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FILED SARPY COUNTY NEBRASKA  
INSTRUMENT NUMBER

2010-10650

04/29/2010 8:32:24 AM

*Clay J. Rouding*

REGISTER OF DEEDS



**Space Above for Recorder's Use Only**

When Recorded Return To  
The Katz Law Firm  
Attn: Michael Book  
7227 Metcalf Avenue  
Overland Park, KS 66204

**DECLARATION OF EXCLUSIVE USE RESTRICTIVE COVENANT**

**THIS DECLARATION OF EXCLUSIVE USE RESTRICTIVE COVENANT ("Declaration")**, made and entered into this 19 day of April, 2010, by and between PAPILLION DEVELOPMENT, LLC, a Nebraska limited liability company ("**Developer**") and **CUSTARD CATS, LLC**, a Kansas Limited Liability Company ("**Owner**").

**WITNESSETH:**

WHEREAS, under the Agreement of Sale dated September 28, 2009, 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) (the "**Property**") and located at the Shadow Lake Towne Center Shopping Center in the City of Papillion, County of Sarpy, State of Nebraska, (the "**Shopping Center**");

WHEREAS, the Property is subject to that that certain Declaration of Reciprocal Easements, Covenants and Restrictions Agreement by and between Seller and Hy-Vee, Inc., an Iowa corporation, and recorded in the Office of the Register of Deeds, Sarpy County, Nebraska, on June 20, 2006, as Instrument No. 2006 - 20802, as it may be supplemented, amended or modified from time to time (the "**ECR**"); and

WHEREAS, the Agreement provides that Developer shall restrict the permitted uses of certain real property owned by Developer which is legally described on **Exhibit B** hereof (the "**Restricted Property**").

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

1. **Owner's Exclusive Use.** Subject to the provisions of this Section, Seller will refrain from leasing or selling all or any portion of the lots shown as "Lot 7" and "Lot 10" on **Exhibit B - 1** (the "**Restricted Parcels**") to any future tenant or occupant for the "primary use" (as defined below) of

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operating a quick-serve restaurant (i.e., with counter and/or drive-through service only) selling hamburgers and/or frozen custard (the "**Exclusive Use**"), provided that all of the following conditions (collectively, the "**Conditions**") are satisfied: (a) Purchaser shall be fully and continuously occupying the Property, fully staffed and operating a quick-serve restaurant selling hamburgers and/or frozen custard as its "primary use" (as defined herein), (b) Purchaser shall not be in default of any term of any of the documents constituting encumbrances affecting the Property including but not limited to the ECR affecting the Property, (c) Purchaser shall not be in violation of any exclusive use rights applicable to the Property, (d) Purchaser has not conveyed the Property to a third party, (e) Purchaser is operating for the Exclusive Use. Notwithstanding the foregoing, the terms and provisions of this Section 1 shall not apply to nor be of any force or effect with respect to (i) any existing tenant or occupant (i.e., as of the date of this Declaration); (ii) any future tenant or occupant leasing or occupying more than 10,000 square feet of floor area on Lot 7 or Lot 10; (iii) any future tenant or occupant leasing or occupying less than 1,500 square feet of floor area on Lot 7 or Lot 10; (iv) any property other than the Restricted Parcels. For purposes hereof, the operation of a quick serve restaurant selling hamburgers and frozen custard as a "**primary use**" shall mean that Purchaser derives more than seventy-five percent (75%) of Purchaser's revenue from the business conducted at the Property from the Exclusive Use (or any future tenant or occupant derives more than twenty percent (20%) of such future tenant's or occupant's revenues from the operation of its premises for the Exclusive Use). Additionally, without limiting the foregoing, the provisions of this Section shall be deemed forever null and void and of no force or effect upon the earliest to occur of the following: (A) the date upon which any or all of the Conditions are not satisfied; (B) the date upon which any or all of the Exclusive Items are not offered for sale to the public in the Property; or (C) the date of expiration or earlier termination of this Declaration.

2. This Declaration and the restrictions contained herein constitute covenants running with the land which shall bind subsequent owners and users of the Property and the Restricted Property.

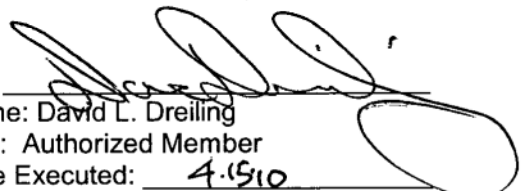
*[SIGNATURE PAGE TO FOLLOW]*

B

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

OWNER:

CUSTARD CATS, LLC,  
a Kansas Limited Liability Company

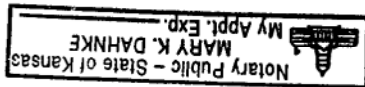
By:   
Name: David L. Dreiling  
Title: Authorized Member  
Date Executed: 4-15-10

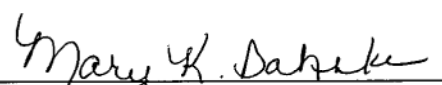
ACKNOWLEDGEMENT

STATE OF Kansas )  
COUNTY OF Riley ) ss.

Now on this 15 day of April, 2010, before me, the undersigned, a Notary Public, in and for the County and State aforesaid, came David Dreiling, authorized member of CUSTARD CATS, LLC, a Kansas Limited Liability Company, personally known to me to be the same person who executed the within instrument on behalf of said National Banking Association and who duly acknowledged the execution of the same to be his free act and deed of said National Banking Association.

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: 10-20-13

C

**DEVELOPER:**

**PAPILLION DEVELOPMENT, LLC,**

By: RED Papillion, LLC,  
a Missouri limited liability company,  
Its Manager

By: E & R Holdings, LLC,  
an Arizona limited liability company,  
Its Manager

By: Michael L. Ebert  
Michael L. Ebert, Manager

Date Executed: April 14, 2010

**ACKNOWLEDGEMENT**

STATE OF Arizona )  
 ) ss.  
COUNTY OF Maricopa )

Now on this 14th day of April, 2010, before me, the undersigned, a Notary Public, in and for the County and State aforesaid, came Michael L. Ebert, Manager of E & R Holdings, LLC, Manager of RED Papillion, LLC, Manager of Papillion Development LLC, a Nebraska limited liability company, personally known to me to be the same person who executed the within instrument on behalf of said limited liability company and who duly acknowledged the execution of the same to be the act and deed of said limited liability company.

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

[Signature]  
Notary Public

My Commission Expires: 3/2/12



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

THE PROPERTY

LOT 15, SHADOW LAKE TOWNE CENTER, A SUBDIVISION IN SARPY COUNTY, NEBRASKA.



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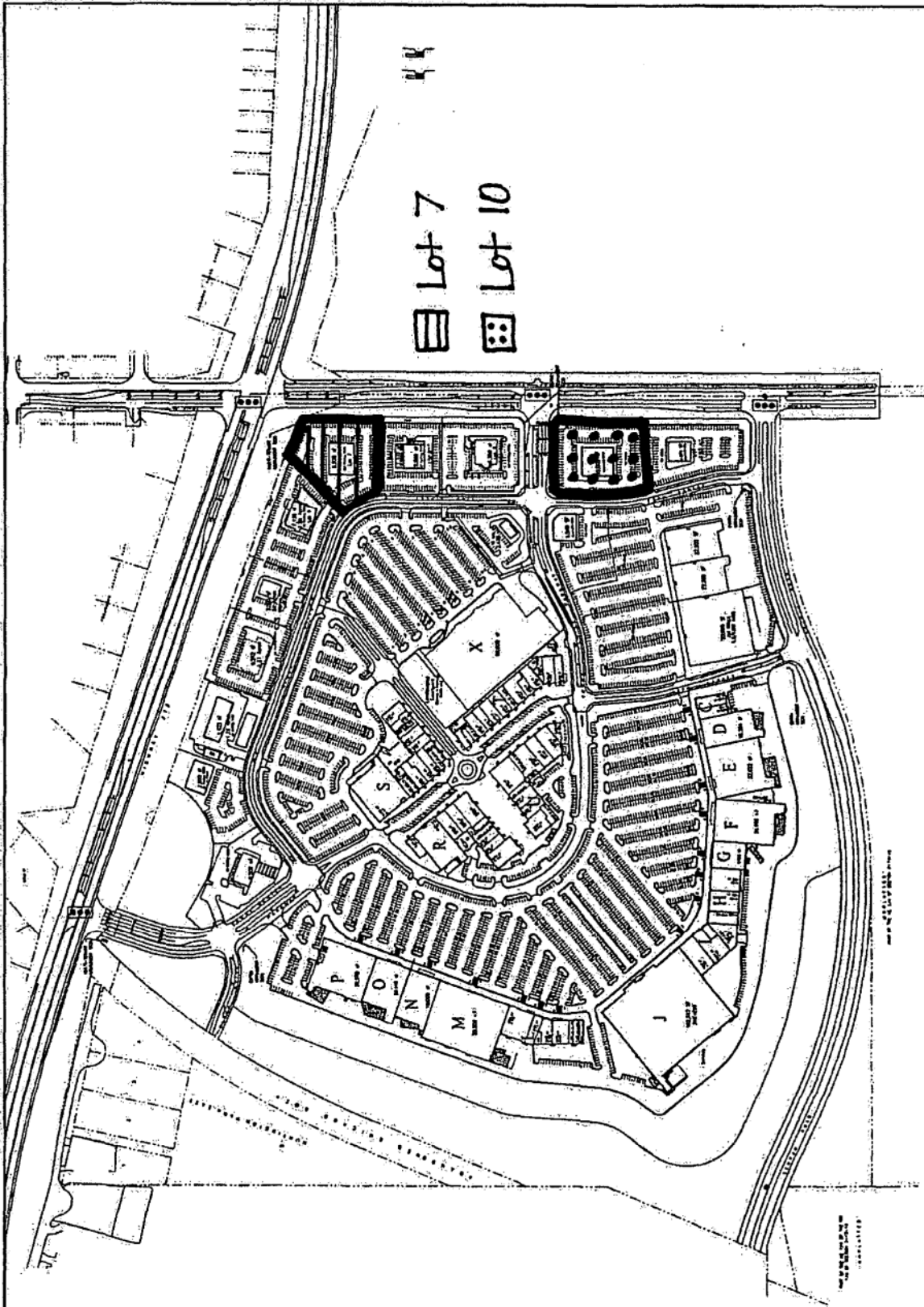
**EXHIBIT B**  
**to Declaration of Exclusive Use Restrictive Covenant**  
**LEGAL DESCRIPTION OF THE RESTRICTED PROPERTY**

LOTS 7 AND 10, SHADOW LAKE TOWNE CENTER, A SUBDIVISION IN SARPY COUNTY,  
NEBRASKA.

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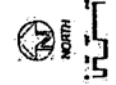
**EXHIBIT B - 1**  
**to Declaration of Exclusive Use Restrictive Covenant**  
**DEPICTION OF THE RESTRICTED PROPERTY**





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SHADOW LAKE TOWNE CENTER  
PAPILLION, NE  
OCTOBER 11, 2007



SHADOW LAKE TOWNE CENTER  
PAPILLION, NE  
OCTOBER 11, 2007