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Drawn By and Return To:

Robinson, Bradshaw & Hinson, P.A.  
Attention: William K. Packard  
101 N. Tryon Street, Suite 1900  
Charlotte, NC 28246

FOR REGISTRATION REGISTER OF DEEDS  
REBECCA T. CHRISTIAN  
NEW HANOVER COUNTY, NC  
2001 SEP 05 03:35:21 PM  
BK: 3038 PG: 266-278 FEE: \$30.00  
INSTRUMENT # 2001039862

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

DECLARATION OF EASEMENTS  
AND RESTRICTIVE COVENANTS

THIS DECLARATION OF EASEMENTS AND RESTRICTIVE COVENANTS ("the Declaration") is executed this 4<sup>th</sup> day of September, 2001, by SMITH CREEK STATION, L.L.C., a North Carolina limited liability company ("SCS").

RECITALS

A. SCS is the owner of certain real property located near the southwesterly intersection of Racine Drive and Old Eastwood Road in the City of Wilmington, County of New Hanover, State of North Carolina, more particularly described on Exhibit A attached hereto (the "Property"). Portions of the Property have been developed by SCS as a shopping center known as "Smith Creek Station." SCS intends to develop the remaining Parcels for lease to third parties or to sell or ground lease the remaining Parcels to third parties who may develop such Parcels, all in substantial accordance with the site plans attached hereto as Exhibit B and Exhibit B-1 (the "Site Plans").

B. Each legally subdivided portion of the Property, including the Soho Parcel (as defined below), is referred to in this Declaration as a "Parcel." Each owner of fee simple title to any Parcel is referred to in this Declaration as an "Owner."

C. On the date hereof, SCS conveyed to 88 Soho, LLC, a North Carolina limited liability company, that certain Parcel known as "Outparcel #5 (Revision)" (the "Soho Parcel") of Smith Creek Station in the City of Wilmington, County of New Hanover, State of North Carolina, more particularly described on Exhibit C attached hereto, to be developed in accordance with the Site Plans. SCS intends to develop Outparcel #2 (Revision) for lease, ground lease or sale to third parties who may develop such Parcel in substantial accordance with the Site Plans.

D. SCS desires to establish a permanent non-exclusive access easement over a fifteen foot strip along the western boundary of the Soho Parcel (the "Soho Easement Area") and over a fifteen foot strip along the eastern boundary of Outparcel #2 (Revision) (the "Outparcel #2 Easement Area," together with the Soho Easement Area, the "Access Easement Area"). The Access Easement Area is labeled as the "30' Wide Access/Ingress/Egress Easement (Private)" on the plat entitled, "Smith Creek Station Tract #2 (3<sup>rd</sup> Revision) 13.95 Acres, Outparcel #2 (Revision) 1.22 Acres, Outparcel #5 (Revision) 1.17 Acres, Outparcel #6 (Revision) 1.11 Acres and Associated Easements," prepared by Michael Underwood and Associates, PA, and recorded on September 4, 2001 in Plat Book 41, Page 193 of the New Hanover County Register of Deeds (the "Plat").

Mailed To

Fisher's Medicine  
2505 Henderson Dr  
Gap NC 28546

E. In order to insure that the development and operation of the Soho Parcel will be harmonious with the development and operation of the remainder of Smith Creek Station, SCS desires to subject the Soho Parcel and the remainder of the Property to the use restrictions set forth in this Declaration.

**NOW, THEREFORE,** in consideration of the covenants set forth in this Declaration and for the purposes set forth above, SCS, for itself, and its successors and assigns, imposes and places the following restrictions and easements upon the Property and the Soho Parcel, reserving unto itself and to future Owners and lessees of Parcels within the Property certain rights and privileges, all as more particularly set forth in this Declaration:

1. **Master Declaration.** The Property is subject to the matters set forth in that document entitled "Amended and Restated Reciprocal Easement and Operation Agreement," dated as of February 28, 1997, and recorded in Book 2147 at Page 632 in the New Hanover County Public Registry, as amended by that certain "Second Amended and Restated Reciprocal Easement and Operation Agreement" dated January 19, 1998 and recorded at Book 2335 Page 0435 of the New Hanover County Register of Deeds (as amended, the "Master Declaration"), granting certain easements and rights and imposing certain assessments and restrictions on the Property. Each Owner shall independently comply with the restrictions set forth in the Master Declaration, such as parking requirements and restrictions, applicable to the Property.

2. **Winn-Dixie Lease.** The Property is subject to the use restrictions set forth in that certain lease agreement between Winn-Dixie Raleigh, Inc. and SCS (the "Winn-Dixie Lease"), dated as of September 15, 1997, a description of which is recorded in a Short Form Lease dated November 21, 1997, and recorded at Book 2246 at Page 866 in the New Hanover County Public Registry. Each Owner shall independently comply with the use restrictions set forth in the Winn-Dixie Lease, applicable to the Property.

3. **Use Restrictions.** No portion of the Property shall be used in violation of the following restrictions:

(a) For so long as the Soho Parcel is used as a Japanese Restaurant (as defined below), no portion of the Property shall be used for the operation of a full-service restaurant that derives more than forty percent (40%) of its gross sales income from the sale of Japanese and other Asian food cooked for on-premises consumption (a "Japanese Restaurant").

(b) The Soho Parcel shall not be used for any purpose other than the operation of a Japanese Restaurant, without the written consent of SCS, its successors and assigns. Notwithstanding the foregoing, SCS shall not unreasonably withhold its consent to any proposed change of use, provided that SCS determines, in its reasonable discretion, that the proposed use does not violate any lease, restrictive covenant, or other non-competition agreement between SCS and any other tenant or Owner located at the Property at the time of the commencement of any new or different use of the Soho Parcel.

(c) The Access Easement Area shall not be used for any purpose other than (a) maintaining, repaving, repairing and replacing any paved access drive located in the

Access Easement Area, (b) using that paved access drive to provide pedestrian and vehicular access from each such Parcel to Old Eastwood Road, and (c) maintaining a landscaped area over the unpaved portion of the Access Easement Area.

4. **Grant of Construction Easement by SCS.** SCS, and its successors and assigns, grants to the Owner of the Soho Parcel a temporary non-exclusive easement upon, over and under the Access Easement Area, for the purpose of constructing and installing a paved driveway extending from Old Eastwood Road and related improvements, such as curbs and gutters, storm drains, and traffic control signs (the "Roadway Improvements"), as shown on the Site Plans. This construction easement also shall include rights of access over the remainder of Outparcel #2 (Revision) as may be reasonably necessary for the Owner of the Soho Parcel to exercise their rights under this Paragraph 4.

Prior to commencing any work on the Access Easement Area, the Owner of the Soho Parcel shall submit to SCS for its prior written approval, not to be unreasonably withheld or delayed, plans and specifications for the proposed Roadway Improvements prepared by a licensed engineer, which plans shall be consistent with the Site Plans, and also shall comply with the applicable requirements of the City of Wilmington or New Hanover County. The temporary construction easement granted by this Paragraph 4 shall terminate at such time the construction of the Roadway Improvements is complete and all such work has been finally approved by governmental authorities, or, if earlier, the date eighteen (18) months from the date hereof (the "Construction Termination Date"). The Owner of the Soho Parcel shall provide copies of all governmental approvals for the Roadway Improvements to SCS within twenty (20) days of the Construction Termination Date.

The Owner of the Soho Parcel shall perform all of its construction work under this Paragraph 4 in a good and workmanlike manner. The Owner of the Soho Parcel shall comply at its own expense with all laws, regulations and ordinances applicable to its construction, and shall be responsible for obtaining, at their own expense, the requisite approvals and permits for the construction work from any appropriate governmental authorities. The Owner of the Soho Parcel shall indemnify, defend and hold SCS harmless from and against any and all claims, damages, losses and expenses (including, without limitation, court costs and attorneys' fees) that may be caused or occasioned by it or its agents, employees or contractors, in connection with its construction work, and shall discharge or bond (within ten (10) days after receipt of notice of filing) any and all liens filed against Outparcel #2 (Revision) as a result of or relating to any such construction work.

The Owner of the Soho Parcel shall be responsible for one-half the cost of constructing the Roadway Improvements in the Access Easement Area. If SCS has sold or ground leased Outparcel #2 (Revision) to a third party prior to the Construction Termination Date, the Owner or ground lessor of Outparcel #2 (Revision) shall reimburse the Owner of the Soho Parcel for one-half the cost of constructing the Roadway Improvements within thirty (30) days of a written request for such payment that includes copies of all governmental approvals. If SCS has not sold or ground leased Outparcel #2 (Revision) prior to the Construction Termination Date, SCS shall reimburse the Owner of the Soho Parcel for one-half the cost of constructing the Roadway Improvements within ten (10) business days of receipt of all the government approvals for the Roadway Improvements.

5. **Roadway Maintenance.** The Owners of fee simple title to the Soho Parcel and Outparcel #2 (Revision) shall each be responsible for one-half of the cost of the maintenance of all Roadway Improvements over the Access Easement Area. This maintenance obligation shall include, without limitation, the following:

a. To keep and maintain all paved roadways in good, safe, clean and sightly condition at all times, including, without limitation, the obligation to repair potholes or pavement cracks, and to resurface or repave the paved areas on each Access Easement Area when reasonably necessary.

b. To remove promptly, to the extent reasonably practicable, snow, ice, surface water and debris.

c. To keep all directional signs, pavement signs, and parking lot striping distinct and legible.

Notwithstanding the preceding provisions of this Paragraph 5, each party shall be solely responsible, at its expense, for any maintenance primarily necessitated by the negligence or wrongful intentional acts of such party, its agents, contractors or employees.

If either party fails to perform its maintenance obligation with respect to the Roadway Improvements located on its Parcel, except when the necessary maintenance is the result of the negligence or wrongful intentional acts of the other party, or its agents, contractors or employees, and if such failure or default continues for a period of thirty (30) days after the first owner (the "Defaulting Owner") has received written notice specifying the nature of the default or failure from the second owner (the "Non-Defaulting Owner"), then the Non-Defaulting Owner shall have the right to go on the Parcel of the Defaulting Owner and to perform any necessary maintenance or repairs, or to cause them to be performed, at the expense of the Defaulting Owner.

If the Defaulting Owner fails to pay the cost of the maintenance work undertaken by the Non-Defaulting Owner within thirty (30) days after written demand, accompanied by copies of the bids for such work from at least two (2) contractors and an invoice for such work from the contractor rendering the low bid, then the Non-Defaulting Owner shall be entitled to file a mechanic's lien against the Parcel of the Defaulting Owner in the amount of such invoice, together with interest thereon (at the lesser of twelve percent (12%) per annum or the highest rate of interest permitted by law) from the date such invoice is paid by the Non-Defaulting Owner until the Non-Defaulting Owner is repaid by the Defaulting Owner, and to recover that amount plus interest in an action at law, all in accordance with the applicable provisions of the North Carolina General Statutes. In addition, the Non-Defaulting Owner shall have any other remedy available to it at law or in equity for such default.

6. **Easement Over Access Easement Area.** The Owners of fee simple title to the Soho Parcel and Outparcel #2 (Revision), their tenants, subtenants, concessionaires and licensees, and their respective officers, employees, agents, customers and invitees, shall have a permanent

non-exclusive easement over the Access Easement Area for the following purposes: (a) maintaining, repaving, repairing and replacing any paved access drive located in the Access Easement Area, and (b) using that paved access drive to provide pedestrian and vehicular access from each such Parcel to Old Eastwood Road.

If at any time in the future a paved access drive in the Access Easement Area extends from Old Eastwood Road to that certain property identified as Tract #2 (3<sup>rd</sup> Revision) on the Plat, SCS shall have the right to grant additional access easements over the Access Easement Area to the Owners or ground lessees of other Parcels in the Smith Creek Station development; provided, however, that the owners of fee simple title to the Soho Parcel and Outparcel #2 (Revision) shall not be permitted to extend the paved access drive to Tract #2 (3<sup>rd</sup> Revision) unless (i) SCS consents in writing to such extension, which consent shall be at the sole discretion of SCS, and (ii) SCS, the owner of fee simple title to the Soho Parcel, and the owner of fee simple title to Outparcel #2 (Revision) execute a written agreement regarding the maintenance costs for such paved access drive.

7. **Utility Easements.** The Owners of fee simple title to the Soho Parcel and Outparcel #2 (Revision), their tenants, subtenants, concessionaires and licensees, and their respective officers, employees, agents, customers and invitees, shall have a permanent non-exclusive easement over the over and across the Access Easement Area for the purpose of installation, maintenance, repair and use of the utility lines serving such Parcel; provided, however, that each such Owner shall have the right to relocate the utility lines on its Parcel at its expense if such relocation is required as a result of the development of its Parcel, so long as it performs such work in a manner to minimize any disruption of utility services to the other Parcels served by such utility lines.

8. **Indemnity.** Each Owner shall indemnify and hold the other Owners harmless from and against any and all claims, demands, liabilities, damages and losses and any incidental expenses (including, without limitation, reasonable attorneys' fees) resulting from injury to or death of persons or damage to property arising out of the use by the indemnifying party or its agents, employees or invitees of the Access Easement Area, unless the injury, death or property damage was sustained as a result of any negligent or other wrongful acts of the indemnified party or its agents, employees, or invitees.

9. **Amendment to Declaration.** This Declaration may be amended only by a written agreement executed by SCS and the Owners of fee simple title to the Soho Parcel and Outparcel #2 (Revision), and properly recorded in the New Hanover County Public Registry.

10. **Binding Effect.** The conditions, restrictions and easements contained in this Declaration are covenants running with the land; they are made by SCS for the benefit of the Owners, their successors and assigns in title to all or part of the Property, each tenant now or hereafter leasing any part of the Property, and each lender making a loan secured by a mortgage on all or any part of the Property.

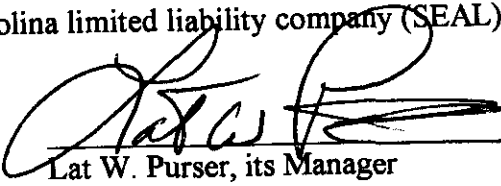
11. **Remedies for Breach.** The terms and conditions of this Declaration shall be enforceable by any Owner by actions for specific performance or injunction, or for the enforcement of any liens provided for in this Declaration, in addition to any other remedies available at law.

12. **Private Agreement.** This Declaration shall not be construed to grant any rights to the public in general.

13. **Joinder of Lender.** Branch Banking and Trust Company joins in this Declaration for the sole purpose of consenting to the terms and provisions of this Declaration and subordinating the liens created by (a) that certain Deed of Trust and Security Agreement dated November 9, 1998, and recorded in Book 2665 at Page 0175 of the New Hanover County Public Registry and securing \$8,727,000.00, (b) that certain Deed of Trust and Security Agreement dated April 13, 1998, and recorded in Book 2345 at Page 0377 of the New Hanover County Public Registry and securing \$8,727,000.00, (c) that certain Deed of Trust and Security Agreement dated September 25, 2000, and recorded in Book 2811 at Page 0452 of the New Hanover County Public Registry and securing \$2,020,000.00, and (d) that certain Assignment of Leases dated November 9, 1999, and recorded in Book 2665 at Page 0188 of the New Hanover County Public Registry, to the easements granted herein.

IN WITNESS WHEREOF, SCS has executed this Declaration under seal as of the day and year first above written.

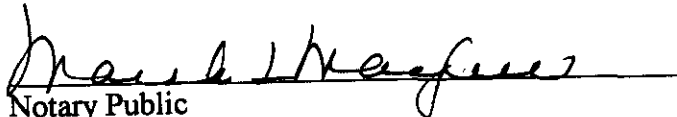
SMITH CREEK STATION, LLC, a North Carolina limited liability company (SEAL)

By:  (SEAL)  
Lat W. Purser, its Manager

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

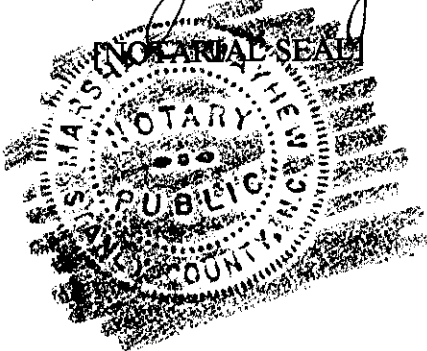
I, MARSHA L. MAYHEW, a Notary Public for <sup>Said</sup> County and State, do hereby certify that Lat W. Purser, the manager of SMITH CREEK STATION, LLC, a North Carolina limited liability company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument on behalf of the company.

WITNESS my hand and official seal, this the 30th day of August, 2001.

  
Notary Public

My commission expires:

26 January 03



**BRANCH BANKING AND TRUST COMPANY, a North Carolina state banking corporation**



ATTEST:  
[Signature]  
Asst. Secretary

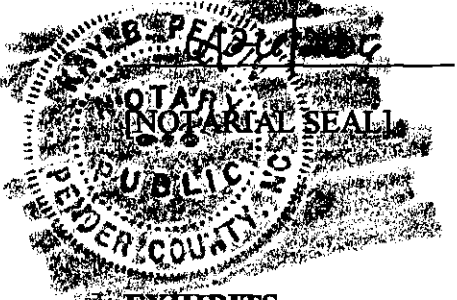
By: [Signature]  
VICE President

STATE OF North Carolina  
COUNTY OF Pender

This 27 day of August, 2001, personally came before me J. Bradford Mickle, who, being by me duly sworn, says that he is the Vice President of Branch Banking and Trust Company, a North Carolina state banking corporation, and that the seal affixed to the foregoing instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him, in behalf of said corporation, by its authority duly given. And the said Vice President acknowledged the said writing to be the act and deed of said corporation.

[Signature]  
Notary Public

My commission expires: 6-26-06



**EXHIBITS:**

- Exhibit A**                      **Legal Description of the Property**
- Exhibits B and B-1**       **Site Plans**
- Exhibit C**                      **Legal Description of the Soho Parcels**

## EXHIBIT A

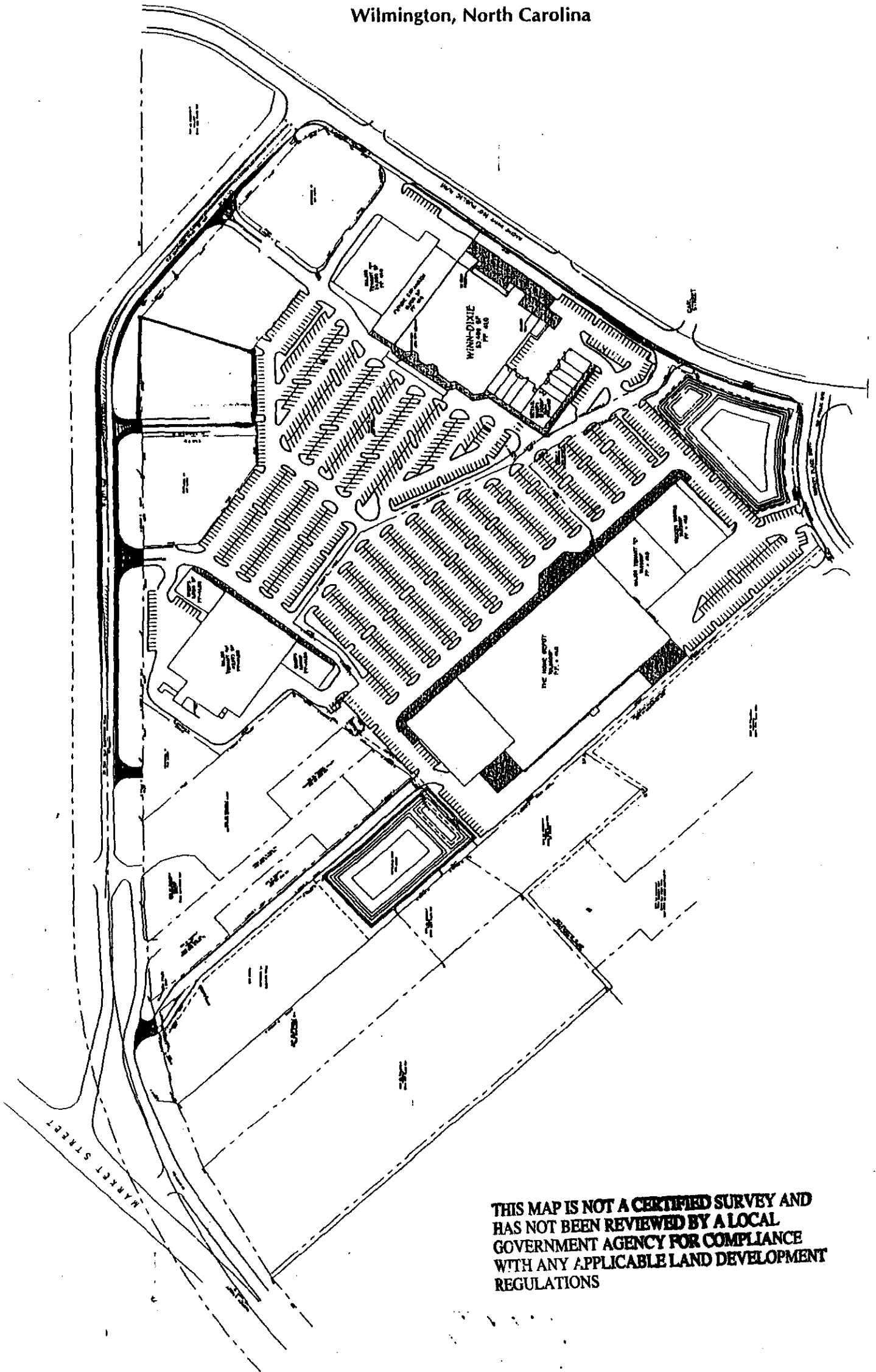
### Legal Description of the Property

Those certain tracts or parcels of land situated, lying and being in New Hanover County, North Carolina, and being all of Tract #3 (5.54 acres), Outparcel #1 (0.50 acres) and Outparcel #4 (3.37 acres) as the same are shown on a survey of Smith Creek Station prepared by Michael Underwood and Associates, P.A., recorded in Map Book 37 at Page 308 of the New Hanover County Register of Deeds (the "Registry"), and being all of Tract #2 (3<sup>rd</sup> Revision) (13.95 acres), Outparcel #2 (Revision) (1.22 acres) and Outparcel #5 (Revision) (1.17 acres), as the same are shown on a survey of Smith Creek Station prepared by Michael Underwood and Associates, P.A., recorded in Map Book 41 at Page 193 of the Registry.



EXHIBIT "B-1" - SITE PLAN

**SMITH CREEK STATION  
Wilmington, North Carolina**



**THIS MAP IS NOT A CERTIFIED SURVEY AND  
HAS NOT BEEN REVIEWED BY A LOCAL  
GOVERNMENT AGENCY FOR COMPLIANCE  
WITH ANY APPLICABLE LAND DEVELOPMENT  
REGULATIONS**

## EXHIBIT C

### Legal Description of the Soho Parcel

BEING all of Outparcel #5 (Revision), containing approximately 1.17 acres, as more particularly shown on the plat entitled, "Smith Creek Station Tract #2 (3<sup>rd</sup> Revision) 13.95 Acres, Outparcel #2 (Revision) 1.22 Acres, Outparcel #5 (Revision) 1.17 Acres, Outparcel #6 (Revision) 1.11 Acres and Associated Easements," prepared by Michael Underwood and Associates, PA, and recorded in Map Book 41, Page 193 of the New Hanover County Register of Deeds, to which plat reference is made for a more particular description of Outparcel #5 (Revision).



REBECCA T. CHRISTIAN  
REGISTER OF DEEDS, NEW HANOVER  
JUDICIAL BUILDING  
316 PRINCESS STREET  
WILMINGTON, NC 28401

\*\*\*\*\*

Filed For Registration: 09/05/2001 03:35:21 PM  
Book: RE 3038 Page: 266-278  
Document No.: 2001039862  
DECL 13 PGS \$30.00

Recorder: MARVIS ANN STORER

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State of North Carolina, County of New Hanover

The foregoing certificate of MARSHA L MAYHEW , KAY B PEEDIN Notaries are certified to be correct. This 5TH of September 2001

REBECCA T. CHRISTIAN , REGISTER OF DEEDS By: Marvis Ann Storer  
Deputy/Assistant Register of Deeds

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**\*2001039862\***

2001039862