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 PROOF _____
 FEES \$ 46.00
 CHECK # 015195
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FILED SARPY CO. NE
 INSTRUMENT NUMBER
2008-29636
 2008 OCT 28 AM 9:43
Shirley G. [Signature]
 REGISTER OF DEEDS

After recording, return to: James B. Cavanagh, 2027 Dodge Street, #100, Omaha, Nebraska 68102, (402)344-4000

**SHARED ACCESS DRIVEWAY
 USE AND MAINTENANCE AGREEMENT**

THIS SHARED ACCESS DRIVEWAY USE AND MAINTENANCE AGREEMENT ("*Agreement*") is made and entered into this 13th day of October, 2008, by and between SIMMONDS PROPERTIES, LTD, a Nebraska limited partnership ("*Simmonds*"), and BURGER KING CORPORATION, a Florida corporation ("*BKC*").

RECITALS:

A. Simmonds is the owner of the following described real property located in Omaha, Douglas County, Nebraska, to-wit ("*Simmonds/BKC Property*"):

Lot 7, Southport East Replat 6, an Addition to the City of LaVista, as surveyed, platted and recorded in Sarpy County, Nebraska.

B. Simmonds has leased a portion of the Simmonds Property to BKC pursuant to a lease dated the 16th day of July, 2008, as evidenced by a Memorandum of Lease recorded in the land records of Douglas County, Nebraska, on the 6th day of August 2008 under Instrument Number 2008-22585 ("*BKC Lease*").

C. Simmonds is the owner of the following described real property located in Omaha, Douglas County, Nebraska, to-wit ("*Simmonds Property*"):

Lot 6, Southport East Replat 6, an Addition to the City of LaVista, as surveyed, platted and recorded in Sarpy County, Nebraska.

D. It is contemplated that a Shared Access Driveway will be constructed as shown on *Exhibit A* attached hereto and by this reference made a part hereof (the "*Shared Access Driveway*"). The Shared Access Driveway shall cross a part of the Simmonds Property and a part of the Simmonds/BKC Property, in the areas depicted on Exhibit A, and shall be utilized by Simmonds and BKC and their respective tenants, sub-tenants, employees, customers, vendors, and other business invitees for ingress,

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 Return to:
 NEBRASKA TITLE COMPANY
 4257 S 144TH STREET
 OMAHA, NE 68137

\$45.50

Courtesy

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egress, and access to the Simmonds/BKC Property and/or the Simmonds Property, pursuant to the terms and conditions set forth in the Declaration. As used in this Agreement, the term "*Declaration*" shall mean that certain Declaration and Grant of Easements, Covenants and Restrictions for Lots 1 and 2 Southport East Replat Two and for Lot 3 Southport East Replat Two Replatted as Lots 1 through 10, Southport East Replat Six, recorded May 4, 2007 as Instrument No. 2007-13018, as amended by First Amendment to Declaration of Easements, Covenants and Restrictions for Lots 1 and 2, South port East Replat Six, recorded July 16, 2007 as Instrument No. 2007-21169, together with that certain Consent and Ratification of Declaration and Grant of Easements, Covenants and Restrictions, recorded July 30, 2007 as Instrument No. 2007-22954, and together with that certain Consent and Ratification of Plat and Dedication and of Declaration and Grant of Easements, Covenants and Restrictions, recorded July 16, 2007 as Instrument No. 2007-21173, records of Sarpy County, Nebraska.

E. The parties desire to provide for the joint use and maintenance of such Shared Access Driveway.

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, it is agreed as follows:

1. *Common Use.* BKC and Simmonds, together with their respective tenants, sub-tenants, employees, customers, vendors, and other business invitees, shall have the common and shared use of the Shared Access Driveway for ingress, egress and access to the Simmonds/BKC Property and/or the Simmonds Property, subject to the terms of the Declaration and subject to the terms of this Agreement. This common right to use shall continue so long the Simmonds/BKC property is leased to BKC or its successors-in-interest, or until the Shared Access Driveway is no longer maintained in materially the configuration shown on *Exhibit A* pursuant to the mutual written agreement of Simmonds and BKC.

2. *Construction and Maintenance.*

(a) *Construction.* Without in any way limiting their respective obligations under the BKC Lease, BKC shall be responsible for the initial construction of the Shared Access Driveway in a first class manner consistent with the standards set forth in the Declaration and otherwise generally in a manner that is consistent with similar properties used for similar purposes by Simmonds and/or BKC in the metropolitan LaVista, Nebraska area. Notwithstanding the foregoing, all reasonable costs and expenses associated with the construction of the Shared Access Driveway shall be shared equally by Simmonds and BKC, regardless of whether the Simmonds Property is improved or occupied. Simmonds shall reimburse BKC for Simmonds' share of such costs within thirty (30) days receipt of an invoice therefor from BKC. Simmonds agrees not to encourage and/or participate in any work stoppage or labor strike that may develop in relation to the construction.

(b) *Initial Maintenance.* Without in any way limiting their respective obligations under the BKC Lease, and except as otherwise provided in Section 2(a) of this Agreement, so long as the Simmonds Property is not improved or occupied, BKC shall be solely responsible, at BKC's sole cost and expense, for maintaining, repairing and replacing the Shared Access Driveway in a first class manner consistent with the standards set forth in the Declaration and otherwise generally in a manner that is consistent with similar properties used for similar purposes by Simmonds and/or BKC in the metropolitan LaVista, Nebraska area. In the event that the Simmonds Property is hereafter improved or occupied, then the provisions of Section 2(c) of this Agreement shall control.

(c) *Shared Maintenance.*

(i) Without in any way limiting their respective obligations under the BKC Lease, in the event that the Simmonds Property is hereafter improved or occupied, then BKC shall continue to maintain, repair and replace the Shared Access Driveway in a first class manner consistent with the standards set forth in the Declaration and otherwise generally in a manner that is consistent with similar properties used for similar purposes by Simmonds and/or BKC in the metropolitan LaVista, Nebraska area. Notwithstanding the foregoing, all reasonable costs and expenses associated with the maintenance, repair and replacement of the Shared Access Driveway shall be shared equally by BKC and Simmonds, and Simmonds shall reimburse BKC for Simmonds' share of such costs within thirty (30) days receipt of an invoice therefor from BKC.

(ii) Without in any way limiting their respective obligations under the BKC Lease, in the event that the Simmonds Property is hereafter improved or occupied, then at BKC's sole option, BKC may elect to shift the maintenance, repair and replacement obligation set forth in Section 2(c)(i) of this Agreement to Simmonds with thirty (30) days prior written notice thereof given by BKC to Simmonds. Notwithstanding the foregoing, all reasonable costs and expenses associated with the maintenance, repair and replacement of the Shared Access Driveway shall be shared equally by BKC and Simmonds, and BKC shall reimburse Simmonds for BKC's share of such costs within thirty (30) days receipt of an invoice therefor from Simmonds.

(iii) For purposes hereof, costs, expenses and maintenance shall include, without limitation, snow removal, striping, sealing, repairs, replacements or substitutions of paving curbing, drainage, or other surfaces, landscaping and all other similar items.

3. *Enforcement.*

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(a) If either party shall fail to perform the obligations set forth in Section 2, above (the non-performing party hereinafter "**Party X**"), then the other party ("**Party Y**"), following written notice from Party Y to Party X of such failure and the passage of 15 days following such notice for Party X to cure such failure, Party Y shall have the right to perform such obligations on Party X's behalf, and Party X shall promptly reimburse Party Y upon demand for the reasonable costs and expenses incurred by Party Y in performing such obligations, plus interest at the rate of 10% per annum if Party X fails to reimburse Party Y within 30 days after such demand, which interest shall accrue from the day demand for such reimbursement is made until the amount due to Party Y is paid in full.

(b) In the event that either party defaults under the terms, provisions, or obligations of this Agreement, the non-defaulting party shall have all rights and remedies available at law or in equity for the redress of such default, including, but not limited to: (i) an action for damages; (ii) an action for temporary and/or permanent injunction; (iii) an action for specific performance of the terms, conditions and obligations of this Agreement; or (iv) any combination of the foregoing. If any party brings an action, lawsuit, or other legal proceeding against the other party arising out of this Agreement, the prevailing party in such action, lawsuit, or proceeding shall be entitled to recover from the non-prevailing party all reasonable costs and expenses (including, but not limited to, all court costs and reasonable attorneys' fees and expenses) incurred in connection with such action, lawsuit, or proceeding.

4. **Run With The Land.** The obligations created by this Agreement and all provisions of this Agreement shall run with the land and shall be binding upon any owner or tenant from time to time of any portion of the Simmonds Property or the Simmonds/BKC Property.

5. **Indemnification.** Each party shall protect, defend, indemnify and hold harmless each other party and their shareholders, directors, officers, service partners, agents, successors and assigns against liability, lawsuits, actions, proceedings, losses, damages, awards, settlements, judgments, claims, costs and expenses of every kind and nature, including, without limitation, reasonable attorneys fees, arising out of the use of the Shared Access Driveway by such party, its employees, agents, contractors, tenants, customers, invitees, successors or assigns, except to the extent caused by the gross negligence or willful misconduct of another party to this Agreement. This section shall survive any release or termination of this Agreement so as to be applicable to any claim or cause of action arising or accruing before the termination or release of this Agreement.

6. **Insurance.** Without limiting the obligations of BKC under the BKC Lease, Simmonds and BKC will each maintain commercial general liability insurance covering

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occurrences in the Shared Access Driveway in an amount of not less than \$1 million per occurrence and \$1 million combined limit. Upon the request of another party, each party will provide evidence to the other party that such insurance is in full force and effect.

7. *Non-Merger.* Title to the Property is vested in Simmonds. Notwithstanding any provision of law that would merge this Agreement with the fee title to the Property, it is the intention of Simmonds, as owner of the Property, that no such merger occur and that this Agreement not merge with the fee title.

8. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

9. *No Partnership or Joint Venture.* The parties expressly disclaim any intention to create by this Agreement or any acts or omissions in connection with this Agreement a partnership for joint venture or other association that would create joint and several liability or otherwise render the parties liable.

10. *Successors and Assigns.* The terms and provisions of this Agreement shall be binding upon and inure to the benefit of Simmonds, BKC and their respective representatives, successors and assigns.

11. *Amendment and Termination.* Subject to the other provisions hereof, this Agreement may not be amended, modified or terminated except by written consent of: (a) Simmonds, (b) BKC, and (c) the holders of any mortgages of record encumbering any portion of the Property, or their successors or assigns. Further, no modification or amendment shall be effective unless in writing and recorded in the Public Records of Douglas County, Nebraska. Upon the expiration or sooner termination of the BKC Lease, the obligations hereunder of BKC shall immediately pass to Simmonds. Notwithstanding the foregoing, Simmonds may assign such obligations to a new lessee and/or occupant of the Simmonds/BKC Property and/or the Simmonds Property, respectively.

12. *Further Assurances.* Simmonds and BKC shall execute such further reasonable documentation as may be necessary to effectuate the purpose of this Agreement.

13. *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska.

14. *References.* All references in this Agreement to BKC or Simmonds shall be deemed to refer to the successors-in-interest of such entities.

15. *Notices.* All notices, consents, approvals or other instruments required or permitted to be given by a party pursuant to this Agreement shall be in writing and

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given by (a) hand delivery, (b) facsimile, (c) express overnight delivery service, or (d) certified or registered mail, return receipt requested, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) transmission, if delivered by facsimile, (iii) the next business day, if delivered by express overnight delivery service, or (iv) the third business day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt requested. Notices shall be provided to the parties' addresses (or facsimile numbers, as applicable) to the following addresses, or as any party may otherwise from time to time specify to the other party in a notice delivered in the manner provided above:

Simmonds Properties, LTD
11404 West Dodge Road, Suite 650
Omaha, NE 68154
Attn: Michael Simmonds
Telephone: (402) 493-2300
Facsimile: (402) 493-8181

Burger King Corporation
5505 Blue Lagoon Drive
Miami, FL 33126
Attn: Legal Department - Real Estate
Facsimile: (305) 378-7868

and

P.O. Box 020783
Miami, FL 33102-0783

"Business day" shall mean any day which is not a weekend or legal holiday in Omaha, Nebraska.

Intending to be legally bound, the parties have executed this Agreement the day and year first above written.

[BALANCE OF PAGE INTENTIONALLY LEFT BLANK]

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WITNESSES:

[Signature]
Print Name: Kevin Simmonds

[Signature]
Print Name: Jeff Bremer

SIMMONDS:

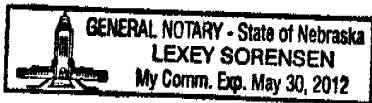
SIMMONDS PROPERTIES, LTD, a
Nebraska limited partnership

By: Simmonds Restaurant Management, Inc.,
General Partner

By: [Signature]
Michael H. Simmonds, President and CEO

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me on
October 13 2008, by Michael H. Simmonds, President and CEO of
Simmonds Restaurant Management, Inc., a Nebraska corporation, General Partner of
Simmonds Properties, LTD, a Nebraska limited partnership, on behalf of the limited
partnership.



[Signature]
Notary Public

My commission expires: 5-30-12

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WITNESSES:

BURGER KING CORPORATION, a Florida corporation

Sara Lopez
Print Name: SARA LOPEZ

[Signature]
Print Name: Vanessa Flores

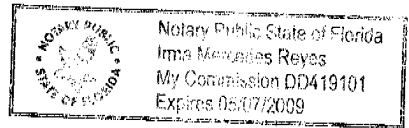
By: [Signature]
Printed Name: AMY R. KNIGHTS
Its Authorized Signatory VICE PRESIDENT

STATE OF FLORIDA)
COUNTY OF MAMI-DADE) ss.

The foregoing instrument was acknowledged before me on October 10 2008, by AMY R. KNIGHTS of Burger King Corporation, a Florida corporation, on behalf of the corporation. VICE PRESIDENT

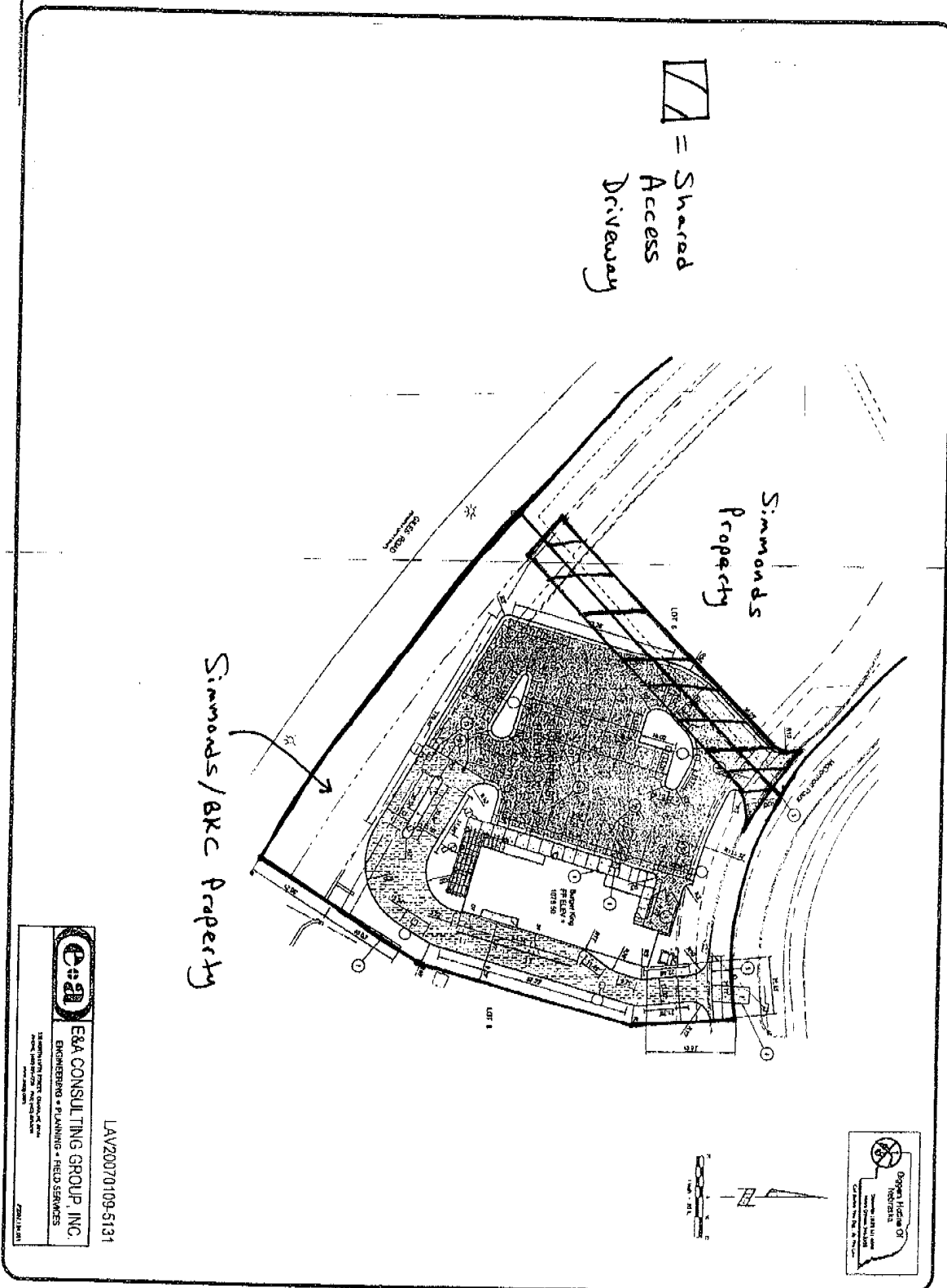
[Signature]
Notary Public


My commission expires: _____



2008-29636H

EXHIBIT A




E&B CONSULTING GROUP, INC.
 ENGINEERING • PLANNING • FIELD SERVICES
 15400 W. 10TH AVENUE, SUITE 100
 DENVER, CO 80202
 TEL: 303.751.1811

LAV20070109-5131

JOB NO. 2008-37
BURGER KING CORPORATION
 BK ROC-80 AT SOUTHPORT
 12223 McDERMOTT PLAZA LA VISTA, NR

 **stanley & how**
 ARCHITECTS



 **BURGER KING CORPORATION**

DATE	1-11-08
DESIGNED BY	...
CHECKED BY	...
DATE	...