

FILED FOR RECORD THE 13 DAY OF July
A.D., 1998 AT 9:44 O'CLOCK A. M.

Caroline Smith
COUNTY RECORDER

Doc # 3953

RECORD 512

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RECORD FEE \$ 36.00

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT is made and entered into as of this 2 day of October, 1998, by and between **DEVELOPERS DIVERSIFIED REALTY CORPORATION**, an Ohio corporation ("DDRC"), having an address at 34555 Chagrin Boulevard, Moreland Hills, Ohio 44022, and **CDJ JOHNSON FAMILY PARTNERSHIP**, a Nebraska limited partnership ("Arby's") having an address at 3205 North 90th Street, Suite #203, Omaha, Nebraska 68134. DDRC and Arby's shall sometimes be referred to herein singularly as a "Party," and collectively, the "Parties."

WITNESSETH:

WHEREAS, DDRC is the fee owner of certain tracts of land located in the City of Ottumwa, County of Wapello and State of Iowa, described in Exhibits A-1 and A-2 attached hereto and made a part hereof (the "Shopping Center" and the "Access Easement Area," respectively); and

WHEREAS, Arby's is the fee owner of a tract of land located in the City of Ottumwa, County of Wapello and State of Iowa described in Exhibit B attached hereto and made a part hereof (the "Outparcel"); and

WHEREAS, the Shopping Center, the Access Easement Area and the Outparcel shall sometimes be referred to herein singularly as a "Tract," and collectively, the "Tracts;" and

WHEREAS, DDRC and Arby's desire that the Outparcel benefit from, and be subject to, certain easements and restrictions as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. DDRC, as grantor, hereby grants to Arby's, as grantee, and to the agents, customers, invitees, licensees, tenants, employees and members of the public having business on the Outparcel, a non-exclusive easement for pedestrian and vehicular traffic in, to, on, over, upon, across, through and around the Shopping Center and the Access Easement Area for the purpose of providing access and ingress to and egress from the Outparcel.

2. Arby's shall carry in full force and effect during the term of this Agreement comprehensive public liability insurance and property damage insurance against claims for personal injury, death or property damage occurring upon, in or about the Shopping Center and/or the Access Easement Area resulting from the activities of Arby's, its agents, customers, invitees, licensees, tenants, employees and members of the public having business on the Outparcel. Such insurance shall have limits of not less than One Million Dollars (\$1,000,000.00)

for personal injury to or death of any one person, Three Million Dollars (\$3,000,000.00) for personal injury to or death of any number of persons in any one accident and One Million Dollars (\$1,000,000.00) for property damage. All policies carried hereunder (i) shall be carried with financially responsible insurance companies rated at least A+ X in Best Rating Guide. Arby's shall provide DDRC with certificates of such insurance from time to time to evidence that such insurance is in force and shall name DDRC as an additional insured. Such insurance may be written by additional premises endorsement on any master policy of insurance carried by Arby's which may cover other property in addition to the property covered by this Agreement. Such insurance shall provide that the same may not be cancelled or reduced in amount or coverage without at least thirty (30) days' prior written notice being given by the insurer to DDRC.

3. Arby's agrees to defend, indemnify and save DDRC, its successors and assigns, harmless from any and all liabilities, losses, damages, demands, claims, suits, causes of action or judgments, and expenses incurred by DDRC, its successors and assigns, relating to any injury to person, loss of life or damage to property occurring in connection with the exercise of the rights granted by this Agreement, except if caused by the act or negligence of DDRC.

4. Each Party agrees that it shall not construct or cause to be constructed a fence, wall, bumper blocks or other barrier between the Tracts.

5. DDRC shall operate, maintain, repair, replace, light and keep free of snow and ice all parking areas, sidewalks, walkways and roadways, including the Access Easement Area, as exist from time to time on the Shopping Center. Costs and expenses of operating, maintaining and repairing common areas on the Shopping Center may include, without limitation, general liability and property damage insurance, lighting, striping, resealing, cleaning, sweeping, cost and expenses of planting, replanting and replacing flowers and landscaping, water and sewage charges, electrical charges, charges for other utilities, security and management fees. Arby's shall pay to DDRC on a quarterly basis its pro rata share of all costs and expenses incurred by DDRC in operating, maintaining and repairing the common areas. Arby's pro rata share shall be determined by multiplying the total cost incurred by DDRC by the ratio of the square feet within Arby's building to the gross leasable area within all of the existing buildings in the Shopping Center and on the outparcels (excluding the gross leasable area of that portion of the Shopping Center more commonly known as the "Wal-Mart Premises").

6. The easements, agreements, duties, responsibilities and covenants herein contained shall be easements and covenants running with the land, and shall inure to the benefit of, and be binding upon, DDRC and Arby's, and their respective successors and assigns, and shall be construed and governed in accordance with the laws of the State of Iowa.

7. The rights of any holder of a lien on all or any part of the Tracts and any assignee or successor in interest of such lienholder, created from and after the date hereof shall at all times be subject and subordinate to the terms and conditions of this Agreement.

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IN WITNESS WHEREOF, the Parties have executed this Access Easement Agreement as of the day and year first above written.

WITNESSES:

Elizabeth A. Berry
(Print Name) ELIZABETH A. BERRY
Jane C. Jurenek
(Print Name) JANE C. JURENEK

DDRC:

DEVELOPERS DIVERSIFIED REALTY
CORPORATION, an Ohio corporation

By: Joan Allgood
Joan Allgood, Vice President

WITNESSES:

Donald G. Furlow
(Print Name) Donald G. Furlow

(Print Name) _____

ARBY'S:

CDJ JOHNSON FAMILY PARTNERSHIP
a Nebraska limited partnership

By: Matthew S. Johnson
Its General Partner

By: Matthew S. Johnson (Print Name)
Its: VP

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

BEFORE ME, a Notary Public in and for said County and State, personally appeared Joan Allgood, Vice President of DEVELOPERS DIVERSIFIED REALTY CORPORATION, the corporation which executed the foregoing instrument, who acknowledged that she did sign the foregoing instrument for, and on behalf of said corporation being thereunto duly authorized by its Board of Directors, that the same is her free act and deed as such officer and the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Moreland Hills, Ohio, this 15th day of September, 1998.

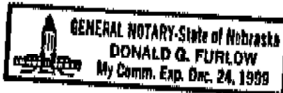
Elizabeth A. Berry
Notary Public **ELIZABETH A. BERRY**
Notary Public, State of Ohio, Cuya. Cty.
My Commission Expires Mar. 8, 2003

STATE OF NEBRASKA)
) SS:
 COUNTY OF Douglas)

BEFORE ME, a Notary Public in and for said County and State, personally appeared CDJ JOHNSON FAMILY PARTNERSHIP, a Nebraska limited partnership by Matthew Johnson for DCM, Inc., its General Partner, by its Vice President, Matthew Johnson, who acknowledged that he did execute the foregoing instrument and that the same is his free act and deed and the free act and deed of said limited partnership partnership.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Omaha, NEBRASKA, this 2nd day of October, 1998.
 (City) (State)

Donald S. Furlow
 Notary Public



THIS INSTRUMENT PREPARED BY:

Joan Allgood, Esq.
 Developers Diversified Realty Corporation
 34555 Chagrin Boulevard
 Moreland Hills, Ohio 44022
 Telephone: (216) 247-4700

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EXHIBIT A-1**LEGAL DESCRIPTION OF THE SHOPPING CENTER**

Tract Five(5) and a part of Tract Six (6), in W & M Properties Sub-division of a part of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-three (23) and a part of the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-six (26), all in Township Seventy-two (72) North, Range Fourteen (14) West of the 5th P.M., in the City of Ottumwa, Wapello County, Iowa, being more particularly described as follows, to-wit:

Beginning at the Northeast Corner of said Tract Five (5); thence North 89° - 53' West along the North line of said Tract Five (5), the same being the South line of the right of way of U.S. Highway No. 34, a distance of 602.35 feet to the Northwest Corner of said Tract Five (5); thence along the following described lines that is the Common Division Line between Tract Four (4) and said Tract Five (5) of W & M Properties Subdivision, South 00° - 07' West, a distance of 566.00 feet; thence North 89° - 53' West, a distance of 104.00 feet; thence South 00° - 07' West, a distance of 159.70 feet; thence South 89° - 53' East, a distance of 150.00 feet; thence South 00° - 07' West, a distance of 190.00 feet to the Southwest corner of said Tract Five (5); thence South 45° - 07' West along the line between said Tracts Four (4) and Six (6), a distance of 14.14 feet to the Southwest Corner of said Tract Six (6); thence South 89° - 53' East along the South line of said Tract Six (6), a distance of 415.97 feet; thence North 45° - 07' East, a distance of 319.68 feet; thence North 00° - 07' East, a distance of 700.00 feet to a point on the North line of said Tract Six (6); thence North 89° - 53' West along the North line of said Tract Six (6) the same being the South line of the right of way of U. S. Highway No. 34, a distance of 75.67 feet to the point of beginning, containing in all 13.997 Acres.

EXHIBIT A-2**LEGAL DESCRIPTION OF THE ACCESS EASEMENT AREA**

Part of Tract 4 as depicted on the Plat of W & M Properties Subdivision of Part of Government Lot Four (4) in Section 23, Township 72 North, Range 14 West of the Fifth Principal Meridian (5th PM), City of Ottumwa, Wapello County, Iowa, bounded and described as follows, to wit: Beginning at the Northeast corner of Tract Three (3) of said W & M Properties Subdivision; thence South 00 Degrees 07 Minutes 41 Seconds West, along the East line thereof, a distance of 192.90 feet (193.00 feet platted) to the Southeast corner of said Tract Three (3); thence South 89 Degrees 53 Minutes 02 Seconds East, along the Westerly extension of the South line of said Tract Three (3), a distance of 56.00 feet; thence North 00 Degrees 07 Minutes 41 Seconds East, a distance of 192.89 feet to the North line of said Tract Four (4), said line being the Southerly line of U.S. Route 34; thence North 89 Degrees 52 Minutes 22 Seconds West, along said North line, a distance of 56.00 feet to the Point of Beginning, containing 0.248 acres, more or less.

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EXHIBIT B**LEGAL DESCRIPTION OF THE OUTPARCEL**

Out Lot "C" or Tract 3 as depicted on the Plat of W & M Properties Subdivision, being a part of Government Lot Four (4), in Section Twenty-three (23), Township Seventy-two (72) North, Range Fourteen (14) West of the 5th Principal Meridian, City of Ottumwa, Wapello County, State of Iowa, being known and described as a part of Auditor's Lot Three (3) and also a part of Auditor's Lot One (1) of said Government Lot Four (4) located in the Southeast Quarter (SE 1/4) of said Section 23, being more particularly described as follows, to wit: Commencing at the South One-Quarter (S 1/4) corner of said Section 23; thence North 89 Degrees 55 Minutes 50 Seconds East, along the South line of said Southeast Quarter (SE 1/4), a distance of 52.01 feet to the Southeast corner of right-of-way acquired by the State of Iowa by Warranty Deed from David J. Thorne and Anna Thorne, filed for record on the 5th day of February 1963 in Book 307 at Page 376 in the Office of the Recorder of Wapello County, Iowa; thence North 00 Degrees 40 Minutes 30 Seconds East, along the East right-of-way line of Quincy Avenue, a distance of 349.59 feet to the Southwest corner of said Tract-3 and the Point of Beginning of the tract of land herein described; thence continuing North 00 Degrees 40 Minutes 30 Seconds East, along said East right-of-way line of Quincy Avenue, a distance of 193.01 feet to the Northwest corner of said Tract-3, being an angle point in said right-of-way line; thence South 89 Degrees 53 Minutes East, along the South right-of-way line of U.S. Route 34 as found described in Book 307 at Page 376 on a line that is 135 feet normally distant Southerly from the Center line of Primary Road No. U.S. Route 34, a distance of 180.00 feet to the Northeast corner of said Tract-3; thence leaving said right-of-way line and running South 00 Degrees 07 Minutes West, a distance of 193.00 feet to the Southeast corner of said Tract-3; thence North 89 Degrees 53 Minutes West, a distance of 181.88 feet to the Point of Beginning, containing 0.801 acres, more or less.