and restrictions established hereby with respect to each Owner and parcel or portion thereof, shall be superior and senior to any lien subsequently placed upon any parcel or portion thereof, including the lien of any mortgage or deed of trust. Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any mortgage or deed of trust made in good faith and for value, but all the easements and restriction and other provisions, terms and conditions contained in this Agreement shall be binding upon and effective against any Person (including, but not limited to any mortgagee or beneficiary under a deed of trust) who acquires title to any Parcel or any portion thereof by foreclosure, or otherwise.

37. Consents and Subordinations. Declarant, by its execution hereinbelow, does hereby expressly join in and consent to this Declaration and the easements and restrictions and other terms, conditions and provisions herein set forth.

38. Time of Essence. Time is of the essence with respect to any time periods or dates referenced in this Declaration with respect to all parties.

39. Effectiveness of this Declaration. The easements, rights, and duties described in this Declaration shall be and are effective immediately without further condition save and except as shall have been expressly set forth herein. Declarant does hereby bind itself and its successors and assigns to WARRANT AND FOREVER DEFEND all and singular the easements, rights, and covenants described herein, and its successors, assigns, legal representatives, including any holders of leasehold interest in and to the Declarant Tract, against every person whomsoever lawfully claiming or to claim the same or any part thereof, BY, THROUGH, OR UNDER DECLARANT, BUT NOT OTHERWISE.

40. Exhibits. The following exhibits are attached hereto, made a part hereof, and incorporated herein for all purposes:

**EXHIBIT A – LEGAL DESCRIPTION – DECLARANT TRACT**

**EXHIBIT B** – CONCEPTUAL SITE PLAN – PROPOSED IMPROVEMENTS

**EXHIBIT C** - LEGAL DESCRIPTION - ACCESS EASEMENT TRACT

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**IN WITNESS WHEREOF**, Faith Heights has executed and delivered this Declaration as of the day and year first written above.

DECLARANT:

**VIA Real Estate, LLC, a Texas limited liability company**

DATE \_\_\_\_\_

By: \_\_\_\_\_  
Derrick Merchant, Manager

STATE OF TEXAS )  
LUBBOCK COUNTY )

I, the undersigned Notary Public in and for the County and State aforesaid, do hereby certify, that **Derrick Merchant**, known to me to be the **Manager of VIA Real Estate, LLC, a Texas limited liability company**, personally appeared before me this day and acknowledged under oath after being duly sworn that, as such Manager, he executed the above and foregoing instrument for and on behalf of said limited liability company, so as to bind said limited liability company, on the date therein shown for the consideration and purposes as therein stated, after first having been duly authorized by said company so to do.

Given under my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

NOTARIAL SEAL

Notary Public, State of Texas



# EXHIBIT A

## Legal Description - Declarant Tract

### Record Legal Description Of "Parcel 1"

LOT NUMBERED ONE (1) IN BLOCK NUMBERED TWO (2) OF THE DOUGLAS MACARTHUR SUBDIVISION, A SUBDIVISION OF A TRACT OF LAND IN SCHOOL DISTRICT NO. 22, BERNALILLO COUNTY, NEW MEXICO, AS THE SAME IS SHOWN AND DESIGNATED ON THE MAP OF SAID SUBDIVISION, FILED IN THE OFFICE OF THE COUNTY CLERK OF BERNALILLO COUNTY, NEW MEXICO, ON SEPTEMBER 17, 1946.

### Record Legal Description "Parcel 2"

A PORTION OF TRACT 112-A AS SHOWN IN THE AMENDED MAP 32, M.R.G.C.D., BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

A TRACT OF LAND IN SCHOOL DISTRICT NO. 22, BERNALILLO COUNTY, NEW MEXICO, WITHIN THE ELENA GALLEGOS GRANT, WHICH IS BOUNDED AS FOLLOWS:

BEGINNING AT THE NORTHEAST COMER, WHICH IS THE NORTHEAST CORNER OF THE LAND OF SAM SHALIT, A POINT ON THE WESTERLY LINE OF NORTH FOURTH STREET WHENCE THE EAST 1/4 CORNER OF SECTION 32, TOWNSHIP 11 NORTH, RANGE 3 EAST, N.M.P.M., AS SHOWN ON BERNALILLO COUNTY SURVEY SHEET NO. 32, BEARS N. 47 DEG. 53' E., 1047.40 FEET DISTANT; RUNNING FROM SAID BEGINNING POINT

S. 80 DEG. 57' W. ALONG THE WESTERLY LINE OF NORTH FOURTH STREET 180 FEET TO THE SOUTHEAST COMER; THENCE

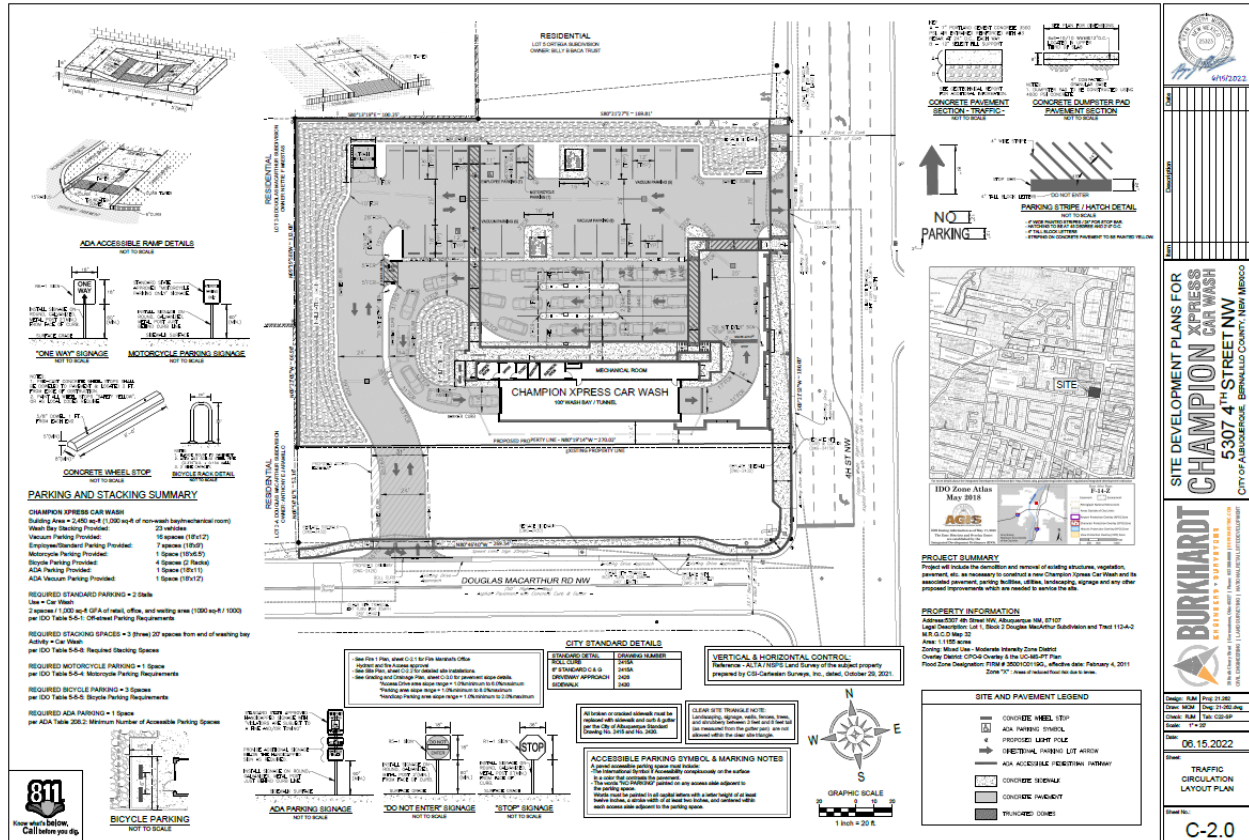
N. 80 DEG. 44' W. 270 FEET TO THE SOUTHWEST CORNER; THENCE

N. 80 DEG. 57' E. 180 FEET TO THE NORTHWEST CORNER; THENCE

S. 80 DEG. 44' E. 270 FEET TO THE PLACE OF BEGINNING.

AND SAID TRACT IS LOCATED IN THE NORTHEAST CORNER OF TRACT NO. 112-A AS SHOWN IN AMENDED MAP NO. 32 OF THE SURVEY OF THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT. SAID TRACT NOW KNOWN AS TRACT 112-A-2, M.R.G.C.D., MAP 32.

## **Conceptual Site Plan – Proposed Improvements**



**EXHIBIT C**  
**Legal Description – Access Easement Tract**

**TBD by a Professional Land Surveyor**