

AFTER RECORDING RETURN TO:

ROBERT D. BURTON, ESQ.
WINSTEAD PC
401 CONGRESS AVE., SUITE 2100
AUSTIN, TEXAS 78701
EMAIL: RBURTON@WINSTEAD.COM



MONTECILLO
FIRST AMENDMENT TO
MONTECILLO MASTER COVENANT
[COMMERCIAL]

El Paso County, Texas

Declarant: EPT MONTECILLO I-10 DEVELOPMENT, LLC, a Texas limited liability company

Cross reference to Montecillo Master Covenant [Commercial], recorded as Document No. 20180049491 of the Official Public Records of El Paso County, Texas, as amended.

4816-5677-0933v.7

61767-1 11/4/2018

**FIRST AMENDMENT TO MONTECILLO
MASTER COVENANT
[COMMERCIAL]**

This First Amendment to Montecillo Master Covenant [*Commercial*] (this "**Amendment**") is made by **EPT MONTECILLO I-10 DEVELOPMENT, LLC**, a Texas limited liability company ("**Declarant**"), and is as follows:

RECITALS:

A. Declarant previously executed that certain Montecillo Master Covenant [*Commercial*], recorded on June 26, 2018 as Document No. 20180049491 of the Official Public Records of El Paso County, Texas, as amended (collectively, the "**Covenants**").

B. Pursuant to *Section 10.3* of the Covenants, but subject to the provisions of this Amendment, the Covenants may be amended by Declarant acting alone.

C. Declarant desires to amend the Covenants as set forth hereinbelow.

NOW THEREFORE, Declarant hereby amends and modifies the Covenants as follows:

1. **Definition of Service Area.** The definition of Service Area in *Article 1* of the Covenants is hereby deleted in its entirety and replaced with the following:

"Service Area" means a group of Lots and/or Condominium Units designated as a Service Area pursuant to this Covenant for the purpose of paying Service Area Assessments for benefits or services performed by the Association with respect to such designated group of Lots and/or Condominium Units. A Service Area may be comprised of more than one type of use or structure and may include noncontiguous Lots and/or Condominium Units or all Lots and/or Condominium Units within the Property. A Lot or Condominium Unit may be assigned to more than one Service Area. Service Area boundaries may be established and modified as provided in *Section 2.4*.

2. **Defined Terms.** Two new defined terms are hereby added to *Article 1* of the Covenants as follows:

"iFly Lease" means that certain Ground Lease, dated as of August 8, 2018, as amended, entered into by and between Declarant, as Landlord, and FLYZONE LLC, a Texas limited liability company, a memorandum of which shall be Recorded concurrently with, but prior to, the Recordation of this Amendment, and shall further include any successor or replacement lease with iFly Tenant and any further renewals and/or extensions of the lease term thereunder or otherwise.

"iFly Permitted Use" means (i) a vertical wind tunnel for indoor skydiving; (ii) skydiving training and exhibitions and similarly related amusement activities; (iii) sales of related merchandise and accessories; (iv) associated classroom, retail and sales area and office use, and all ancillary uses related thereto; (v) the retail sale of food and beverages for consumption on the iFly Property (as defined in Exhibit "B" attached hereto); (vi) the retail sale of merchandise relating to skydiving; and (vii) any other lawful use, provided that, at the time iFly Tenant commences such other lawful use, it is not a primary or exclusive use of any other Owner or Tenant within the Property, or is not otherwise prohibited by this Covenant.

"iFly Tenant" means FLYZONE LLC, a Texas limited liability company, together with its successors and assigns.

3. **Incorporation of Development Tract Declarations.** *Section 2.2* of the Covenants is hereby deleted in its entirety and replaced with the following:

2.2 Incorporation of Development Tract Declarations. Upon Recordation of a Development Tract Declaration such Development Tract Declaration will automatically, and without the necessity of further act, be incorporated into, and be deemed to constitute a part of this Covenant, but will apply only to portions of the Property made subject to the Development Tract Declaration upon Recordation unless otherwise provided in such Development Tract Declaration. To the extent of any conflict between the terms and provisions of a Development Tract Declaration and this Covenant, the terms and provisions of this Covenant will control; provided, however, that notwithstanding the foregoing and the provisions of *Section 10.8* hereof to the contrary, the terms and provisions of a Development Tract Declaration shall control and govern to the extent specifically provided for in such Development Tract Declaration.

4. **Provision of Benefits and Services to Service Areas.** *Section 2.4* of the Covenants is hereby deleted in its entirety and replaced with the following:

2.4 Provision of Benefits and Services to Service Areas.

2.4.1 Declarant Designation. Declarant may, in a Recorded written instrument: (i) assign Lots and/or Condominium Units to one or more Service Areas (by name or other identifying designation) as it deems appropriate, which Service Areas may be then existing or newly created; and (ii) require that the Association provide benefits or services to all or any portion of such Lots and/or Condominium Units or Improvements thereon in addition to those which the Association generally provides to the Property. During the Development Period, Declarant may unilaterally amend any written Recorded notice

designating Service Areas. All costs associated with the provision of services or benefits to a Service Area will be assessed against the Lots and/or Condominium Units within the Service Area as a Service Area Assessment.

2.4.2 Owner Petition. In addition to Service Areas which Declarant may designate, until expiration or termination of the Development Period, any group of Owners may petition the Board to assign their Lots and/or Condominium Units to a Service Area for the purpose of the Association providing: (a) special benefits or services to all or any portion of such Lots and/or Condominium Units or Improvements thereon; or (b) a higher level of service than the Association otherwise provides. Upon receipt of a petition signed by Owners of a Majority of the Lots and/or Condominium Units within the proposed Service Area, the Board will investigate the terms upon which the requested benefits or services might be provided and notify the Owners in the proposed Service Area of such terms and associated expenses, which may include a reasonable administrative charge in such amount as the Board deems appropriate (provided, any such administrative charge will apply at a uniform rate per Lot and/or Condominium Units among all Service Areas receiving the same service). If approved by the Board, the Declarant during the Development Period, and the Owners of at least seventy-five percent (75%) of the total number of votes held by all Lots and/or Condominium Units within the proposed Service Area, the Association will provide the requested benefits or services on the terms set forth in the proposal or in a manner otherwise determined by the Board. The cost and administrative charges associated with such benefits or services will be assessed against the Lots and/or Condominium Units within such Service Area as a Service Area Assessment. After expiration or termination of the Development Period, the Board may discontinue or modify benefits or services provided to a Service Area.

5. Property Maintenance. A new section, *Section 2.5*, is hereby added to the Covenants as follows:

2.5 Property Maintenance. The Association or each Owner, as applicable, shall, subject to events beyond its reasonable control, maintain, or cause to be maintained the Common Area, Special Common Area, Service Areas, and Property in a first class condition, and in a clean, orderly, sanitary and safe condition, and in compliance with Applicable Law. If replacement of equipment, fixtures and appurtenances are necessary, the Association or Owner, as applicable, shall at its cost and in accordance with *Article 6* of this Covenant, replace the same with equipment, fixtures and appurtenances of good quality, and shall repair all damages caused by such replacement. Notwithstanding the

foregoing and for avoidance of doubt, Declarant during the Development Period and a Majority of the Board thereafter, reserves the right to designate certain Lots within the Property as being self-maintained by the Owners or operators thereof ("**Self-Maintained Property**"). In the event all or any portion of the Self-Maintained Property is being maintained by the Association as part of a Service Area, the Association is relieved of its obligations with respect to the Lot upon its designation as a Self-Maintained Property to the extent that the Owner or operators of the Self-Maintained Property maintain the Self-Maintained Property in a first class condition, and in a clean, orderly, sanitary and safe condition, and in compliance with Applicable Law.

6. **Restrictions on the Use of Parking Areas.** A new section, *Section 2.6*, is hereby added to the Covenants as follows:

2.6 Restrictions on the Use of Parking Areas. The portions of the Property that are developed for use as parking lots will be used only for: (a) the parking of motor vehicles, and pedestrian and vehicular ingress and egress by Owners, Tenants and their employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants and concessionaires insofar as their activities relate to the use and occupancy of the Property (collectively, "**Permittees**"); provided that each Permittee shall only have the right to use the parking spaces for parking of passenger vehicles in the areas not designated for use exclusively by other Permittees; (b) parking stalls, walls, ramps, driveways, lanes, curbs, bike racks, traffic control areas, signals, traffic and parking lighting facilities, and all things incidental thereto; (c) ingress and egress of delivery and service vehicles to and from the Property or any portion thereof and adjacent public streets; and (d) the construction and maintenance of utility facilities (including, without limitation, electrical supply, communication conduits, water supply, sewer facilities, gas supply, and water drainage and/or retention). Notwithstanding the foregoing, the parking lots may be used for temporary events, promotions, and construction staging provided such uses do not have a material adverse effect on the business operations of an Owner or Tenant.

7. **Insurance.** *Section 4.1* of the Covenants is hereby deleted in its entirety and replaced with the following:

4.1 Insurance Obligations. Each Owner will be required to purchase and maintain, or cause to be purchased and maintained, commercially standard insurance on the Improvements located upon such Owner's Lot or Condominium Unit. Such Improvements will be insured for, without limitation, fire, "special form", vandalism, malicious mischief and other endorsements deemed advisable by the Association for the full replacement insurable value thereof, with such commercially reasonable deductibles consistent with the deductible carried at comparable shopping centers in El Paso, Texas, such

insurance coverage to include endorsements for coverages for flood, earthquake, terrorism, windstorm, earth movement, demolition, increased cost of construction and contingent operation of building laws coverages.

The Association will not maintain insurance on the Improvements constructed upon any Lot or Condominium Unit. The Association will, however, obtain commercial general liability insurance on the Property including the Common Areas insuring Owners and Tenants, against all claims, damages or actions arising out of or in connection with use or occupancy of the Property or by the condition of the Property providing coverage of not less than Five Million Dollars (\$5,000,000.00) against liability for bodily injury including death and personal injury for any one (1) occurrence, and One Million Dollars (\$1,000,000.00) against liability for property damage and such other insurance as the Board, in its discretion, may deem necessary. Insurance premiums for such policies will be a Common Expense to be included in the Assessments levied by the Association. The acquisition of insurance by the Association will be without prejudice to the right and obligation of any Owner to obtain additional individual insurance.

8. **Special Assessments.** *Section 5.4* of the Covenants is hereby deleted in its entirety and replaced with the following:

5.4 Special Assessments. In addition to the Regular Assessments provided for above, the Board may levy special assessments (the "**Special Assessments**") whenever in the Board's opinion such Special Assessments are necessary to enable the Board to carry out the functions of the Association under the Documents. The amount of any Special Assessments will be at the sole discretion of the Board. In addition to the Special Assessments authorized above, the Association may, in any fiscal year, levy a Special Assessment for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area or Special Common Area. Any Special Assessment levied by the Association for the purpose of defraying, in whole or in part, costs of any construction, reconstruction, repair or replacement of capital improvement upon the Common Area will be levied against all Owners on the same basis as Assessment Units, regardless of whether such Owner's Lot or Condominium Unit is allocated an Annual Levy in accordance with *Section 5.8.5* hereinbelow (i.e., the payments will be made by all Owners based on Assessment Units). Any Special Assessments levied by the Association for the purpose of defraying in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon any Special Common Area will be levied against all Owners who have been assigned the obligation to pay Special Common Area Assessments based on Assessment Units. All such Special Assessments will be due and payable to the Association at the beginning of the

fiscal year or during the fiscal year in equal monthly installments on or before the first day of each month, or in such other manner as the Board may designate in its sole and absolute discretion.

9. **Annual Levy.** A new section, *Section 5.8.5*, is hereby added to the Covenants as follows:

5.8.5 **Annual Levy.** Notwithstanding any term or provision herein to the contrary, in lieu of levying Regular Assessments based on Assessment Units, Declarant may, in its sole discretion, allocate an annual levy (the "**Annual Levy**") of Regular Assessments to a Lot or Condominium Unit. In the event Declarant elects to allocate an Annual Levy pursuant to this Section, such Annual Levy will be set forth in a Recorded written instrument executed by Declarant. Declarant during the Development Period or the Board thereafter, with the consent of the Lot or Condominium Unit Owner, may terminate or modify the Annual Levy set forth in a previously Recorded instrument by the Recordation of a replacement instrument. A Lot or Condominium Unit which is allocated an Annual Levy shall remain liable for Special Assessments, Special Common Area Assessments, Service Area Assessments, and Individual Assessments allocated in accordance with *Section 5.8.2* hereinabove. At the beginning of each calendar year, the Annual Levy will be adjusted to reflect any percentage change in the Consumer Price Index ("**CPI**") for all Urban Consumers U.S. City Average for all items, as published by the United States Department of Labor, Bureau of Labor Statistics, for the last reporting period. The Association shall determine such adjustment by first determining the index point change between the CPI for the last reporting period and the CPI reported one year earlier (using the index base period 1982 - 84 = 100), and dividing this difference by the earlier reported CPI and multiplying this quotient by 100; provided, however, the Annual Levy shall in no event be decreased as a result of a change in CPI. If for any reason the Bureau of Labor Statistics ceases to furnish CPI, the Board shall thereafter accept and use such other index or comparable statistics, as shall be computed and published by an agency of the United States or by a responsible financial periodical of recognized authority. The Annual Levy shall be secured by a lien against the Lot or Condominium Unit and collectible in the same manner as provided for Assessments in *Section 5.11*.

10. **Collection of Assessments from Tenant.** A new section, *Section 5.14*, is hereby added to the Covenants as follows:

5.14 **Collection of Assessments from Tenant.** Upon the written request of an Owner, the Association will collect Assessments levied pursuant to this Covenant against the Owner from the Owner's Tenants. The written request from the Owner may include instructions on the portion of Assessments levied against the Owner's Lot or Condominium Unit to be collected from each of the

Owner's Tenants. In the event a Tenant fails to pay such Assessments as and when due, the Owner shall be obligated to pay all such amounts unpaid by the Tenant, including late fees and collection costs. This Section does not relieve any Owner of the obligation to pay Assessments pursuant to this Covenant.

11. **Eminent Domain.** *Section 10.2* of the Covenants is hereby deleted in its entirety and replaced with the following:

10.2 Eminent Domain. In the event it becomes necessary for any Governmental Entity to acquire all or any part of the Common Area or Special Common Area for any public purpose during the period this Covenant is in effect, the Board is hereby authorized to negotiate with such Governmental Entity for such acquisition and to execute instruments necessary for that purpose; provided, however, that the Board will use reasonable good faith efforts to avoid any acquisition that is likely to have a material adverse effect on the Owners or Tenants. Should acquisitions by eminent domain become necessary, only the Board need be made a party, and in any event the proceeds received will be held by the Association for the benefit of the Owners. In the event any proceeds attributable to acquisition of Common Area are paid to Owners, such payments will be allocated on the same basis as Assessment Units, regardless of whether such Owner's Lot or Condominium Unit is allocated an Annual Levy in accordance with *Section 5.8.5* hereinabove (i.e., the payments will be made to all Owners based on Assessment Units) and paid jointly to the Owners and the holders of first Mortgages or deeds of trust on the respective Lot or Condominium Unit. In the event any proceeds attributable to acquisition of Special Common Area are paid to Owners who have been assigned the obligation to pay Special Common Area Assessments attributable to such Special Common Area, such payment will be allocated on the basis of Assessment Units and paid jointly to such Owners and the holders of first Mortgages or deeds of trust on the respective Lot or Condominium Unit.

12. **iFly Provisions.** A new section, *Section 10.3.1*, is hereby added to the Covenants as follows:

10.3.1 iFly Provisions.

Notwithstanding any term or provision in this Covenant to the contrary, the rights, covenants, conditions, restrictions, and easements set out in this Covenant and the Documents for the benefit of iFly Tenant shall automatically terminate and be of no further force or effect upon expiration or termination of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time). After the expiration or termination of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time), Declarant has the right, but not the obligation, to unilaterally Record an instrument providing

notice of the termination or expiration of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time) and of the termination of the rights, covenants, conditions, restrictions, and easements set out in this Covenant and the Documents for the benefit of iFly Tenant that are terminated and of no further force or effect; provided, however, in the event the iFly Lease is terminated prior to the stated expiration date of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time), Declarant shall provide thirty (30) days advance written notice to iFly Tenant prior to Recording an instrument providing notice of such termination.

Notwithstanding any term or provision in this Covenant to the contrary, until the iFly Lease (as the same may be extended, renewed and/or replaced from time to time) expires or is terminated:

(a) with iFly Tenant's consent, Declarant shall have the right to amend this Covenant and the Documents (individually, an "**Amendment**"); iFly Tenant shall not withhold its consent to an Amendment, as long as such Amendment does not adversely affect iFly Tenant's ability to operate the iFly Permitted Use and does not materially affect iFly Tenant's other rights or obligations under the iFly Lease, this Covenant or any other Documents. Any Amendment shall be in recordable form and filed for record in the office of the County Clerk of El Paso, Texas.

(b) within thirty (30) days (the "**Amendment Review Period**") after iFly Tenant receives a copy of a proposed Amendment requiring its consent pursuant to subsection (a) above, iFly Tenant shall deliver to Declarant, in writing, either: (1) iFly Tenant's consent to the proposed Amendment; or (2) iFly Tenant's objections to the proposed Amendment setting forth, in good faith and with specificity, the reason for iFly Tenant's objections, including without limitation, the manner in which the proposed Amendment adversely affects iFly Tenant's ability to operate the iFly Permitted Use or materially affects iFly Tenant's other rights or obligations under the iFly Lease, this Covenant or any other Documents. In the event iFly Tenant objects to a proposed Amendment, Declarant may, but shall have no obligation, to deliver a revised Amendment to iFly Tenant and iFly Tenant shall have ten (10) business days after receipt of the revised Amendment (the "**Revised Amendment Review Period**") to either consent or object to the revised Amendment in writing; iFly Tenant shall not withhold its consent to the revised Amendment, as long as such Amendment does not adversely affect iFly Tenant's ability to operate the iFly Permitted Use and does not materially affect iFly Tenant's other rights or obligations under the iFly Lease. In the event iFly Tenant fails to respond, in writing during the Amendment Review Period or Revised Amendment Review Period, as applicable, iFly Tenant shall be deemed to have consented to the Amendment and such Amendment shall be effective on the date stated therein. For any

Amendment consented to by iFly Tenant as set forth herein, iFly Tenant agrees, to the extent necessary or required, to execute any documentation reasonably necessary or required to evidence its consent to such Amendment.

(c) Declarant covenants that any assignment, in whole or in part, of its rights as the "Declarant" under the Covenant or any other Documents, will be subject to the provisions of the Documents and will require the assignee to assume the obligations of the "Declarant" with respect to such provisions.

(d) Lot 1 of Block 43 (the "**Retention Pond Lot**") is reserved for use as a storm water retention pond. In the event that all or any portions of the Retention Pond Lot is or are being developed for uses other than a storm water retention pond in the future, Declarant will cause such portions of the Retention Pond Lot that become available for such other uses to be subject to this Covenant to the extent permitted by Applicable Law.

(e) Until termination or expiration of the iFly Lease, Declarant shall not terminate the Development Period without the written consent of iFly Tenant.

The iFly Lease provides that the Owner of the iFly Property, will construct two (2) pylon and/or monument signs on the Property in areas outside of the iFly Property (the "**Initial Pylon Signs**"); and then, from time to time, may elect to construct additional pylon or monument signs (the "**Additional Pylon Signs**" and together with the Initial Pylon Signs, collectively, the "**Outside Pylon Signs**"). In the event Declarant, the Owner of the iFly Property, or any affiliate or successor of Declarant or such Owner elects to construct Additional Pylon Signs, such Owner and Declarant hereby grant (and shall cause any affiliated entity or successor to grant) to iFly Tenant the right to place its sign panel on such Additional Pylon Sign in accordance with the iFly Lease, which includes the right to install its panel on the second highest location on each of the Outside Pylon Signs; if the holder of the signage rights granted pursuant to *Section 2.03* of that certain Montecillo Notice of Annexation and Development Area Declaration [Topgolf Property], recorded as Document No. 20170046071 in the Official Public Records of El Paso County, Texas has elected not to install its panel on any Outside Pylon Sign, iFly Tenant shall be entitled to install its panel on the highest location on such Outside Pylon Sign subject to the iFly Lease. Declarant hereby grants, conveys and establishes a non-exclusive easement in favor of iFly Tenant, its employees and contractors for the purpose of installation, maintenance, inspection, repair and replacement of its panels on each of the Outside Pylon Signs in accordance with the iFly Lease. In the event that the Owner of the iFly Property is not also the Owner of the portions of the Property on which the Initial Pylon Signs are to be constructed, Declarant hereby grants, conveys and establishes an easement in favor of the Owner of the iFly Property over such portions of the Property as are necessary to allow for the Owner of the iFly

Property to satisfy its obligations under the iFly Lease.

13. **Proceeds Payable to Owners.** *Section 10.11.6* of the Covenants is hereby deleted in its entirety and replaced with the following:

10.11.6 Proceeds Payable to Owners. In the event that any proceeds of insurance policies are paid to Owners as a result of any damage or destruction to any Common Area, such payments will be allocated on the same basis as Assessment Units, regardless of whether such Owner's Lot or Condominium Unit is allocated an Annual Levy in accordance with *Section 5.8.5* hereinabove (i.e., the payments will be made to all Owners based on Assessment Units) and paid jointly to the Owners and the holders of first Mortgages or deeds of trust on their Lots or Condominium Units.

14. **Use Restrictions; Exhibit "B".** *Exhibit "B"* of the Covenants is hereby deleted in its entirety and replaced with Exhibit "B" attached hereto.

15. **Miscellaneous.** Any capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Covenants. Unless expressly modified by this Amendment, all other terms and provisions of the Covenants remain in full force and effect as written, and are hereby ratified and confirmed. If any provision of this Amendment is held to be invalid by any court of competent jurisdiction, such invalidity will not affect the validity of any other provision of this Amendment, or, to the extent permitted by Applicable Law, the validity of such provision as applied to any other Person. A breach of this Amendment shall not entitle Declarant or any Owner to cancel, rescind or otherwise terminate this Amendment, but such limitation shall not affect in any manner any other rights or remedies which Declarant or such Owner may have hereunder, at law or in equity, by reason of any breach of this Amendment. Each grantee of a Lot, Condominium Unit or other real property interest in the Property, by the acceptance of a deed of conveyance, and each subsequent purchaser, accepts the same subject to all terms, restrictions, conditions, covenants, reservations, easements, liens and charges, and the jurisdiction rights and powers created or reserved by this Amendment or to whom this Amendment is subject, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared. All impositions and obligations hereby imposed will constitute covenants running with the land, and will bind any Person having at any time any interest or estate in the Property and will inure to the benefit of each Owner in like manner as though the provisions of this Amendment were recited and stipulated at length in each and every deed of conveyance.

16. **iFly Tenant Consent.** iFly Tenant executes this Amendment to evidence its consent to the terms and provisions herein pursuant to *Section 10.3.1(a)* of the Covenants.

Executed to be effective on this 10th day of August, 2019.

[SIGNATURE PAGE FOLLOWS]

DECLARANT:

EPT MONTECILLO I-10 DEVELOPMENT, LLC,
a Texas limited liability company

By: 123 Plus Management, LLC, a Texas limited
liability company, its Manager

By: _____

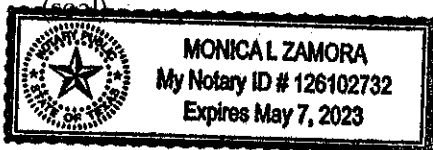
Printed Name: Richard Aguilar

Title: Manager

THE STATE OF TEXAS §

COUNTY OF EL PASO §

This instrument was acknowledged before me on this 19th day of August, 2019, by Richard Aguilar, Manager of 123 Plus Management, LLC, a Texas limited liability company, Manager of EPT Montecillo I-10 Development, LLC, a Texas limited liability company, on behalf of said limited liability company.



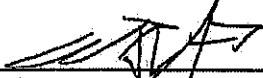
Notary Public

123 Plus Management, LLC
123 Plus Management, LLC
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123 Plus Management, LLC

ACKNOWLEDGED AND AGREED TO BY IFLY TENANT:

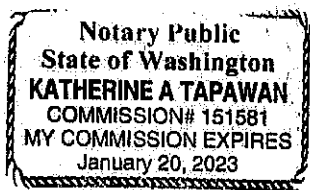
FLYZONE LLC,
a Texas limited liability company

By: 
William "Bill" P. Adams, Manager

THE STATE OF WASHINGTON §
COUNTY OF KITSAP §

This instrument was acknowledged before me this 25 day of July, 2019 by William "Bill" P. Adams, Manager of FLYZONE LLC, a Texas limited liability company, on behalf of said limited liability company.

(SEAL)



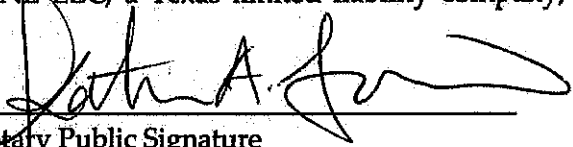

Notary Public Signature

EXHIBIT "A-1"
LEGAL DESCRIPTION OF iFLY PROPERTY

A 1.0424 acres parcel situate within the City of El Paso, El Paso County, Texas as all of Lot 5 and a portion of Lot 4, Block 43, Montecillo Unit Eleven, recorded in File No. 20180006139, Plat Records of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING at a city monument found at the right-of-way intersection of Vin Rambla Drive (variable width) and Suncrest Drive (60 feet wide); WHENCE, a city monument found at the right-of-way intersection of said Vin Rambla and New Orleans Drive (60 feet wide) bears, South 73°22'05" East, a distance of 495.00 feet; THENCE, leaving said Vin Rambla Drive and Suncrest Drive intersections, South 16°37'55" West, a distance of 59.00 feet to a 1/2 inch rebar with survey cap No. "TX 6223" found on the southerly right-of-way line of said Vin Rambla Drive for the POINT OF BEGINNING of the parcel herein described, identical to the northeasterly corner of said Lot 5;

THENCE, leaving the southerly right-of-way line of said Vin Rambla Drive and following the easterly boundary line of said Lot 5, South 16°39'22" West, a distance of 241.45 feet to a 1/2 inch rebar with survey cap No. "TX 6223" found on the northerly right-of-way line of Interstate Highway No. 10 (variable width) for the southeasterly corner of the parcel herein described, identical to the southeasterly corner of said Lot 5;

THENCE, leaving the easterly boundary line of said Lot 5 and following the northerly right-of-way line of said Interstate Highway No. 10, North 73°20'38" West, a distance of 32.21 feet to a 1/2 inch rebar with survey cap No. "TX 6223" found for an angle point;

THENCE, continuing along the northerly right-of-way line of said Interstate Highway No. 10, North 89°51'09" West, at a distance of 66.40 feet pass the boundary line common to said Lots 5 and 4 and continuing on for a total distance of 106.37 feet to a 1/2 inch rebar with survey cap No. "TX 6223" set for the southwesterly corner of the parcel herein described;

THENCE, leaving the northerly right-of-way line of said Interstate Highway No. 10, North 00°11'11" East, a distance of 265.54 feet to a chiseled "X" set on concrete on the southerly right-of-way line of said Vin Rambla Drive for the northwesterly corner of the parcel herein described;

THENCE, following the southerly right-of-way line of said Vin Rambla Drive, South 89°48'49" East, at a distance of 39.96 feet pass the boundary line common to said Lots 5 and 4 and continuing on for a total distance of 119.71 feet to a chiseled "X" found on concrete for an angle point of the parcel herein described;

THENCE, continuing along the southerly right-of-way line of said Vin Rambla Drive, South 60°03'52" East, a distance of 73.64 feet to chiseled "X" found on concrete for an angle point of the parcel herein described;

THENCE, continuing along the southerly right-of-way line of said Vin Rambla Drive, South 73°22'05" East, a distance of 23.00 feet to the POINT OF BEGINNING;

Said parcel containing 1.0424 acres (45,407.8 square feet), more or less, and being subject to all easements, restrictions and covenants of record.

EXHIBIT "B"
USE RESTRICTIONS

1. **Prohibited Uses and Activities.** The following uses are prohibited on any portion of the Property.

- (i) Any use which is illegal under Applicable Law;
- (ii) Any use involving the use, transportation, storage or generation of any noxious, toxic, caustic or corrosive fuel or gas;
- (iii) Any use involving any unusual risk of fire, explosion or other damaging or dangerous hazard, including the storage, display or sale of explosives or fireworks;
- (iv) Any warehouse, or for any assembling (other than the incidental assembly of prefabricated furniture), manufacturing (other than cooking, baking and other preparation of food products for sale, and other than lens grinding, lens finishing, and eye glass fabrication and repair), distilling (other than any microbrewery), refining, smelting, agricultural (other than the sale of agricultural products and the preparation thereof for sale) or industrial or mining operations;
- (v) Any use of manufactured housing, mobile homes or trailers (except those used as construction or leasing trailers during construction of Improvements for a non-prohibited use and thereafter removed upon the completion of construction);
- (vi) Any auction house, pawn shop, flea market, junk yard, salvage yard, stock yard or storage facility for abandoned, wrecked or salvaged vehicles or vehicle parts;
- (vii) Any car wash facility; provided, however, a car wash facility operated in conjunction with a convenience store or mini-mart operation shall be permitted;
- (viii) Any 99 cent store or dollar store (i.e., Family Dollar, Dollar Tree, Dollar General, or a store substantially similar in product mix and pricing to the foregoing establishments);
- (ix) Any storage, incineration or reduction of garbage or refuse, except that this restriction does not prohibit the temporary storage or compaction of garbage incidental to the operation of commercial businesses operated on the Property while awaiting regular-interval offsite disposal through governmental or privately contracted pickup or other such similar means so as to minimize offensive odors;
- (x) Any business that specializes in bankruptcy or liquidation sales or the selling of fire damaged items;
- (xi) Any fire, going out of business, relocation, bankruptcy or similar sales (unless pursuant to court order);
- (xii) Industrial manufacturing; automobile dealership; automobile or body

- repair facilities;
- (xiii) Central laundry, dry cleaning plant, or laundromat; provided, however, this restriction shall not apply to any dry cleaning facility providing on-site services oriented to pickup and delivery by the retail customer, including nominal supporting facilities, or to laundry facilities for any Owner or Tenant of the Property for such Owner or Tenant's own towels, linens, and uniforms used in its premises within the Property;
 - (xiv) Blood bank, plasma center, mortuary, crematorium or funeral parlor;
 - (xv) Any truck or trailer rental (unless incidental to a permitted business use, such as the rental of trucks or trailers by a home improvement center to customers for hauling of purchased materials);
 - (xvi) Adult bookstore or establishment selling, exhibiting or distributing pornographic or obscene materials (including without limitation, magazines, books, movies, videos, photographs or so called "sexual toys") or providing adult type entertainment or activities (including, without limitation, any displays or activities of a variety involving, exhibiting or depicting sexual themes, nudity or lewd acts);
 - (xvii) Any sexually oriented massage parlor, nude modeling studio, or bar, tavern, restaurant or other establishment that employs or uses nude or topless entertainers or staff, or any other sexually oriented business; As used herein, the term "sexually oriented business" will have the same meaning assigned to such term by Section 243.002 of the Texas Local Government Code as of the date hereof;
 - (xviii) Any facility which sells drug-related paraphernalia for use with illicit drugs;
 - (xix) Tattoo parlor;
 - (xx) Bingo, lotto, off-track betting hall or other gambling establishment (which will not be deemed to include state lottery tickets lawfully sold);
 - (xxi) Veterinary hospital, animal clinic, stock yard or raising or boarding of animals;
 - (xxii) Skating rink, Nightclub, ballroom, dance hall or discotheque;
 - (xxiii) Any storage or warehouse facility;
 - (xxiv) The sale or providing of bail bonds;
 - (xxv) Beauty school, barber college, or any training school, provided that the training of employees of the Owners or Tenants shall be permitted;
 - (xxvi) Shooting range or gallery;
 - (xxvii) Privately operated sanitary landfill, sewage or treatment plant;
 - (xxviii) Slaughterhouse, meat packing or facilities for the rendering of animal substances or for the skinning or tanning of animal hides;
 - (xxix) Prisons, jails or other detention or correctional facilities including, but not limited to, half-way houses;
 - (xxx) Extended stay hotels or motels; the term "extended stay hotel or motel" shall mean a hotel that rents or leases more than 15% of its total guest

rooms for periods in excess of 14 consecutive days or that advertises monthly or weekly rates, but does not include those hotels offering extended stays that (a) cater primarily to business travelers and (b) are operated by a reputable national chain such as Marriott, Hilton or Holiday Inn;

- (xxxii) A cinema or theater: (i) for so long as a cinema or theatre is operating on any portion of that certain real property located in El Paso County, Texas, as more particularly described on Exhibit "C", attached hereto and incorporated herein; or (ii) until termination or expiration of the iFly Lease, whichever occurs last;
- (xxxiii) The takeoff, storage, or landing of aircraft (including, without limitation, helicopters) except for medical emergencies; and
- (xxxiiii) Any residential use; provided, however, (A) residences may be located in any area identified as "Residential Use Permitted" on Exhibit "B-1" attached hereto and incorporated herein (the "**Residential Permitted Areas**"); (B) residences may also be located in all areas that are not "Residential Permitted Areas", as long as such residences are only located on the upper floors of buildings where the first floor is used for a use which is not restricted/prohibited under the terms and provisions of the Covenant or the iFly Lease, provided however, the first floor of any building shall not be used as a service or amenity for the residential occupants above the first floor (e.g., lobby, business centers, theater room, or gym, etc. for the occupants of the residences), except that no more than 10% of the storefront of the first floor of any building, and no more than 25% of the entire first floor of any building, may be used as an entrance and lobby to service the residential occupants above the first floor; and (C) the buildings in the areas designated as "Potential Live-Work Areas" on Exhibit "B-1" attached hereto and incorporated herein may be used for live-work purposes.

2. *Intentionally deleted.*

3. **Topgolf Property.** This Section, *Section 3* of Exhibit "B" to the Covenant is for the benefit of certain real property adjacent to the Property and located in El Paso County, Texas, as more particularly described on Exhibit "D", attached hereto and incorporated herein (the "**Topgolf Property**"). Notwithstanding any term or provision in the Covenant to the contrary, this Section may only be amended or terminated by the Recording of an instrument executed and acknowledged by the Declarant and 30 West Pershing LLC, a Missouri limited liability company ("**30 West**"). 30 West, Topgolf USA El Paso, LLC, a Delaware limited liability company ("**Topgolf**"), the Association, and the Declarant shall have the right but not the obligation to enforce the terms and provisions of this Section.

- (i) Notwithstanding any term or provision in the Covenant to the contrary,

the following uses are prohibited on any portion of the Property within five-hundred feet (500') of the Topgolf Property:

- (a) An entertainment center of more than ten thousand (10,000) square feet such as, without limitation, a Dave and Buster's, Main Event, or bowling alley;
 - (b) Any 99 cent store or dollar store such as, without limitation, Family Dollar, Dollar Tree, or Dollar General;
 - (c) A deep discount, bargain, fire sale or thrift store, such as, without limitation, a Goodwill Industries or Salvation Army; and
 - (d) Any sexually oriented massage parlor, nude modeling studio, or bar, tavern, restaurant or other establishment that employs or uses nude or topless entertainers or staff, or any other sexually oriented business; As used herein, the term "sexually oriented business" will have the same meaning assigned to such term by Section 243.002 of the Texas Local Government Code as of the date hereof.
- (ii) Notwithstanding any term or provision in the Covenant to the contrary, any and all pad sites within the Property which are adjacent to the Topgolf Property and within the "Sitelines" shown on Exhibit "E", attached hereto and incorporated herein, shall be restricted to a building elevation and fascia height that does not exceed thirty feet (30'). Additionally, all pylon signs associated with such pad sites shall not be permitted to exceed the maximum height as permitted by Applicable Law.
- (iii) The Property shall be developed and maintained as a mixed-use development that may include, but shall not be limited to, the following: (i) shopping centers; (ii) hotels; (iii) multifamily residences; (iv) single-family residences; (v) townhome residences; (vi) office(s); (vii) restaurants; and (viii) retail.
- (iv) Declarant acknowledges and agrees that *Section 2.03* of that certain Montecillo Notice of Annexation and Development Area Declaration [Topgolf Property], recorded as Document No. 20170046071 in the Official Public Records of El Paso County, Texas (the "**Topgolf NOA**") shall be binding on Declarant. Notwithstanding any term or provision in the Covenant to the contrary, Declarant shall allow 30 West (or Topgolf on behalf of 30 West) to install signage on the Property in accordance with the Topgolf NOA.

4. **iFly Property.** This Section, *Section 4 of Exhibit "B"* to the Covenant is for the benefit of that certain real property described on Exhibit "A-1" attached hereto and incorporated herein (the "**iFly Property**"). Notwithstanding any term or provision in the Covenant to the contrary, this Section may only be amended or terminated by the Recording of an instrument executed and acknowledged by the Declarant and until termination or expiration of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time), the consent of iFly Tenant and the landlord under the iFly Lease (if different than Declarant), which consents shall not be unreasonably withheld by the iFly Tenant or landlord under the iFly Lease as long as such amendment or termination does not adversely affect iFly Tenant's ability to operate the iFly Permitted Use pursuant to the iFly Lease or materially affect iFly Tenant's other rights or obligations under the iFly Lease, this Covenant or any other Documents. Until the iFly Lease (as the same may be extended, renewed and/or replaced from time to time) expires or is terminated, the iFly Tenant and the landlord under the iFly Lease, in addition to the Declarant and the Association, shall have the right but not the obligation to enforce the terms and provisions of this Section. Except for the iFly Property and for the term of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time), no portion of the Property may be leased to or occupied by anyone who offers (i) indoor skydiving, (ii) any skydiving simulation (including any virtual reality related thereto) or (iii) a vertical tunnel. Accordingly, for the term of the iFly Lease (as the same may be extended, renewed and/or replaced from time to time), the iFly Tenant shall have the exclusive right within the Property to offer indoor skydiving, any skydiving simulation (including any virtual reality related thereto) or a vertical tunnel (collectively, the "**iFly Exclusive Use**"). In the event that Declarant (or any subsequent landlord under the iFly Lease or any affiliate of either such parties) or any Owner, Tenant or other occupant of the Property violates the provisions of this *Section 4 of Exhibit "B"* to the Covenant then, the landlord under the iFly Lease and iFly Tenant, without limiting their other rights and remedies under the iFly Lease, shall have the right to seek equitable relief against such violator, including an injunction against such violation. In the event that any real property is withdrawn from the definition of "Property" under the Covenant in accordance with the requirements of the Covenant, such withdrawn real property shall continue to be subject to the iFly Exclusive Use in accordance with the iFly Lease. Declarant acknowledges that iFly Tenant has additional rights under the iFly Lease and that the Documents shall in no way limit iFly Tenant's rights thereunder; iFly Tenant shall not be bound by or required to comply with any provision of any lease, declaration, reciprocal easement agreement or any other agreement or any amendments thereto, including, without limitation, the Covenant and the other Documents, to the extent such provision decreases any of iFly Tenant's rights provided pursuant to the terms and provisions of the iFly Lease or increases any of iFly Tenant's obligations pursuant to the terms and provisions of the iFly Lease. For the avoidance of doubt, all references to the iFly Lease shall be deemed to include any amendments to and/or replacements of the leasehold estate created by the iFly Lease, and any extensions and renewals of the term created thereunder and all references to iFly Tenant shall include any successors and assigns holding a leasehold interest under the iFly Lease.

5. **Trash.** Owners and Tenants will place trash entirely within trash receptacles located within the Property, which receptacles must be approved as to location and design by Declarant, and may not place trash outside, next to, or on top of the receptacle. Boxes and large objects should be crushed or broken down before being placed in a receptacle. Receptacles are to be closed at all times when not in use. Owners and Tenants must arrange privately for removal of discarded furnishings or any unusually large volume of debris.

6. **Unsightly Articles; Vehicles.** No article deemed to be unsightly by the Board will be permitted to remain within the Property so as to be visible from public or private thoroughfares. Without limiting the generality of the foregoing, trailers, graders, commercial trucks (other than pickups), boats, tractors, campers, wagons, buses, all-terrain vehicles and garden maintenance equipment belonging to any Owner or Tenant must be kept at all times, except when in actual use, in enclosed structures or screened from view and no repair or maintenance work may be done on any of the foregoing, or on any automobile (other than minor emergency repairs), except in enclosed garages or other structures. Service areas and storage areas must be appropriately screened from view, and no lumber, grass, plant waste, shrub or tree clippings, metals, bulk materials, scrap, refuse or trash may be stored or allowed to accumulate on any portion of the Property except within enclosed structures or appropriately screened from view. No: (i) racing vehicles; or (ii) other vehicles (including, without limitation, motorcycles or motor scooters) which are inoperable or do not have a current license tag will be permitted to remain visible within or parked on any roadway within the Property.

7. **Outside Burning.** There will be no exterior fires, except that barbecues, outside fireplaces, braziers and incinerator fires contained within facilities or receptacles for such purposes and in areas designated and approved by the Board shall be permitted. No Owner or Tenant will permit any condition to exist within the Property which creates a fire hazard or violates Applicable Law.

8. **Storage and Loading Areas.** Unless approved in advance and in writing by the Montecillo Commercial Reviewer, no materials, supplies or equipment shall be loaded or unloaded or stored upon any portion of the Property, except in designated loading and unloading areas or inside a closed building or otherwise behind a visual barrier screening such materials, supplies or vehicles.

9. **Utility Lines.** Unless otherwise approved by the Montecillo Commercial Reviewer, no sewer, drainage or utility lines or wires or other devices for the communication or transmission of electric current, power, or signals including telephone, television, microwave or radio signals, shall be constructed, placed or maintained anywhere in or upon any portion of the Property other than within buildings or structures unless the same shall be contained in conduits or cables constructed, placed or maintained underground or concealed in or under buildings or other structures.

10. **Walls and Fences.** No walls or fences shall be erected or maintained on any Lot except in accordance with the Design Guidelines, if any. No chain link fences shall be permitted,

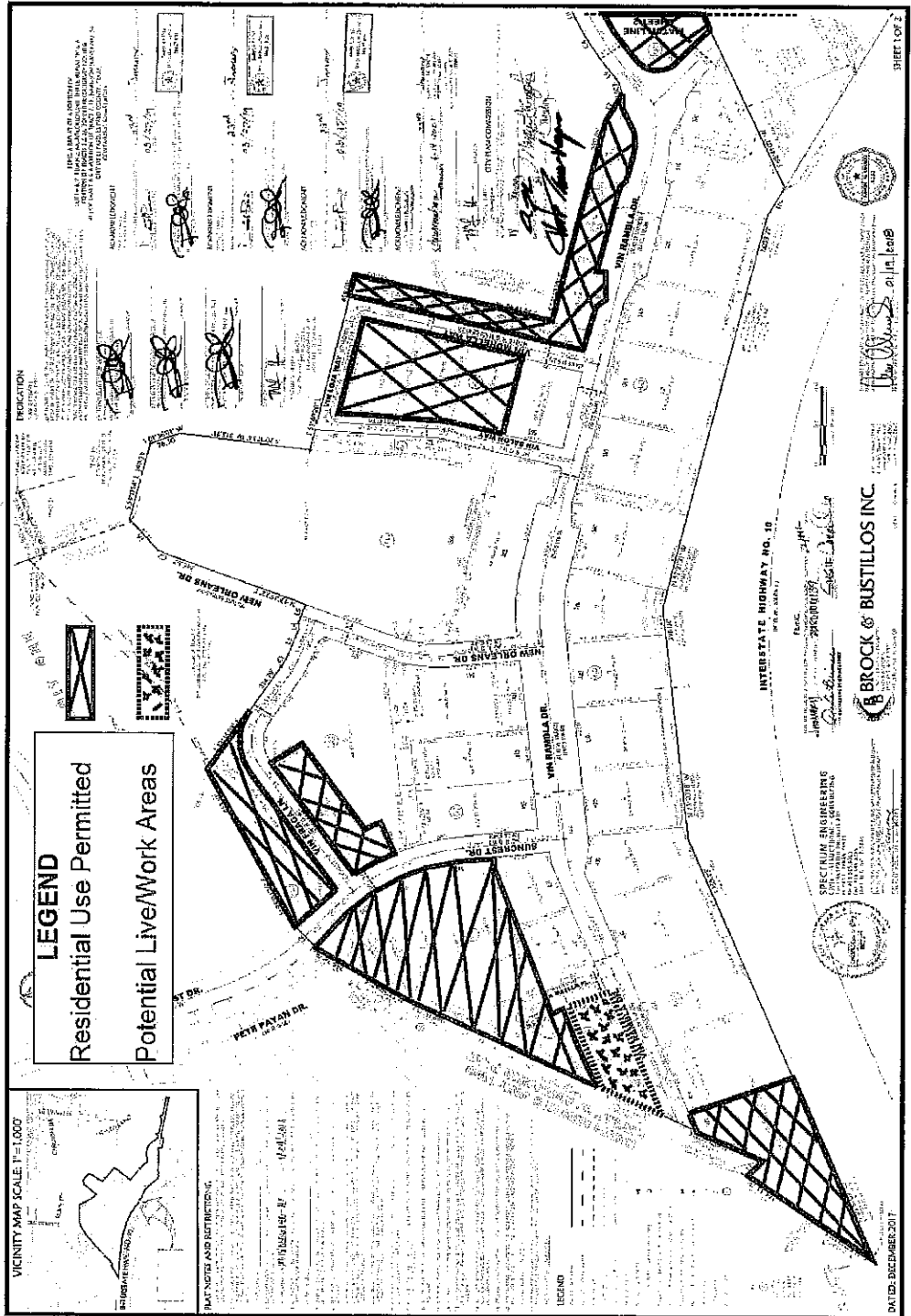
except for temporary fences constructed by Declarant or permitted by the Montecillo Commercial Reviewer during construction of Improvements.

11. **Removal of Dirt.** The digging of dirt or the removal of any dirt from any Lot is prohibited, except as necessary in conjunction with landscaping or plans approved in advance by the Montecillo Commercial Reviewer.

12. **Hazardous Substances.** No Owner shall use, or permit the use of any Hazardous Substances (defined below) in, on or about its Lot, Condominium Unit, or the Property, except in the ordinary course of the business operations permitted thereon, and any such use shall at all times be in compliance with Applicable Law. Each Owner agrees to defend, protect, indemnify and hold harmless the Association, Declarant, other Owners, and Tenants from and against any and all claims, costs and liabilities (including, without limitation, reasonable attorneys' fees and costs, investigation and cleanup costs, governmental response costs, natural resource damages, containment, or other remediation) arising from Hazardous Substances used, released or allegedly released by the indemnifying Owner or any other person for whose conduct the indemnifying Owner is or may be held responsible. "**Hazardous Substances**" means any hazardous or toxic substance, material or waste that is or becomes regulated by any local governmental authority, the State of Texas, or the United States. Hazardous Substances include, without limitation, the following: (a) any pollutant, oil or hazardous substance, identified or listed pursuant to Sections 307, 311 or 502 of the Federal Water Pollution Control Act (33 U.S.C. §1317, §1321 and §1362); (b) any element, compound, mixture, solution or substance designated pursuant to Section 102 of the Comprehensive Environmental Response Compensation and Liability Act (42 U.S.C. §9602); (c) any substance or material having the characteristics identified under or listed pursuant to Section 3001 of the Resource Conservation and Recovery Act (42 U.S.C. §6921) or equivalent law or regulation in the State of Texas; (d) any petroleum, crude oil, or any fraction of either that is not otherwise specifically listed or designated under items (a)-(c); (e) any hazardous waste, extremely hazardous waste, hazardous substance or hazardous material, as defined or listed under Applicable Law; and (f) any waste, material or building contaminant, including asbestos, lead, and mold, which is listed or meets any identification or toxicity criterion under Applicable Law.

13. **Owner's Obligation.** Each Owner shall be responsible for compliance with the provisions of this Exhibit "B" to the Covenant by any Tenant occupying such Owner's Lot and their respective licensees, subtenants, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, and concessionaires.

EXHIBIT "B-1"
RESIDENTIAL PERMITTED AND POTENTIAL LIVE-WORK AREAS



Doc # 20190063127
#Pages 23 #NFPages 1
08/19/2019 02:44 PM
Filed & Recorded in
Official Records of
El Paso County
Delia Briones
County Clerk
Fees \$114.00

eRecorded

I hereby certify that this instrument was filed on the date and time stamped
hereon by me and was duly recorded by document number in the Official
Public Records of real Property in El Paso County.



EL PASO COUNTY, TEXAS

A handwritten signature in cursive script, appearing to read "Delia Briones".