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| FEE \$ <u>76.00</u>                         |
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| SUBMITTED <u>NEBRASKA TITLE COMPANY - O</u> |

FILED SARPY CO. NE.  
INSTRUMENT NUMBER

**2013-21926**

2013 Jul 09 03:20:08 PM

*Sheryl J. Dowling*

REGISTER OF DEEDS



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Declaration of Permitted Use Restrictive Covenants

Market Pointe, LLC, a Missouri limited liability company (Developer)

Jackrabbit Holdings, LLC, a South Dakota limited liability company (Owner)

Legal Description shown on Exhibit A

0254698

*Please Return recorded document to:*  
Nebraska Title Company  
11336 South 96th Street, Suite 120  
Papillion, NE 68046

## DECLARATION OF PERMITTED USE RESTRICTIVE COVENANTS

THIS DECLARATION OF PERMITTED USE RESTRICTIVE COVENANTS ("**Declaration**"), made and entered into this 8<sup>th</sup> day of July, 2013, by and between **Market Pointe, LLC**, a Missouri limited liability company, its successors and/or assigns ("**Developer**") and Jackrabbit Holdings, LLC, a South Dakota limited liability company ("**Owner**").

### WITNESSETH:

WHEREAS, under the Agreement of Sale dated January 22, 2013, as amended (the "**Agreement**"), Developer has agreed to sell to Owner the property described in the Agreement (which property is legally described on **Exhibit A** attached hereto) (hereafter, the "**Property**") and located at The Shoppes at Market Pointe Shopping Center in Papillion, Sarpy County, Nebraska (the "**Shopping Center**"), as depicted on the site plan of Shopping Center attached hereto as **Exhibit B** (the "**Site Plan**");

WHEREAS, the Property is subject to that certain Easements With Covenants and Restrictions Affecting Land recorded January 24, 2006, as Instrument No. 2006-02430, as amended by that certain First Amendment to Easements With Covenants and Restrictions Affecting Land recorded September 5, 2006, as Instrument No. 2006-30539, and as further amended by that certain Second Amendment to Easements With Covenants and Restrictions Affecting Land recorded February 9, 2009, as Instrument No. 2009-03341 (collectively, the "**ECR**"), copies of which Owner acknowledges receipt; and

WHEREAS, the Agreement provides that the use of the Property shall be restricted to certain specific uses.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Developer and Owner covenant and agree as follows:

1. Owner agrees that the Property shall be used only for the purposes described as follows:

1.1 Owner agrees that the Property shall be used for the operation of a restaurant and/or retail store (the "**Permitted Use**"). Owner shall not change the use of all or any portion of the Property from the Permitted Use set forth above without in each instance first obtaining Developer's prior written consent, which shall not be unreasonably withheld.

2. It is understood and agreed between the parties hereto that the Property shall be used and occupied only for the Permitted Use and for no other purpose or purposes without the prior written consent of Developer (which consent shall not be unreasonably withheld). In addition to Owner's agreement to operate only for the Permitted Use as hereinabove provided, Owner expressly covenants and agrees that it shall not operate or permit any operation in the Property so as to violate or permit the violation of any of the exclusives and/or restrictions which have been negotiated to date, which are set forth in **Exhibit C** attached hereto and incorporated herein by reference (collectively, the "**Exclusives**"). In the event that Owner's use conflicts with its Permitted Use or any use protected by the Exclusives, Developer shall give Owner written notice of same and Owner shall immediately cease the use of the Property for such prohibited

use within 5 days thereafter. In the event Owner fails to cease such prohibited use, then Owner agrees to indemnify, defend, and hold harmless Developer from and against any and all claims, demands, actions, causes of action, losses (including, but not limited to, loss of rents resulting from the termination by a tenant of its lease), damages, costs, and expenses, including court costs and attorneys' fees, including any cost or legal expenses of Developer in enforcing the restriction as and against Owner, and including any cost or legal expenses of Developer arising from or related to wholly or in part, the use of the Property for any purpose prohibited or listed in **Exhibit C** hereto. In the event Owner violates any of the provisions of this Agreement, Developer shall have all rights and remedies provided herein, in the Agreement and in the Developer Acquisition Rights Agreement, in addition to all rights and remedies available to Developer at law or in equity, including, but not limited to, injunctive relief and specific performance.

3. This Declaration and the restrictions contained herein constitute covenants running with the land which shall bind subsequent owners and users of the Property. The prevailing party in any litigation arising from this Declaration shall recover its reasonable attorney fees and other costs of suit from the non-prevailing party.

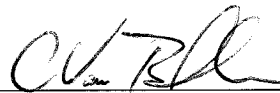
[THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK]

IN WITNESS WHEREOF, Owner and Developer have caused this Declaration to be executed effective as of the latest date executed, as shown below.

**"OWNER"**

**Jackrabbit Holdings, LLC,**  
a South Dakota limited liability company

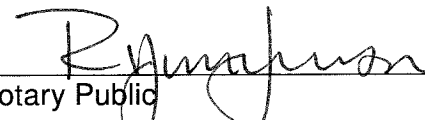
**By: VBC, Inc.,**  
a South Dakota corporation  
Title: Manager

By:   
Name: CHAD VAN BUSKIRK  
Title: MANAGER  
Date of Execution: 7/3/13

STATE OF South Dakota )  
 ) ss.  
COUNTY OF Lincoln )

Now on this 3RD day of July, 2013, before me, the undersigned, a Notary Public, in and for the County and State aforesaid, came Chad Van Buskirk, Manager of VBC Inc. who is personally known to me to be the same person who executed the within instrument and who duly acknowledged the execution of the same to be his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year last above written.

  
Notary Public

My Commission Expires: 4/1/2019

[REMAINDER OF PAGE INTENTIONALLY BLANK; DEVELOPER'S SIGNATURE FOLLOWS.]

**Market Pointe, LLC,**  
a Missouri limited liability company

STATE OF KANSAS )  
COUNTY OF JOHNSON ) ss.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year last above written.

My Commission Expires: 9/21/15

L:\LANE4\Omaha-Market Pointe\0-CURRENT\VBC Inc (Lot 1, Replat 6)\Closing\DRCPU\DRCPU02.doc

**EXHIBIT A**  
**to Declaration of Permitted Use Restrictive Covenant**

**THE PROPERTY**

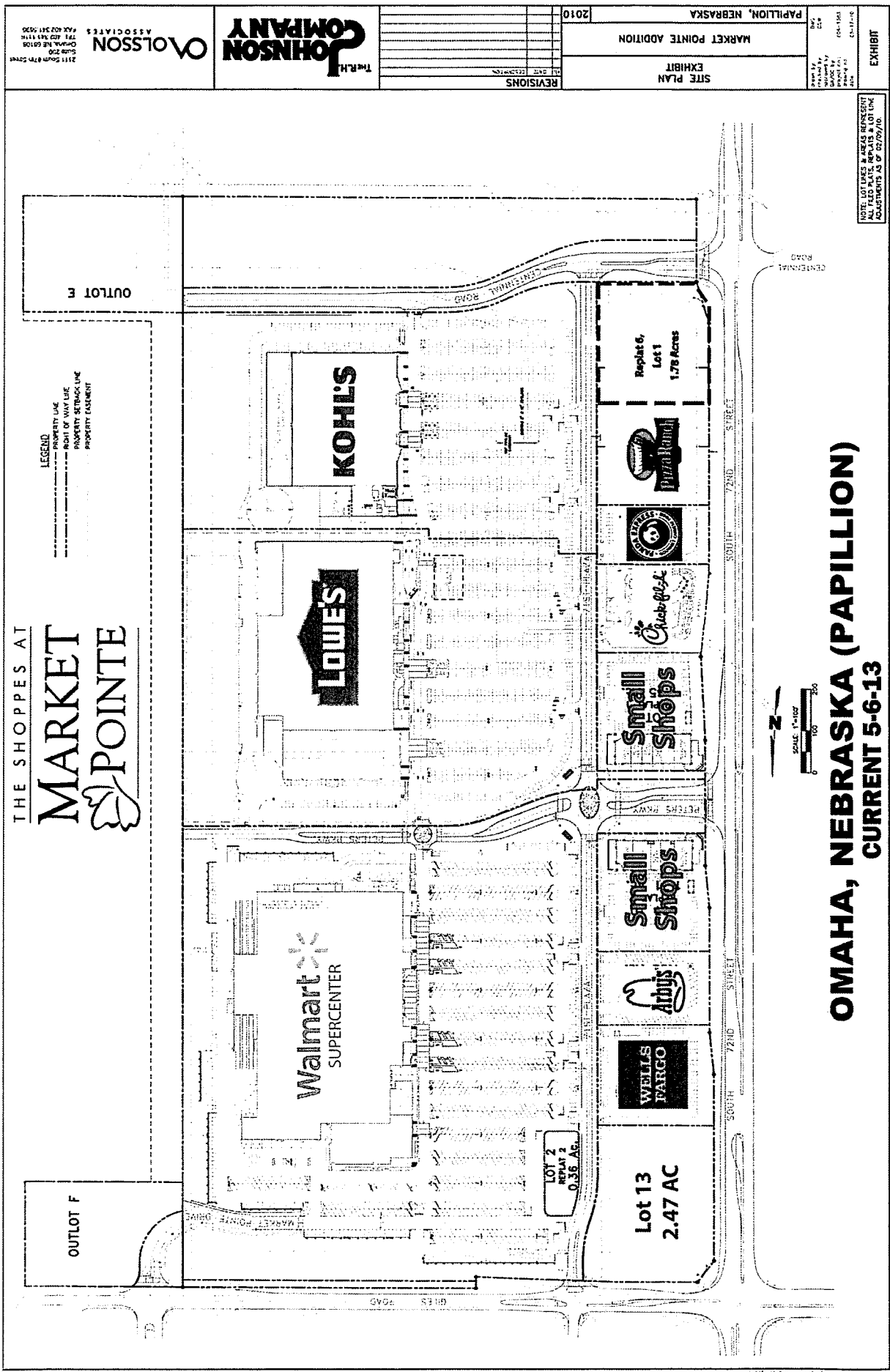
Lot 1, in Market Pointe Addition Replat 6, an Addition to the City of Papillion, as surveyed, platted and recorded in Sarpy County, Nebraska

**EXHIBIT B**  
**to Declaration of Permitted Use Restrictive Covenant**

**SITE PLAN**

(See attached)

# EXHIBIT A



**EXHIBIT C**  
**to Declaration of Permitted Use Restrictive Covenant**

**EXCLUSIVES**

(Updated as of 7/8/2013)

1. **WAL-MART REAL ESTATE BUSINESS TRUST**, a Delaware statutory trust, d/b/a Wal-Mart or alternative d/b/as, its successors, assigns, and/or affiliates (herein "**Wal-Mart**")

1.1. So long as Wal-Mart is an owner, tenant or user of the Shopping Center, no space in or portion of the Property, and no space in or portion of any other real property adjacent to the Shopping Center which may subsequently be acquired by Purchaser, shall be leased or occupied by or conveyed to any other party for use as (a) a facility dispensing gasoline or fuel from pumps, (b) a membership warehouse club, (c) a pharmacy requiring the services of a licensed pharmacist, (d) a Discount Department Store or other Discount Store, as such terms are defined below, (e) a variety, general or "dollar" store, (f) a Grocery Store or Supermarket as such terms are defined below or (g) any combination of the foregoing uses. "Grocery Store" and "Supermarket," as those terms are used in this Section, shall mean a food store or a food department containing more than 16,000 square feet of floor area used for the purpose of selling food for off-premises consumption, which shall include but not be limited to the sale of dry, refrigerated or frozen groceries, meat, seafood, poultry, produce, delicatessen or bakery products, refrigerated or frozen dairy products or any grocery products normally sold in such stores or departments. "Discount Department Store" and/or "Discount Store," as those terms are used in this Section, shall mean a discount department store or discount store containing more than 35,000 square feet of building space used for the purpose of selling a full line of hard goods and soft goods including, but not limited to, clothing, cards, gifts, electronics, garden supplies, furniture, lawnmowers, toys, health and beauty aids, hardware items, bath accessories and auto accessories at a discount in a retail operation similar to that of Wal-Mart. The term "Discount Department Store" and "Discount Store" shall specifically exclude and not apply to either: (i) Kohl's Department Stores; or (ii) Lowe's Home Centers, Inc.

2. **LOWE'S HOME CENTERS, INC.**, a North Carolina corporation, d/b/a Lowe's or alternative d/b/as, its successors, assigns, and/or affiliates (herein "**Lowe's**")

2.1. So long as Lowe's or is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used for any of the following purposes: (i) a hardware store containing more than 5,000 square feet of useable floor area; (ii) an appliance and/or home electronics store containing more than 5,000 square feet of useable floor area (provided the foregoing shall not prohibit a Circuit City store, Best Buy store, Gateway Computer store, Radio Shack store or a successor store to any of the foregoing which has substantially the same types and quantities of merchandise as offered by such stores on January 23, 2006, or if different types or quantities of merchandise are offered, such merchandise does not exceed the limitations in this Section); (iii) a lawn and garden store containing more than 3,000 square feet of useable floor area; (iv) a paint and/or home décor center containing more than 5,000 square feet of useable floor area; or (v) a retail and/or warehouse home improvement center, lumber yard, building materials supply center, home improvement service center and/or other stores or centers similar to those operated by or as Lowe's, Home Depot, Home Depot Expo, Villagers Hardware, 84 Lumber, Wickes, Hughes Lumber, McCoys, Menard's, Sears Hardware, Great Indoors, Sutherlands, Scotty's and Orchard Supply. These restrictions or exclusive rights shall also apply to prohibit a larger business having space in its store devoted to selling the merchandise described in subparagraphs (i) through (v) which such space exceeds the limitations of subparagraphs (i) through (v).

3. PANEBRASKA, L.L.C., an Iowa limited liability company, d/b/a Panera or alternative d/b/as, its successors, assigns, and/or affiliates (herein "**Panera**")

3.1. So long as Panera is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used for a bakery or café whose "primary" use is the sale of all of the following (the "**Panera Items**"): baked goods, breads, brewed coffee, ground or whole coffee beans, brewed tea and tea leaves and food items used in connection with the preparation of coffee and tea ("**Panera's Exclusive**"). The term "**primary**" as used in this Section shall mean a tenant or occupant that derives 25% or more of its gross sales from the sale of the Panera Items. Notwithstanding the foregoing, Panera's Exclusive shall not apply to the following: (a) any tenant or occupant at the Property that bakes or sells breads as items or ingredients of a meal; (b) any tenant or occupant at the Property that operates a full service restaurant; and (c) Starbucks, Caribou Coffee and Scooter's. An example of tenants who are restricted by this exclusive include, without limitation, Atlanta Bread Company, Camille's, Cosi, Paradise Bakery and Brueggers.

4. GAMESTOP INC., a Minnesota corporation, d/b/a Gamestop or alternative d/b/a, its successors, assigns, and/or affiliates (herein "**Gamestop**")

4.1. So long as Gamestop is an owner, tenant or user at the Shopping Center, no singly demised premises on the Property shall be used for the retail sale of entertainment software, video software or video games typically sold in GameStop retail stores. For the purposes of this Section, the following are excluded: (i) Blockbuster Video, (ii) Hollywood Video, (iii) Movie Gallery, and (iii) any user occupying at least 5,000 square feet of floor area.

5. WELLS FARGO BANK, N.A., a national association, d/b/a Wells Fargo or alternative d/b/as, its successors, assigns, and/or affiliates (herein "**Wells Fargo**")

5.1. So long as Wells Fargo is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used as and for banking with a retail storefront, lending with a retail storefront or a drive-through automated teller machine.

6. NEBRASKA FRESH-MEX, LLC, a Colorado limited liability company, d/b/a Qdoba Mexican Grill, or Qdoba or alternative d/b/as, its successors, assigns and/or affiliates (herein "**Qdoba**")

6.1. So long as Qdoba is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used for the sale of "quick casual" Mexican style food and Mexican style wraps for on and off premises consumption (the "**Qdoba Items**"). Notwithstanding the foregoing, this restriction shall not apply to the following: (a) any tenant or occupant of the Shopping Center whose sale of the Qdoba Items are "incidental" to such tenant or occupant's business operations (For purposes of this Section, the term "**incidental**" shall mean the sale of the Qdoba Items account for less than 10% of such tenant or occupant's gross sales); and (b) any full service Mexican style restaurant, such as On The Border and Mi Cocina, which is greater than 4,000 square feet of floor area.

7. PAYLESS SHOESOURCE, INC., a Missouri corporation, d/b/a Payless Shoesource or alternative d/b/a, its successors, assigns, and/or affiliates (herein "**Payless**")

7.1. So long as Payless is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used: (i) by any tenant or occupant whose principal use is a retail shoe store and whose premises is less than 6,000 square feet of floor area, or (ii) for any retail shoe store that sells over 50% of non-branded shoes; provided, however, the foregoing restriction shall not apply to (a) Rack Room Shoes or (b) Famous Footwear.

8. OMAHA CELLULAR TELEPHONE COMPANY, a Nebraska partnership, d/b/a Verizon Wireless or alternative d/b/a, its successors, assigns, and/or affiliates (herein "**Verizon**")

8.1. So long as Verizon is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used as a business which sells Verizon wireless service or as a business that is considered, in the wireless telecommunications industry, a competitor of Verizon Wireless (i.e., a business that primarily sells wireless telecommunication products and services) (a "**Competitor**"), and Landlord shall not consent to the sublease of any premises or the assignment of any lease whereby the sublessee or assignee is a Competitor. Notwithstanding anything in this Section to the contrary, the provisions of this Section shall not apply to any of the following: (1) any tenant whose lease is executed at any time when one or more of the Conditions are not satisfied; (2) any tenant whose lease was executed prior to the Effective Date of this Lease, and any such tenant's successors, assigns and subtenants (provided Landlord does not have the right to restrict or limit the use of the premises of such successors, assigns and subtenants); (3) any tenant in the Shopping Center whose premises contain 10,000 square feet or more of Floor Area; and (4) Lot 1, Lot 2 and Lot 3 (as shown on the Site Plan).

9. GENERAL NUTRITION CORPORATION, a Pennsylvania corporation, d/b/a/ General Nutrition Center or alternative d/b/a, its successors, assigns, and/or affiliates (herein "**GNC**")

9.1. So long as GNC is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used "primarily" (as defined below) for the sale of health foods, vitamins, mineral and herbal supplements or sports nutrition supplements (collectively, the "**GNC Items**"). For purposes of this Section, the term "**primarily**" shall mean that the GNC Items are sold in more than the lesser of: (a) 100 square feet of Floor Area of the building on the Property, or (b) 5% of the Floor Area of the building on the Property. Notwithstanding anything in this Section to the contrary, the provisions of this Section shall not apply to any of the following: (1) any tenant or occupant whose lease or occupancy agreement is entered into at any time when one or more of the Conditions are not satisfied, and any such tenant's or occupant's successors, assigns and subtenants; (2) any tenant or occupant under a lease or occupancy agreement, or the purchaser under a purchase agreement, entered into prior to the Effective Date of this Lease, and any such tenant's, occupant's or purchaser's successors, assigns and subtenants, or any tenant or occupant leasing pursuant to any renewal, extension or modification of any lease that was executed prior to the Effective Date of this Lease; (3) any tenant or occupant that does not devote more than the lesser of: (a) 100 square feet of Floor Area in its premises, or (b) 5% of the Floor Area in its premises, to the sale of the GNC Items; (4) any tenant or occupant which has been permitted to assume a lease or operate its business based upon or as a result of a bankruptcy, insolvency or similar action, or as the result of an action or order by any court.

10. CTF DEVELOPMENTS, LLC, a California limited liability company, d/b/a Panda Express or alternative d/b/a, its successors, assigns, and/or affiliates (herein "**Panda Express**")

10.1. So long as Panda Express is an owner, tenant or user at the Shopping Center, no portion of the Restricted Area (Lots 4, 5, 6 & 8) shall be used as a restaurant serving "Asian Food", as defined below (hereinafter "**Owner's Exclusive Use**"). In the event: (1) Market Pointe acquires fee simple title to any portion of land within a one (1) mile radius of the boundary of the Property (the "**Future Restricted Area**"); or (2) this Declaration is still in effect and has not terminated, expired or been released; and (3) Owner is not in violation of any of the Exclusive Conditions as of the date Market Pointe acquires title to such land, Owner's Exclusive Use will apply against such portion of land in the Future Restricted Area which is acquired by Market Pointe; PROVIDED, HOWEVER, Owner agrees that the foregoing restriction shall not apply to any then-existing tenant or occupant of the Future Restricted Area that has the right to use its premises for the Owner's Exclusive Use. For purposes of this Section, the term "**Asian Food**" as used herein shall mean Chinese, Japanese (including sushi), Vietnamese, Thai, Hawaiian, Mongolian and Korean food, any of the foregoing foods cooked in a wok, foods generally recognized as Chinese, soy sauce based food, or Asian Food served in a buffet format. Additionally, notwithstanding

anything in this Declaration to the contrary, the restriction against operating for Owner's Exclusive Use shall not apply to any tenant or occupant under a lease or occupancy agreement, or the purchaser under a purchase agreement, entered into prior to the date of this Declaration, and any such tenant's or occupant's successors, assigns or subtenants; PROVIDED, HOWEVER, in the event Market Pointe has the contractual right to consent to or approve any proposed change in use of any such tenant's or occupant's premises, and such proposed change in use would otherwise violate the restriction against operating for Owner's Exclusive Use, then Market Pointe shall withhold its consent or approval to such change of use, subject to applicable laws.

11. STAPLES THE OFFICE SUPERSTORE EAST, INC., a Delaware corporation d/b/a STAPLES, (herein "**Staples**")

11.1. So long as Staples is an owner, tenant or user at the Shopping Center, no portion of the Property shall be used for the sale, leasing or distribution of equipment (including computers and telecommunications equipment), furniture or supplies for business or office (including home office) use, or the provision of business or office services (including copying, printing, telecommunications, packing, shipping and business equipment repair services) (collectively, the "Exclusive Goods and Services"). Notwithstanding the foregoing, this provision shall not prohibit any tenant or occupant from selling, leasing, distributing or providing the Exclusive Goods and Services incidental to such tenant's or occupant's primary business in no more than an aggregate of 10% of such tenant's or occupant's sales floor area.

12. CHICK-FIL-A, INC., a Georgia corporation d/b/a CHICK FIL-A (herein "**Chick-fil-A**")

12.1. So long as Chick fil-A does not cease to operate a Chick-fil-A restaurant on it's Tract for a period in excess of twelve (12) consecutive months (except that the time during which operations cease due to a remodeling, condemnation, casualty or event of force majeure will not count towards the 12-month period), the Property shall not be leased, used or occupied as a restaurant selling or serving chicken as a principal menu item. For the purposes of this Agreement, "a restaurant selling or serving chicken as a principal menu item" means a restaurant, other than a restaurant where orders are taken and served by a server at the customer's table, deriving twenty-five percent (25%) or more of its gross sales from the sale of chicken.

12.2. So long as Chick fil-A does not cease to operate a Chick-fil-A restaurant on the it's Tract for a period in excess of twelve (12) consecutive months (except that the time during which operations cease due to a remodeling, condemnation, casualty or event of force majeure will not count towards the 12-month period), no portion of the Property will be leased, used or occupied by or for any of the following uses: Boston Market, Kenny Roger's, Kentucky Fried Chicken, Popeye's, Church's, Bojangle's, Mrs. Winner's, Chicken Out, Willie May's Chicken, Biscuitville, Zaxby's, Ranch One, Koo-Koo Roo or Raising Cane's.

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