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Shelby Cnty Judge of Probate, AL
02/29/2012 01:21:25 PM FILED/CERT

**FIRST AMENDMENT TO
DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS
AND GRANT OF EASEMENTS (PELHAM TOWNE CENTER)**

This Instrument Prepared By:

**BALCH & BINGHAM LLP
1310 25th Avenue
Gulfport, Mississippi 39501
Attn: Charles A. Oimage, Esq.
(228) 864-9900**

STATE OF ALABAMA)
)
COUNTY OF SHELBY)


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**FIRST AMENDMENT TO
DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS AND
GRANT OF EASEMENTS (PELHAM TOWNE CENTER)**

THIS FIRST AMENDMENT TO DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS AND GRANT OF EASEMENTS (PELHAM TOWNE CENTER) (this “*First Amendment*”) is made as of June 20, 2011, by and among **ENCORE RETAIL BPTC, LLC**, a Delaware limited liability company (hereinafter referred to as “*Declarant*”), **SHARP PELHAM, L.L.C.**, an Alabama limited liability company (“*Sharp*”), **PUBLIX ALABAMA, LLC**, an Alabama limited liability company (“*Publix*”), and **SUPERIOR BANK, N.A.** (“*Superior Bank*”).

RECITALS:

WHEREAS, Sharp, as predecessor-in-interest to Declarant, heretofore has caused that certain Declaration of Restrictions, Covenants and Conditions and Grant of Easements (Pelham Towne Center) to be recorded on June 16, 2008 as Instrument No. 20080616000243120 in the Office of the Judge of Probate of Shelby County, Alabama (the “*Declaration*”);

WHEREAS, on June 20, 2011, Sharp sold to Declarant, and Declarant purchased from Sharp, the Shopping Center Tract (the “*Sale*”), pursuant to the terms and conditions of that certain Purchase and Sale Agreement dated May 6, 2011 between Sharp and Declarant;

WHEREAS, the Declaration provides for certain restrictive covenants (including, without limitation, those prohibited uses set forth in Section 9.1 of the Declaration) (collectively, the “*Restrictive Use Covenants*”), exclusive uses (including, without limitation, those exclusive uses set forth in Section 9.1 of the Declaration) (collectively, the “*Exclusive Use Covenants*”) and other terms and conditions that benefit Publix (including, without limitation, the consent rights under Section 2.5 and the signage rights under Section 4.2 of the Declaration) (collectively, the “*Other Publix Rights*”);

WHEREAS, the parties hereto, as Owners, acknowledge and agree that, under the terms and conditions of the Declaration, in the event that Publix were to terminate the Publix Lease and/or vacate the Publix Premises, or if for any other reason the Publix Lease is no longer in effect (each, a “*Publix Termination Event*”), the Restrictive Use Covenants would nevertheless survive such Publix Termination Event, run to the benefit of any replacement or future tenant leasing the Publix Premises (each, a “*Replacement Tenant*”), and bind all Owners, subject to Declarant’s right, as the Owner of the Shopping Center Tract, to waive or otherwise permit such uses by Declarant or the other Owners by written consent in its sole discretion;

WHEREAS, notwithstanding the acknowledgement and agreement by the Owners, and as a condition to the Sale, Declarant is requiring that the parties hereto, as Owners, enter into this



First Amendment for the purpose of (i) eliminating any doubt and clarifying of record that a Publix Termination Event would not terminate or otherwise affect the Restrictive Use Covenants, and (ii) providing that, contrary to any conflicting terms in the Declaration, a Publix Termination Event would not terminate or otherwise affect the Exclusive Use Covenants or Other Publix Rights, subject to the rights of Declarant, as the Owner of Shopping Center Tract, to waive or otherwise permit such uses by Declarant or the other Owners by written consent in its sole discretion; and

WHEREAS, the parties hereto, as Owners, desire to enter into this First Amendment for the foregoing purposes, and to evidence their mutual understanding and agreement regarding certain modifications to the Declaration as more specifically set forth hereinbelow.

WITNESSETH:

NOW THEREFORE, for and in consideration of valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, as Owners, hereby agree as follows:

1. **Capitalized Terms.** Unless otherwise defined in this First Amendment, all capitalized terms used herein shall have the same meaning as defined in the Declaration.

2. **Restrictive Use Covenants.** In the event of a Publix Termination Event, the Restrictive Use Covenants shall nevertheless survive such Publix Termination Event, run to the benefit of and be enforceable by the Replacement Tenant, and bind all Owners, subject to Declarant's right, as the Owner of the Shopping Center Tract, to waive or otherwise permit such uses by Declarant or any Owner by written consent in its sole discretion.

3. **Exclusive Use Covenants.** In the event of a Publix Termination Event, the Exclusive Use Covenants shall nevertheless survive such Publix Termination Event, run to the benefit of and be enforceable by the Replacement Tenant, and bind all Owners, subject to Declarant's right, as the Owner of the Shopping Center Tract, to waive or otherwise permit such uses by Declarant or any other Owner by written consent in its sole discretion.

4. **Other Publix Rights.** In the event of a Publix Termination Event, the Other Publix Rights shall nevertheless survive such Publix Termination Event, run to the benefit of and be enforceable by the Replacement Tenant, and bind all Owners, subject to Declarant's right, as the Owner of the Shopping Center Tract, to waive or otherwise permit such uses by Declarant or any Owner by written consent in its sole discretion.

5. **Miscellaneous.** The Declaration, as amended by this First Amendment, constitutes and contains the sole and entire agreement of the parties hereto with respect to the subject matter hereof, and no prior or contemporaneous oral or written representations or agreements between the parties and relating to the subject matter hereof shall have any legal effect. Except as amended hereby, all terms, conditions and provisions of the Declaration shall remain in full force and effect and unmodified hereby. In the event of any conflict between the terms, conditions and provisions of this First Amendment and the terms, conditions and

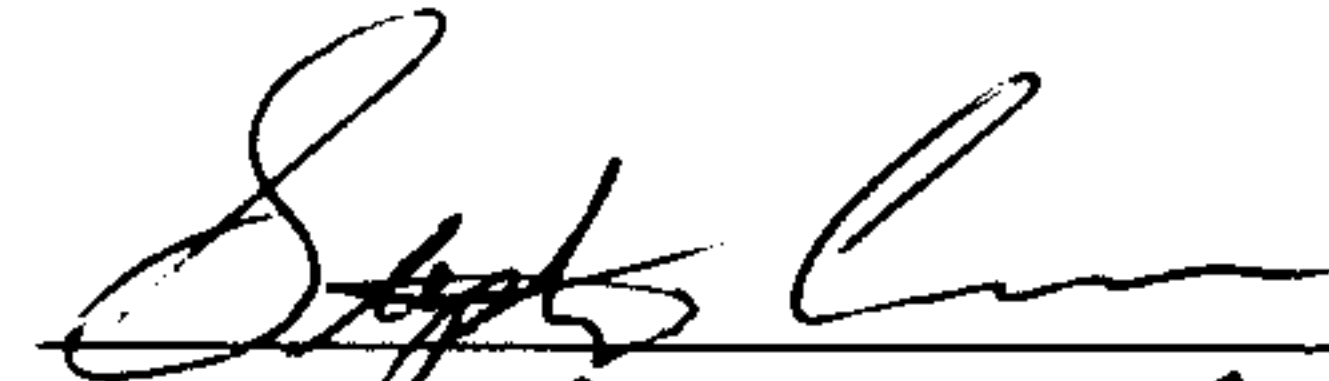
provisions of the Declaration, the terms, conditions and provisions of this First Amendment shall supercede and control. The terms and provisions hereof are severable such that if any term or provision is declared or found to be invalid or unenforceable, such invalidity or unenforceability shall not affect the remaining terms and provisions of this First Amendment. The captions contained in this First Amendment are inserted only as a matter of convenience and shall not be construed as defining, limiting, extending, or describing the scope of this First Amendment, any section hereof, or the intent of any provision hereof. This First Amendment shall be binding upon and inure to the benefit of the parties hereto and their respective successors, successors-in-title, representatives and permitted assigns. This First Amendment may be signed in multiple counterparts, which, when taken together, shall constitute a fully executed and binding original First Amendment.

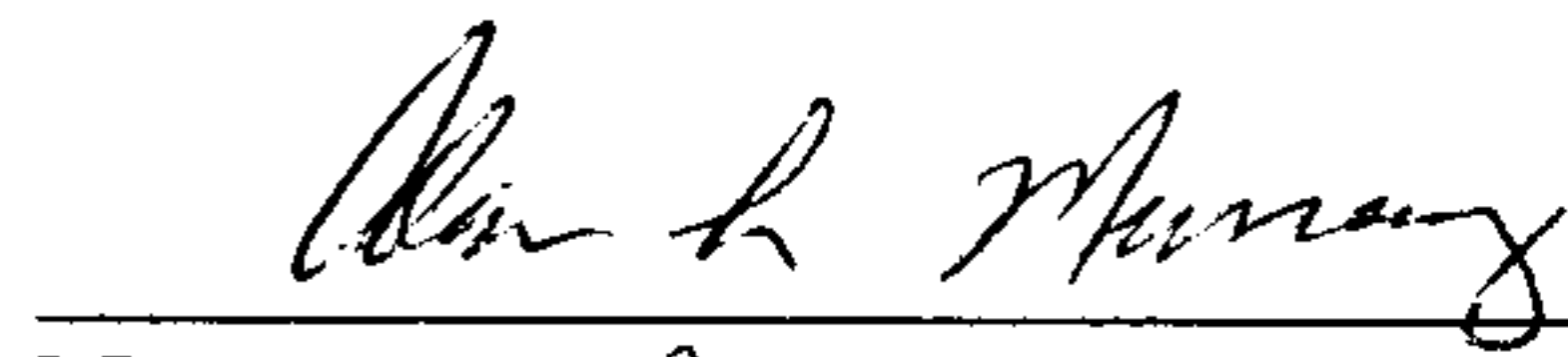
[Signature Pages Follow]

IN WITNESS WHEREOF, this First Amendment has been executed by the parties hereto effective as of the date first above written.

DECLARANT:

Witnesses:

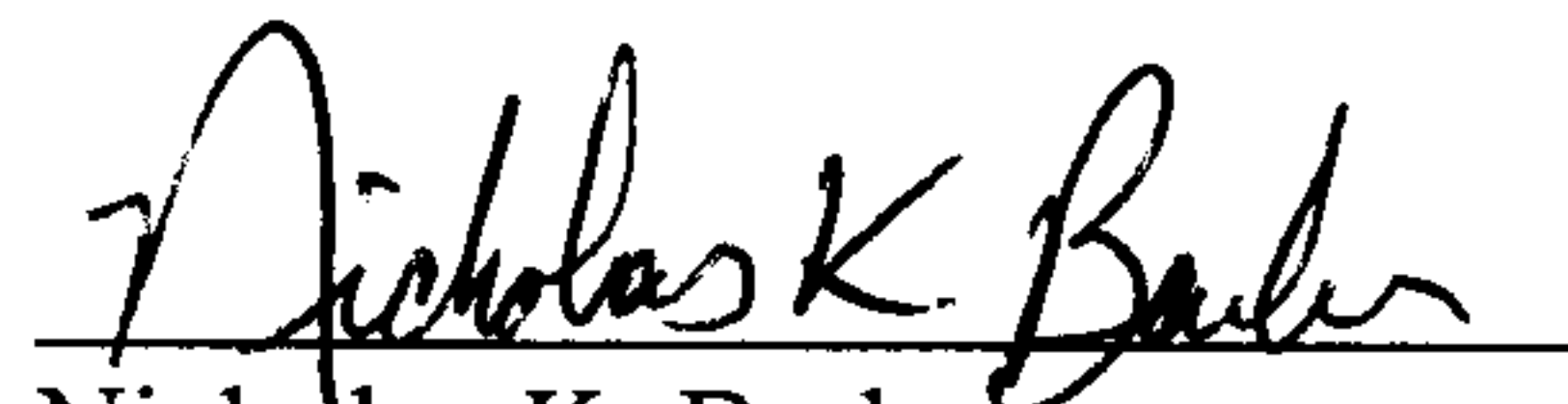

Name: Stephanie Carruth


Name: Alan L. Murray

ENCORE RETAIL BPTC, LLC,
a Delaware limited liability company

By: ER Management BPTC, LLC,
a Delaware limited liability company,
its Managing Member

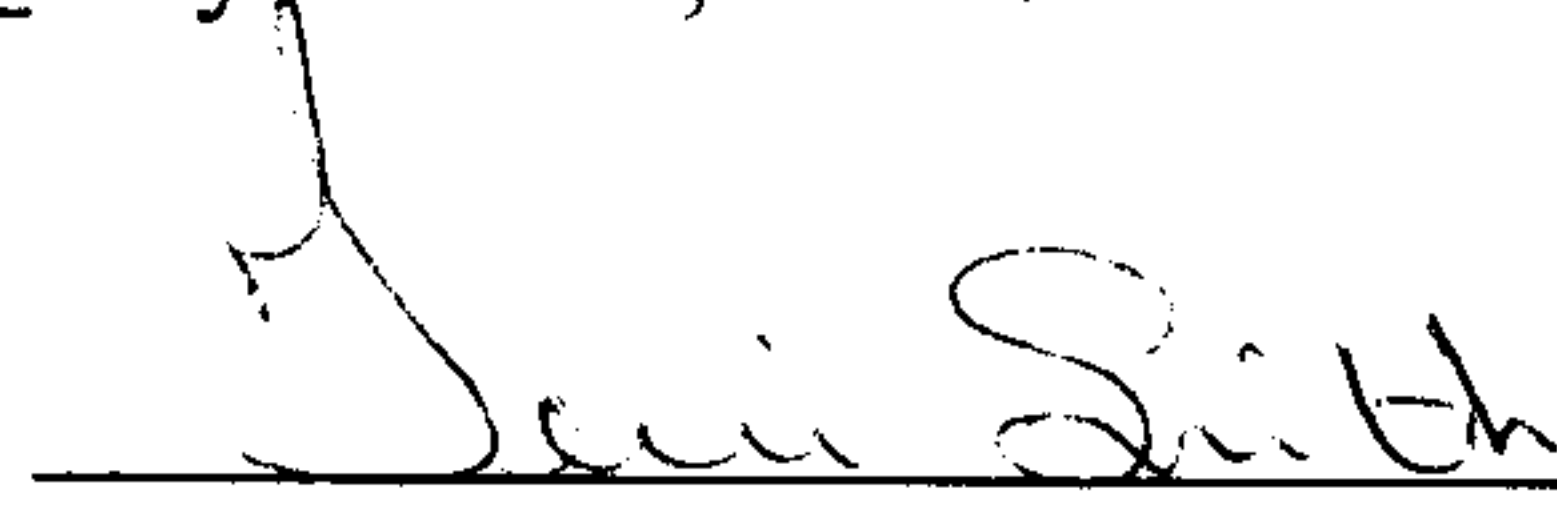
By: Encore Retail, LLC,
a Delaware limited liability company,
its Sole Member

By: 
Name: Nicholas K. Barber
Title: President

STATE OF TEXAS)
COUNTY OF DALLAS)

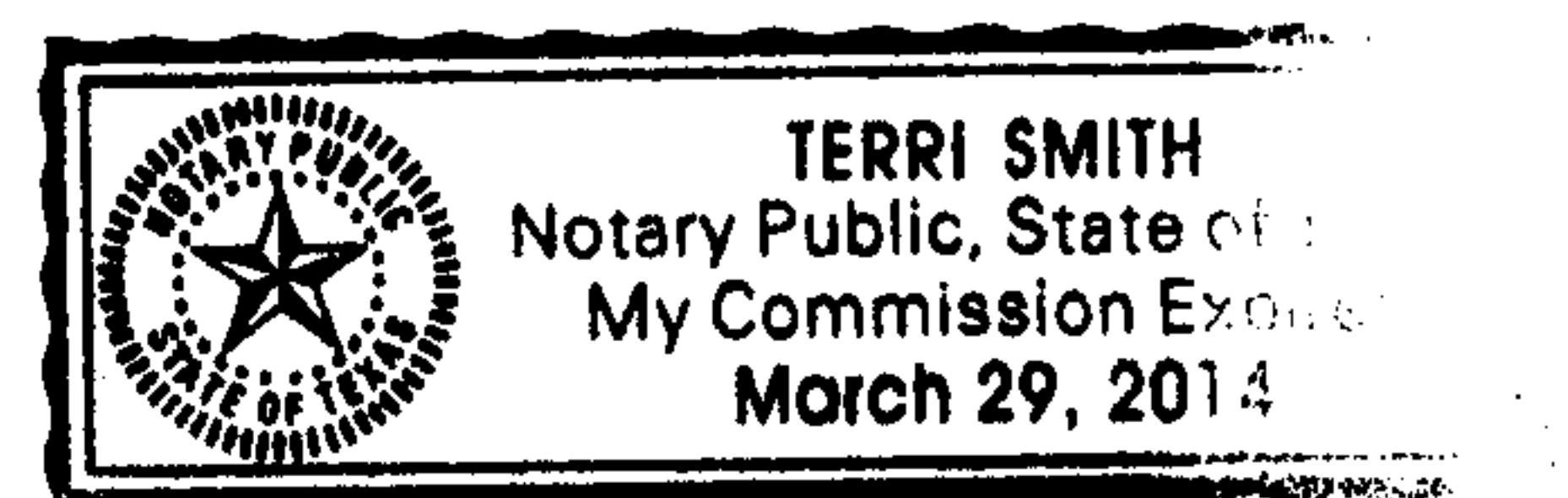
I, Terr. Smith, the undersigned Notary Public in and for said County in said State, hereby certify that Nicholas K. Barber, whose name as President Encore Retail, LLC, the Sole Member of ER Management BPTC, LLC, the Managing Member of Encore Retail BPTC, LLC, a Delaware limited liability company, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said company.

Given under my hand this the 15 day of June, 2011.


Notary Public
My Commission Expires: _____

[NOTARIAL SEAL]

[Signature Pages Follow]



SHARP:

Witnesses:

[Signature]
Name: Robert A Sprain Jr

SHARP PELHAM, L.L.C.,
an Alabama limited liability company

By: [Signature]
Name: Samuel W. Sharp
Title: Managing Member

Name: _____

STATE OF ALABAMA)
)
COUNTY OF SHELBY)

I, Robert A Sprain Jr, the undersigned Notary Public in and for said County in said State, hereby certify that Samuel W. Sharp, whose name as Managing Member of Sharp Pelham, L.L.C., an Alabama limited liability company, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Given under my hand this the 17th day of June, 2011.

[NOTARIAL SEAL]

[Signature]
Notary Public
My Commission Expires: June 29, 2013
ROBERT A. SPRAIN, JR
NOTARY PUBLIC - ALABAMA
JEFFERSON COUNTY
My Commission Expires
JUNE 29, 2013

[Signature Pages Follow]

PUBLIX:

Witnesses:

Shelly Sasnett
Name: Shelly Sasnett
Allison E. Noles
Name: _____

PUBLIX ALABAMA, LLC,
an Alabama limited liability company

By: [Signature]
Name: _____
Title: Jeffrey Chamberlain
President

STATE OF FLORIDA)
)
COUNTY OF POLK)

I, Allison E. Noles, the undersigned Notary Public in and for said County in said State, hereby certify that Jeff Chamberlain whose name as Vice President of Publix Alabama, LLC, an Alabama limited liability company, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he/she, as such officer and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Given under my hand this the 4th day of October, 2011.

Allison E. Noles
Notary Public

[NOTARIAL SEAL]



ALLISON E. NOLES
MY COMMISSION # DD 954811
EXPIRES: February 22, 2014
Bonded Thru Budget Notary Services

My Commission Expires: 2/22/2014

[Signature Pages Follow]

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SUPERIOR BANK:

SUPERIOR BANK, N.A.

Witnesses:

Jane Dotson
Name: Jane Dotson

Jerry W. Powell
Name: Jerry W. Powell

By: [Signature]
Name: Douglas E. Hutt
Title: President

STATE OF Alabama)
COUNTY OF Jefferson)

I, Carol S. Murcks, the undersigned Notary Public in and for said County in said State, hereby certify that Douglas E. Hutt, whose name as President of Superior Bank, N.A., a national banking association, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he/she, as such officer and with full authority, executed the same voluntarily for and as the act of said company.

Given under my hand this the 22nd day of Aug. ~~June~~, 2011.

[NOTARIAL SEAL]

Carol S. Murcks
Notary Public
My Commission Expires: 10-6-14

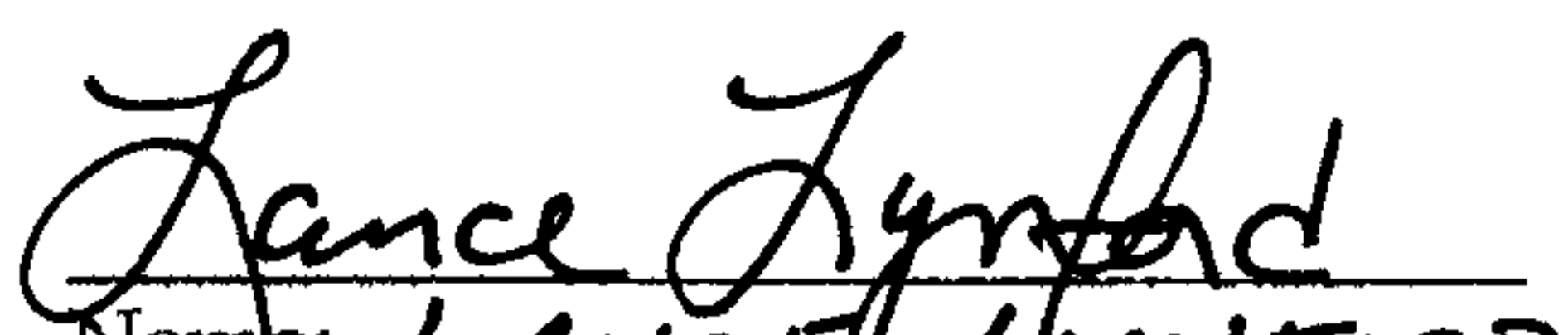
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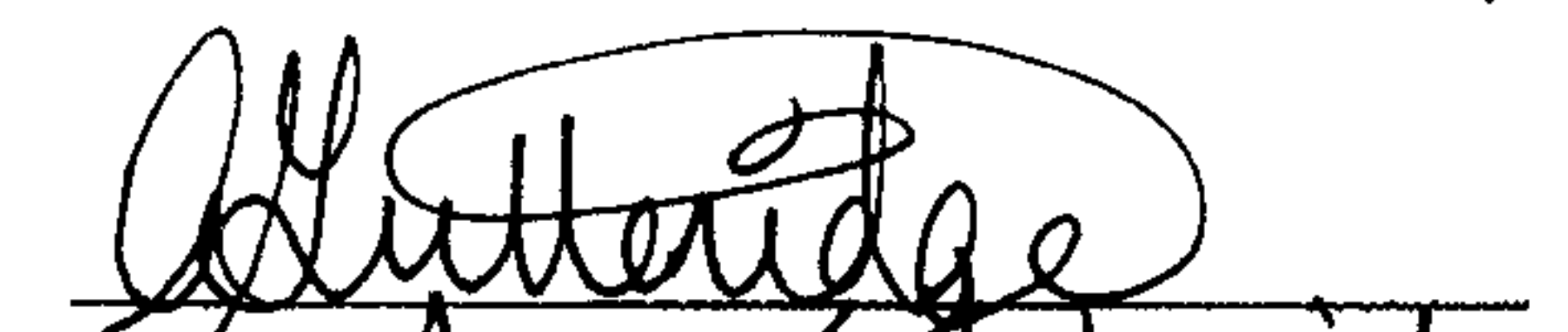
JOINDER AND CONSENT

The undersigned, **CITIGROUP GLOBAL MARKETS REALTY CORP.**, a New York corporation, its successors, assigns and/or designees, hereby consents to the execution and recording of this First Amendment to Declaration of Restrictions, Covenants and Conditions and Grant of Easements (Pelham Towne Center) (the "*First Amendment*"), and consents to the terms and conditions set forth therein.

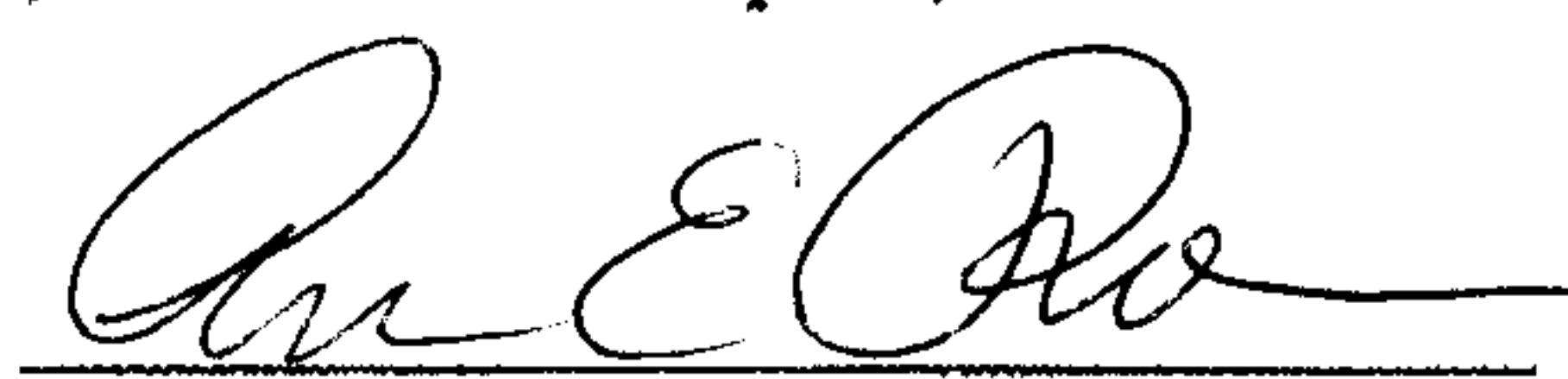
IN WITNESS WHEREOF, this Joinder and Consent has been executed by the undersigned effective as of the date of the First Amendment first above written.

Witnesses:


Name: LANCE LYNFORD


Name: Anna Gutteridge

CITIGROUP GLOBAL MARKETS REALTY CORP., a New York corporation

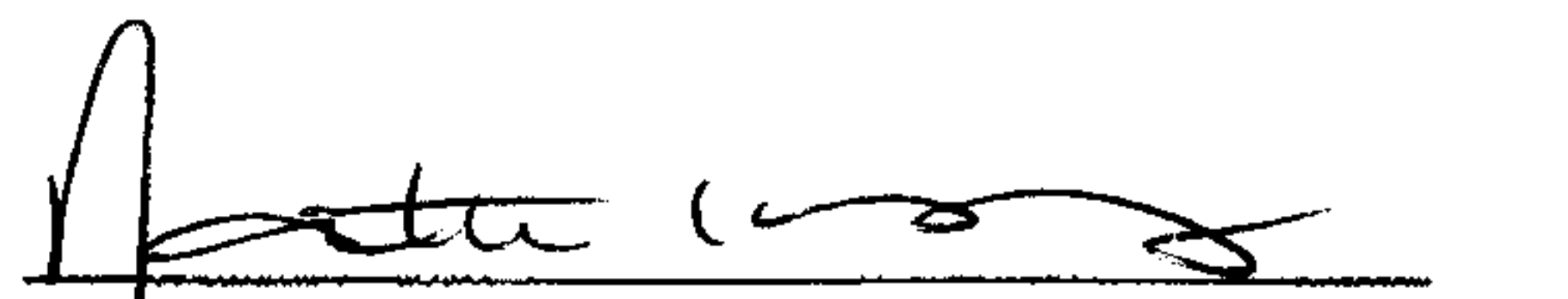
By: 
Name: _____
Title: Ana E. Rosu
Authorized Signatory

STATE OF NEW YORK)
COUNTY OF NEW YORK)

I, Nannette L Edwards, the undersigned Notary Public in and for said County in said State, hereby certify that Ana E. Rosu, whose name as Authorized Signatory of Citigroup Global Markets Realty Corp., a New York corporation, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he/she, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand this the 5 day of ^{July}~~June~~, 2011.

[NOTARIAL SEAL]


Notary Public
My Commission Expires: 01-08-2015

Nannette L. Edwards
Notary Public, State of New York
No. 01ED6158862
Qualified in Queens County
Commission Expires Jan. 08, 2015