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Deb Houghtaling

Pages: 7

COUNTY CLERK/REGISTER OF DEEDS

By: AH

Submitter: TITLECORE NATIONAL, LLC

S-File



RC

Prepared by and when recorded return to: Hy-Vee, Inc.; 5820 Westown Parkway, West Des Moines, IA 50266;
TEL: 515-267-2870

DECLARATION OF USE RESTRICTIONS

THIS DECLARATION OF USE RESTRICTIONS ("Declaration") effective the 8
day of JANUARY, 2020 (the "Effective Date"), is made by the undersigned owner of
the Restricted Parcel (hereinafter referred to as the "Declarant"); WITNESSETH:

RECITALS

WHEREAS, Declarant is the owner of the Restricted Parcel (defined below); and

WHEREAS, Declarant desires to place certain use restrictions on the Restricted Parcel for
the benefit of the Benefited Party.

NOW, THEREFORE, the Declarant hereby declares and imposes the following:

1. Recitals. The Recitals set forth above are incorporated by this reference.
2. Definitions.
 - a. "Benefited Party" means Hy-Vee, Inc., an Iowa corporation ("Hy-Vee") and the
owner of the Benefited Parcel.
 - b. "Benefited Parcel" means the C-Store Tract and the Grocery Store Tract (as defined
herein).
 - c. "Burdened Party" means owner, from time-to-time of the Restricted Parcel.

d. "C-Store Tract" means the following parcel (s) of real estate, to-wit:

See Exhibit "A"

e. "Grocery Store Tract" means the following parcel (s) of real estate, to-wit:

See Exhibit "A"

f. "Restricted Parcel" means the following parcel(s) of real estate, to-wit:

See Exhibit "B".

3. Use Restrictions. During the term of this Declaration and for the benefit of the Benefited Party and the Benefited Parcel, the Restricted Parcel must not be used for any of the following, to-wit:

a. the sale of (i) edible perishable products, including, but not limited to fruits, vegetables, meat and seafood; (ii) pre-packaged food and/or pre-packaged beverages, provided, however that the same may be sold on the Restricted Parcel so long as the sale of such products does not exceed three percent (3%) of the gross sales of such business; (iii) alcoholic beverages for off premises consumption; and/or (iv) prescription and/or over-the-counter pharmaceuticals; provided, however, the restrictions contained in this paragraph (a) shall not prohibit restaurant uses so long as it otherwise complies with the restrictions contained herein and with applicable law.

b. a grocery store, supermarket, or specialty food store (by way of example only, and not limitation: Fareway, Albertson's, Kroger, Safeway, Publix, Price Chopper, Meijer, Dillons, Giant Eagle, Schnucks, The Fresh Market, Woodman's, WinCo, Wal-Mart Express, Aldi, Trader Joes, Whole Foods Market, Campbell's Nutrition, Gateway Market, Cub Foods, Lund's, Byerly's, Coborn's, Cash Wisse, Kowalski's, Festival Foods);

c. a pharmacy and/or drug store (by way of example only, and not in limitation: CVS, Walgreens, Rite Aid, Medicap, Health Mart, The Medicine Shoppe);

d. a retail store marketed as any form of "dollar store," or derivation thereof (by way of example only, and not in limitation: Dollar General, Family Dollar, Dollar Tree, 99 Cents Only);

e. a retail and/or club and/or wholesale store that sells non-food merchandise that includes a grocery section or department (by way of example only, and not in limitation: Wal-Mart, Wal-Mart Supercenter, Target, Super Target, Costco, Sam's Club);

f. a convenience store (with or without gas) and/or gasoline station, including any type of business that sells diesel fuel, ethanol fuel, bio-fuel or any other type of fuel used to power motorized vehicles designed primarily for use on public streets and highways;

g. a coffee shop (by way of example only, and not in limitation: Starbucks, Caribou Coffee, Dunkin Donuts, Dunn Bros Coffee, Dutch Bros Coffee, Peet's Coffee & Tea, Seattle's Best Coffee, Archetype Coffee, Howlin' Hounds Coffee, Whisk + Measure Specialty Bakery and Coffee);

h. a Panera Bread® restaurant (including any successor name, in the event the same is re-named from time-to-time), and/or any retail store marketed as any type of bagel shop, donut shop, and/or bakery outlet;

i. any supporting element (by way of example only, and not in limitation: parking lot, storm water detention facility, green-space) of any property not located within the Restricted Parcel that is used for any of the restricted uses set forth in paragraph (a) – (h) herein.

Notwithstanding the foregoing, in the event at any time between June 30, 2023 and April 30, 2033, 192nd and Cypress, LLC becomes the owner of the fee interest in and to the Grocery Store Tract (except in the event Hy-Vee is then a tenant of 192nd and Cypress, LLC as a result thereof), then the restrictions set forth in subparagraphs 3(a), (b), (c), (d), (e), (g) but only to the extent if it is located within a large box (40,000 or more square feet) as incidental business or amenity to the large box business and further provided the same may not have a drive thru, and (h) hereof shall, upon the filing of certification thereof by 192nd and Cypress, LLC in the land records of the county in which the Grocery Store Tract is located, be deemed terminated and of no further force and/or effect. For the avoidance of doubt, in the event such a certification is not filed in the land records of the county in which the Grocery Store Tract is located between June 30, 2023 and April 30, 2033, then the restrictions set forth in subparagraphs 3(a), (b), (c), (d), (e), (g) and (h) hereof shall continue and shall not be terminated.

4. Term. Unless sooner terminated by Hy-Vee as provided herein, the use restrictions imposed against the Restricted Parcel will remain in full force and effect in perpetuity.

5. Modification, Termination. Hy-Vee may at any time and from time-to-time during the term of this Declaration, and without the consent of the owner of the Benefited Parcel or the Restricted Parcel, (a) add (but not remove) permitted restaurants and/or coffee shops, and/or (b) terminate any one or more of said use restrictions, by the execution and recording of an amendment of this Declaration in the land records of the county in which the Restricted Parcel is located.

6. Governing Law, Remedies. This Declaration will be governed by the laws of the State of in which the Restricted Parcel is located, without regard to conflicts of laws principles. In the event of a breach, or threat of a breach, of this Declaration, then in addition to all remedies at law or in equity, Benefited Party will be entitled to injunctive relief. Any one or more Benefited Parties may enforce this Declaration against Burdened Party, its successors in interest, as well as any person or entity violating or attempting to violate any provision hereof. Any and all rights and/or remedies conferred to Benefited Parties herein will not be deemed to be exclusive of any other remedy and each and every remedy will be cumulative in all respects.

7. Liquidated Damages. It is acknowledged by the parties that the damages which would be suffered by the Benefited Party for any breach of this Declaration would be difficult to calculate, and therefore, the parties acknowledge and agree that, for each day that any portion of the Restricted Parcel is determined to be in violation of this Declaration, Burdened Party will pay to Hy-Vee the greater of (a) thirty percent (30%) of the gross sales generated on the Restricted Parcel, or (b) Two Thousand Dollars and NO/100 (\$2,000.00) per day, as a reasonable measure of the damages likely to be suffered by Hy-Vee and/or the owner of the Benefited Parcel, and not as a penalty.

8. Attorneys' Fees, Litigation Costs. In the event of an action by Benefited Party to enforce the terms of this Declaration, the non-prevailing party(ies) in such litigation shall reimburse the prevailing party(ies)'s litigation expenses, including reasonable attorneys' fees..

9. Restrictions Run with Land. The use restrictions imposed by this instrument constitute covenants running with the land and, as such, will be binding upon the owners from time-to-time of the Restricted Parcel and their respective heirs, successors and assigns.

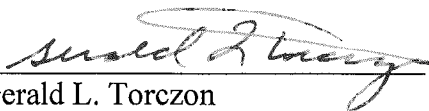
10. Severability. If any provision of this instrument is invalid, illegal or incapable of being enforced by any law or public policy, all other provisions of this declaration will remain in full force and effect.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Declarant has caused this Declaration to be executed on or as of the day and year first above written.

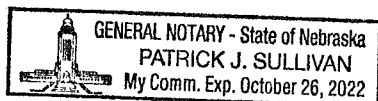
DECLARANT:

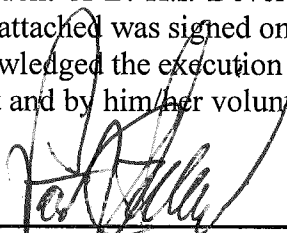
B. H. I. Development, Inc., a Nebraska corporation

By: 
Gerald L. Torczon
Its: President

STATE OF NEBRASKA, COUNTY OF SARPY, ss

On this 8th day of January 2020, before me, the undersigned, a Notary Public in and for the state of Nebraska, personally appeared Gerald L. Torczon, to me personally known, who being by me duly sworn did say that he/she is President of B. H.I. Development, Inc., , a Nebraska corporation, that the instrument to which this is attached was signed on behalf of said corporation; and that the said President as such officer acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by him/her voluntarily executed.




Notary Public in and for the
State of Nebraska

DECLARATION OF USE RESTRICTION - EXHIBIT "A"
LEGAL DESCRIPTION OF BENEFITED PARCEL

C-Store Tract:

Lot 359, Aspen Creek, a subdivision as surveyed, platted and recorded in Sarpy County,
Nebraska

Grocery Store Tract:

Lot 358, Aspen Creek, a subdivision as surveyed, platted and recorded in Sarpy County,
Nebraska

DECLARATION OF USE RESTRICTION - EXHIBIT "B"
LEGAL DESCRIPTION OF RESTRICTED PARCEL

Lots 242, 349, 350, 351, 352, , ASPEN CREEK, Lots 1, 2, 3, 4, 5 and Outlots A and B, Aspen
Creek Replat 1, Subdivisions, as surveyed, platted and recorded in Sarpy County, Nebraska