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OFFICIAL PUBLIC RECORDS



*Dana DeBeauvoir*

Dana DeBeauvoir, County Clerk  
Travis County, Texas

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## DECLARATION OF RESTRICTIVE COVENANT

This Declaration of Restrictive Covenant (this “**Restrictive Covenant**” or “**Agreement**”) is entered into by and between **Luby’s Fuddrucker’s Restaurants, LLC**, a Texas limited liability company, successor by conversion to Luby’s Restaurants Limited Partnership, a Texas limited partnership (“**Owner**”) and HomeBase Texas, a Texas nonprofit corporation (“**HomeBase**”), as of August 12, 2021.

### RECITALS

- A. Owner owns that certain tract of land located in Austin, Travis County, Texas more particularly described in Exhibit “A” attached hereto and made a part hereof (the “**Property**”).
- B. Owner desires to provide for the redevelopment of the Property (the “**Project**”) for multifamily residential purposes.
- C. Owner has filed one land use application with the City of Austin, as described below (collectively, the “**8176 North MoPac Expressway Land Use Case**”):
  - a. Case C14-2021-0100, to rezone the Property from LR to MF-6.
- D. Contingent upon final approval by the City of Austin City Council of the 8176 North MoPac Expressway Land Use Case with no additional restrictions not agreed to by Owner, Owner has agreed that the Property shall be restricted by this Restrictive Covenant and that this Restrictive Covenant shall be filed of record in the Official Public Records of Travis County, Texas.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to all of the terms and conditions of this Restrictive Covenant, Owner and HomeBase agree that the Property shall be subject to the following covenants, conditions and restrictions, which are impressed upon the Property by this Restrictive Covenant:

### I. DECLARATIONS AND AGREEMENTS

- 1.1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:
  - 1.1.1. “**Owner**” means Owner and all future owners of the fee interest or any portion of the Property (whether such fee interest is obtained through a purchase from Owner or through a purchase at a foreclosure sale or trustee’s sale or through a deed in lieu of foreclosure) and their successors and assigns.

- 1.1.2. **“MFI”** means annual median family income in the Austin statistical metropolitan area, as determined by the director of the City of Austin’s Neighborhood Housing and Community Development Office.
- 1.1.3. **“Affordable Housing Unit”** means a habitable space reserved for rental by households meeting the following affordability requirements: the Average Affordable Housing Unit Household Earnings among all Affordable Housing Units shall not exceed 80 percent of MFI.
- 1.1.4. **“Average Affordable Housing Unit Household Earning”** means the arithmetic mean of the household earnings of every household leased an Affordable Housing Unit, calculated by adding the household earnings of every household leased an Affordable Housing Unit in the Project and then dividing that sum by the total number of households leased an Affordable Housing Unit in the Project.
- 1.2. Affordability Requirements. Subject to the terms and conditions hereof, if a multifamily residential Project is constructed on the Property, then Owner shall provide Affordable Housing Units as required by this section:
- a. 10 percent of the total number of rental units in the Project shall be Affordable Housing Units. Owner shall provide such Affordable Housing Units for a period of 40 years from the date of a final or last Certificate of Occupancy is issued for the Project. For purposes of clarification, the household earnings of any individual Affordable Housing Unit may exceed 80 percent of MFI so long as the Average Affordable Housing Unit Household Earnings among all Affordable Housing Units do not exceed 80 percent of MFI.
- 1.3. Affordable Housing Unit Requirements. For a Project providing Affordable Housing Units, Owner shall provide Affordable Housing Units in a manner that ensures that:
- a. Affordable Housing Units are reasonably dispersed throughout the Project to avoid clustering of Affordable Housing Units;
  - b. Affordable Housing Units are accessible by the same routes as market-rate units;
  - c. Occupants of Affordable Housing Units have access to all on-site amenities available to market-rate units, including the same access to common areas, amenities, and parking facilities;
  - d. Affordable Housing Units are functionally equivalent to the market-rate units in the Project and the interior components in the Affordable Housing Units are durable and good quality, although the Affordable Housing Units may have different interior finishes, features, and appliances; and

- e. All Affordable Housing Units must be made available concurrently with the market-rate units.

- 1.4. Marketing Plan. For a Project providing Affordable Housing Units, Owner shall prepare and utilize a marketing and outreach plan that identifies communities that would be otherwise least likely to apply for housing and establishes outreach and advertising strategies for marketing the Affordable Housing Units within the identified communities.

## **II. COMPLIANCE, MONITORING AND ENFORCEMENT**

- 2.1. Compliance with Affordable Housing Requirements. Beginning on commencement of construction of the Project and continuing until the expiration or sooner termination of this Restrictive Covenant, all occupancy of the improvements to or modifications to improvements on the Property shall be in full compliance with the Affordable Housing Unit Requirements.
- 2.2. Compliance Monitoring of Affordable Housing Units. If Owner is required to provide any Affordable Housing Units under this Agreement, then within thirty (30) days after written request from HomeBase from time to time (but not more frequently than once per calendar quarter), Owner will provide information and materials reasonably requested by HomeBase to evidence Owner's compliance with the Affordable Housing Units required to be provided under this Agreement. In consideration of HomeBase's compliance monitoring activities, Owner agrees to make annual payments to HomeBase in the amount of \$100 per Affordable Housing Unit in the Project, commencing on substantial completion of construction of the Project (as evidenced by issuance of the last certificate of occupancy for the Project). Thereafter, during the term of this Agreement, the amount of such annual payments shall increase in accordance with the CPI-U as reported by the U.S. Bureau of Labor Statistics on each fifth anniversary of substantial completion. For example for a project with a substantial completion in 2015, the fee for years 1-5 shall be \$100/year per Affordable Housing Unit, and be recalculated in 2020 based on the change in CPI (using [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)) for an increase to \$110.38 for years 6-10, and so on through the term of this agreement.
- 2.3. Excusable Delays. Whenever performance is required of the Owner, the Owner shall use all due diligence to perform and take all reasonable and necessary measures in good faith to perform within a reasonable time; provided, however, that if completion of performance is delayed at any time by reasons of acts of God, pandemic, war, civil commotion, riots, strikes, picketing, or other labor disputes, unavailability of labor or material, damage to work in progress by reason of fire or other casualty, or any other cause beyond the reasonable control of the Owner (financial inability, imprudent management or negligence excepted), then the time for performance as herein specified will be extended by the amount of delay actually so caused.

- 2.4. Breach Does Not Permit Termination. Notwithstanding anything to the contrary contained herein, no breach of this Restrictive Covenant entitles the Owner to cancel, rescind or otherwise terminate this Restrictive Covenant, but such limitations do not affect in any manner any other rights or remedies which the Owner may have hereunder by reason of any breach of this Restrictive Covenant.
- 2.5. Enforcement. If any person, persons, corporations, or entity of any other character, violates or attempts to violate this Restrictive Covenant, it will be lawful for HomeBase, its successors and assigns, to prosecute proceedings at law, or in equity, against the person or entity violating or attempting to violate this Restrictive Covenant and to prevent said person or entity from violating or attempting to violate such covenant. The failure at any time to enforce this Restrictive Covenant by HomeBase, its successors and assigns, whether any violations hereof are known or not, does not constitute a waiver or estoppel of the right to do so.

### III. GENERAL PROVISIONS

- 3.1. Entire Agreement. This Restrictive Covenant, and the exhibits attached hereto, contain all the representations and the entire agreement between the parties to this Restrictive Covenant with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are superseded in total by this Restrictive Covenant and the exhibits attached hereto. The provisions of this Restrictive Covenant will be construed as a whole according to their common meaning and not strictly for or against Owner.
- 3.2. Severability. The provisions of this Restrictive Covenant are deemed to be independent and severable, and the invalidity or partial invalidity of any provision or portion hereof does not affect the validity or enforceability of any other provision.
- 3.3. Inurement. This Restrictive Covenant and the restrictions created hereby inure to the benefit of and bind Owner, and its successors and assigns. When Owner conveys all or any portion of the Property, that former Owner will thereupon be released and discharged from any and all further obligations, if any, under this Restrictive Covenant that it had in connection with the Property conveyed by it from and after the date of recording of such conveyance, but no such sale releases that former Owner from any liabilities, if any, actual or contingent, existing as of the time of such conveyance.
- 3.4. Estoppel Certificates. Within ten (10) days after written request from Owner, HomeBase agrees to execute and deliver a certificate certifying that, to HomeBase's knowledge, (a) Owner is not in default in the performance of its obligations under this Restrictive Covenant, or, if in default, describing the nature and amount or degree of such default, and (b) such other information regarding the status of the obligations under this Restrictive Covenant as may be reasonably requested by Owner.

- 3.5. No Third-Party Beneficiaries. The provisions of this Restrictive Covenant are for the exclusive benefit of the parties hereto, and their permitted successors and assigns, and not for the benefit of any third person, nor shall this Restrictive Covenant be deemed to have conferred any rights, express or implied, upon any third person or the public.
- 3.6. No Dedication. No provision of this Restrictive Covenant shall ever be construed to grant or create any rights whatsoever in or to any portion of the Property other than the covenants, conditions and restrictions specifically set forth herein. Nothing in this Restrictive Covenant shall ever constitute or be construed as a dedication of any interest herein described to the public or give any member of the public any right whatsoever.
- 3.7. Governing Law; Place of Performance. This Restrictive Covenant and all rights and obligations created hereby will be governed by the laws of the State of Texas. This Restrictive Covenant is performable in Travis County, Texas.
- 3.8. Captions. The captions preceding the text of each section and subsection hereof are included only for convenience of reference and will be disregarded in the construction and interpretation of this Restrictive Covenant.
- 3.9. Notices. All notices required or permitted to be given hereunder, or given in regard to this Restrictive Covenant, shall be in writing and the same shall be given and be deemed to have been served, given and received (a) one (1) business day after being placed in a prepaid package with a national, reputable overnight courier addressed to the other party at the address hereinafter specified, or (b) if mailed, three (3) business days following the date placed in the United States mail, postage prepaid, by certified mail, return receipt requested, addressed to the party at the address herein specified. Owner or HomeBase may change their respective addresses for notices by giving five (5) business days' advance written notice to the other in the manner provided for herein. Until changed in the manner provided herein, Owner and HomeBase's address for notice is as follows:

Owner:

Luby's Fuddruckers Restaurants, LLC  
Attn: Bill ~~Gordon~~ **GORDON**  
13111 NW Freeway, Suite 600  
Houston, Texas 77040

With copies to:

Ardent Residential, L.P.  
Attn: Brett Denton  
5453 Burnet Road, Ste. 203  
Austin, Texas 78756

Michael J. Whellan  
Armbrust & Brown, PLLC  
100 Congress Avenue, Suite 1300  
Austin, Texas 78701

HomeBase:  
HomeBase Texas  
Attn: Phyllis Snodgrass  
500 West Ben White Blvd., Suite 100  
Austin, Texas 78704

- 3.10. Negation of Partnership. None of the terms or provisions of this Restrictive Covenant will be deemed to create a partnership between the Owner and HomeBase in their respective businesses or otherwise; nor will it cause them to be considered joint ventures or members of any joint enterprise.
- 3.11. Modification and Amendment. This Restrictive Covenant may only be modified, amended or terminated upon the filing of a written modification, amendment or termination document in the Official Records of the county in Texas where the Property is located, executed, acknowledged and approved by (a) HomeBase or successor; and (b) Owner or successor.
- 3.12. Expiration. This Restrictive Covenant shall be deemed to have terminated and shall be of no further force and effect forty (40) years after the date a final or last Certificate of Occupancy is issued for the Project; provided, however, the effectiveness of this Restrictive Covenant and the agreements of Owner and HomeBase reflected herein are conditioned upon final approval (i.e., third reading) of the 8176 North Mopac Expressway Land Use Case by the City of Austin City Council, with no subsequent appeal, and with no conditional overlay or additional restrictions not agreed to by Owner. An affidavit executed by Owner and recorded in the Official Public Records of Travis County, Texas, certifying the facts supporting the expiration or ineffectiveness of this Restrictive Covenant pursuant to the foregoing shall be prima facie evidence that this Restrictive Covenant has terminated and no longer encumbers the Property. Any potential purchaser, lender, investor or tenant of the Property and any other third parties shall have the right to rely on such affidavit without any further investigation or inquiry.

*[Remainder of page intentionally left blank; Signatures follow.]*

Executed to be effective as of the date first written above.

**OWNER:**

LUBY'S FUDDRUCKERS RESTAURANTS, LLC,  
a Texas limited liability company, successor by  
conversion to Luby's Restaurants Limited  
Partnership, a Texas limited partnership

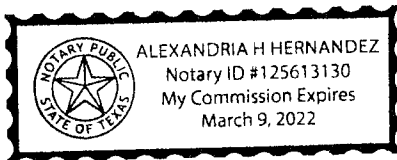
By: *Bill Gordon*  
Name: Bill GORDON  
Title: Vice President

THE STATE OF TEXAS       §  
  §  
COUNTY OF Harris       §

This instrument was acknowledged before me on the 12<sup>th</sup> day of August,  
2021 by Bill Gordon, \_\_\_\_\_ of Luby's  
Fuddruckers Restaurants, LLC, a Texas limited liability company, on behalf of said limited liability  
company.

(SEAL)

*Alexandra H. Hernandez*  
Notary Public Signature





Executed to be effective as of the date first written above.

**HOMEBASE:**

HOMEBASE TEXAS, INC.,  
a Texas nonprofit corporation

By: Phyllis Snodgrass  
Phyllis Snodgrass, CEO

THE STATE OF TEXAS       §  
  §  
COUNTY OF TRAVIS       §

This instrument was acknowledged before me on the 9<sup>th</sup> day of August, 2021 by Phyllis Snodgrass, CEO of HOMEBASE TEXAS, INC., a Texas non-profit corporation, on behalf of said non-profit corporation.

(SEAL)



Bertha Flores-Samilpa  
Notary Public Signature

EXHIBIT A  
Property Description

Lot 1, J.V. WALDEN ADDITION, a subdivision in Travis County, Texas, according to the map or plat thereof, recorded in Volume 77, Page 314, Plat Records of Travis County, Texas.