

STATE OF INDIANA  
LAKE COUNTY  
FILED FOR RECORD

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MORRIS W. CARTER

**DECLARATION OF RESTRICTIONS**

**AND**

**RIGHT OF FIRST REFUSAL**

Chicago Title Insurance Company

THIS DECLARATION OF RESTRICTIONS AND RIGHT OF FIRST REFUSAL (the "Declaration") is made and entered into as of October \_\_\_\_, 1999, by and between WENDY'S INTERNATIONAL, INC., an Ohio corporation, with an address and principal office at 4288 West Dublin-Granville Road, P. O. Box 256, Dublin, Ohio 43017 ("Wendy's"), and J & A ENTERPRISES, an Indiana partnership, with an address at 617 Merrillville Road, Crown Point, Indiana 46307 ("Declarant").

WITNESSETH:

WHEREAS, Declarant is the record owner of the real property situated in the City of Hobart, County of Lake, and State of Indiana, commonly known as Lot 2, Omega Plaza, Hobart, Indiana (the "Property"), which Property is more particularly described in the legal description attached hereto and made a part hereof as Exhibit A; and

WHEREAS, Declarant obtained title to the Property by virtue of that certain Assignment and Assumption of Purchase Contract by and between Wendy's and Declarant dated as of October 5th, 1999 (the "Assignment") regarding that certain Real Property Purchase Contract between Wendy's and Omega Realty L.L.C., an Indiana limited liability company last dated and effective as of November 16, 1998, as such Real Property Purchase Contract was subsequently amended as set forth in the Assignment; and

WHEREAS, as partial consideration for the Assignment, Declarant has agreed to subject the Property to the use restriction and right of first refusal set forth in this Declaration.

NOW THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Declarant, Declarant hereby declares that the Property shall be held, transferred, sold, leased, conveyed and occupied during the term hereof subject to the covenants, conditions and restrictions hereinafter set forth.

**FILED**

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PETER BENJAMIN  
LAKE COUNTY AUDITOR

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1. Use Restriction. Declarant agrees that, for a period of twenty (20) years from the date of recording of this Declaration, or for so long as the Unit Franchise Agreement dated October \_\_\_\_, 1999 for the Property between Wendy's International, Inc. and HOBART ENTERPRISES, INC., an Indiana corporation, or any modification, renewal, substitution or consolidation thereof is in effect, whichever is longer, the Property shall be used exclusively for the operation of a Wendy's Old Fashioned Hamburgers Restaurant.

2. Prohibition Against Transfer Unless Transaction Offered to Wendy's. Declarant agrees that, for a period of twenty (20) years from the date of recording of this Declaration, or for so long as the Unit Franchise Agreement, dated October \_\_\_\_, 1999 for the Property between Wendy's International, Inc. and HOBART ENTERPRISES, INC., an Indiana corporation, or any modification, renewal, substitution or consolidation thereof is in effect, whichever period is longer, Declarant shall not sell, transfer, lease or otherwise dispose of all or any part of the Property until and unless Declarant shall have:

- (a) obtained a bona fide offer from a third party to purchase, transfer, lease or otherwise acquire all or any part of the Property (the "Offer");
- (b) delivered to Wendy's in writing a true and accurate copy of the Offer and all documentation relating to the Offer and the prospective purchaser/lessee as Wendy's may require, including, but not limited to, all material information provided to the prospective purchaser/lessee by Declarant; and
- (c) offered to sell, transfer, lease or otherwise dispose of such interest in the Property to Wendy's at the same price and upon the same terms and conditions contained in the Offer (including any consideration to be paid for the value of the business operation upon the Property, if any).

The prohibition against transfer shall not apply to a lease by Declarant as landlord to HOBART ENTERPRISES, INC., an Indiana corporation as tenant (the "Lease") as long as a copy of the fully executed Lease has been furnished to Wendy's and the Lease is in compliance with the terms and conditions of the Unit Franchise Agreement. Declarant shall not execute any contract or lease (other than the Lease) or accept any offer unless the provisions of this Right of First Refusal have been satisfied.

3. Additional Items to be Provided With Information About Offer. The information to be supplied by Declarant and required by Wendy's, as set forth in Paragraph 2(b) above, shall be accompanied by (a) a written representation and warranty from Declarant that Declarant has provided Wendy's with all of the information required under this Declaration, and that such information is true, accurate, and complete, and (b)

if Declarant is not an individual, an appropriate resolution of Declarant's board of directors (or other applicable owners, investors, or the like) approving the proposed transaction, or other evidence satisfactory to Wendy's of Declarant's intent to consummate the transaction.

4. Wendy's Right to Acquire Property on Same Terms as Offer. Wendy's shall have the right and option, exercisable within forty-five (45) days after receipt by Wendy's of all such written notification and all other information required by Wendy's, to send written notice to Declarant that Wendy's intends to acquire the Property on the same terms and conditions as set forth in the Offer. Notwithstanding the foregoing, Wendy's shall not be bound by any provision or condition in the Offer which increases the cost or otherwise changes the economic terms if Wendy's is substituted for the prospective purchaser, transferee or lessee pursuant to this Declaration.

5. Wendy's Right to Conduct Due Diligence. If Wendy's elects to exercise its option hereunder, notwithstanding anything in the Offer, Wendy's shall be entitled to conduct due diligence of the scope customary for transactions of the type proposed in the Offer for a period of not less than sixty (60) days, which period shall commence upon the date of Wendy's notice to Declarant of Wendy's election to exercise its option. Wendy's shall not be bound by the Offer until after it has completed its due diligence and determines that the Property is in all respects satisfactory.

6. Closing After Acceptance of Offer. In the event Wendy's elects to exercise its option hereunder, closing on such transaction shall occur within the later of: (i) sixty (60) days from the date of notice by Wendy's to Declarant of the election to exercise its option, (ii) such period as may have been provided by in the Offer, or (iii) such period as may be necessary to conduct due diligence as provided herein. The purchase price shall be due from Wendy's to Declarant at closing in the form of cash or a cashier's or certified check made payable to Declarant. Wendy's may substitute cash for any non-monetary consideration set forth in the Offer so long as Declarant is fully compensated for the value of any non-monetary consideration, including, but not limited to, any favorable financing provisions or tax savings associated with such non-monetary consideration. Wendy's shall be entitled to possession of the Property on the next day following the closing, unless the Offer provides otherwise. If the Offer involves a sale of the Property, Declarant shall convey the Property to Wendy's by General Warranty Deed, unless the Offer provides otherwise, and all costs and expenses incurred in connection with Wendy's purchase of the Property shall be borne by Declarant.

7. Rejection of Offer. In the event Wendy's either rejects the Offer or fails to give notice of its election to exercise its option with respect to the Offer within forty-five (45) days after the date of receipt of the information set forth in Paragraphs 1 and 2 hereof (hereinafter collectively referred to as a "Rejection"), the Property may thereafter be sold, transferred, leased or otherwise disposed of to the original offeror at the same price and upon the same terms and conditions contained in the Offer. Unless the transaction is

otherwise excepted by the provisions of Paragraphs 8 and 9 below, this Declaration shall continue in full force and effect and be applicable to subsequent sales, transfers, leases or other dispositions of all or any part of the Property.

8. Termination Upon Sale for Non-Wendy's Use. This Declaration shall remain in effect for the remainder of its term notwithstanding a transfer or disposition of the Property, except that, in the event (a) of a Rejection and (b) where Declarant transfers fee simple title to the Property pursuant to the Offer for a use other than as a Wendy's Old Fashioned Hamburgers Restaurant, and (c) Wendy's International, Inc. has agreed to a termination of the Unit Franchise Agreement and to the closure of the Restaurant in accordance with Wendy's standard store closing policies, then this Declaration shall terminate. Wendy's shall, upon the request of Declarant, execute and deliver a statement of such termination in recordable form, provided that Declarant can provide evidence satisfactory to Wendy's that the Property was transferred pursuant to the Offer.

9. Termination Upon Transfer to Wendy's. Upon any vesting of title in Wendy's, all covenants, conditions, restrictions and reservations imposed hereunder shall automatically terminate and be of no further force and effect.

10. Change in Offer Constitutes New Offer. Any material change in the terms of the Offer shall constitute a new offer subject to the same rights of first refusal by Wendy's as in the case of the initial offer, and notice of any such material change shall be provided in writing by the Declarant promptly to Wendy's.

11. Exception for Acquisition of Property By Mortgagee. Wendy's right of first refusal hereunder shall be inapplicable to the acquisition of the Property by a third party mortgagee, trustee or beneficiary pursuant to a bona fide foreclosure proceeding (or deed given in lieu of foreclosure) instituted by such third party mortgagee, trustee or beneficiary against the then owner of the Property pursuant to the terms of any mortgage or deed of trust securing the cost of acquisition of the Property or the construction of improvements thereon, or any refinancing thereof. Notwithstanding the foregoing, this Declaration shall be binding upon and effective against any subsequent transfer of the Property by such mortgagee, beneficiary or trustee.

12. Enforceability. If any term, provision or condition contained in this Declaration shall, to any extent, be invalid or unenforceable, the remainder of this Declaration (or the application of such term, provision or condition to persons or circumstances other than those in respect of which it is invalid or unenforceable) shall not be affected thereby, and each and every other term, provision and condition of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

13. Notice. All notices, waivers, statements, demands, approvals or other communications to be given under or pursuant to this Declaration shall be in writing, signed by the party serving the same and shall be deemed effective upon (a) actual

delivery, if delivered by personal delivery, or (b) five (5) business days after deposit in United States registered or certified mail, postage prepaid, return receipt requested, or (c) one (1) day after deposit with an overnight courier service for next day delivery, with postage prepaid or (d) actual delivery if transmitted by facsimile during normal business hours (8:00 a.m. – 5:00 p.m.) for the recipient, provided, however, that the same notice is also deposited on the same day with an overnight courier for next day delivery, with postage prepaid. All such notices shall be addressed to the parties at their respective addresses as provided below as follows:

If to Declarant: J & A Enterprises  
617 Merrillville Road  
Crown Point, Indiana 46307  
Attention: Mr. John Barney  
Facsimile Number (219) 663-7772

If to Wendy's: Wendy's International, Inc.  
4288 West Dublin-Granville Road  
P. O. Box 256  
Dublin, Ohio 43017  
Attention: Legal Department – Real Estate  
Facsimile Number (614) 764-3243

14. Covenant Running With the Land. The foregoing covenants, conditions and restrictions shall be binding upon and inure to the benefit of Declarant, Wendy's, and their respective successors and assigns, and shall run with the land.

15. Amendment. This Declaration shall not be amended or modified, in whole or in part, unless such amendment or modification is in writing and signed by Declarant and Wendy's.

16. Non-Waiver. The failure of Wendy's to insist upon strict performance of any covenants, conditions or terms of this Declaration shall not be construed as a waiver or relinquishment of any such covenants, conditions or terms, but the same shall be and remain in full force and effect.

17. Headings. The captions and headings used herein are for convenience of reference only and shall not affect the interpretation of this Declaration.

18. Counterparts. This Declaration may be executed in several counterparts, but together shall constitute an original.

19. Governing Law. This Declaration shall be governed by and construed in accordance with the law of the jurisdiction where the Property is located.

IN WITNESS WHEREOF, this Declaration has been executed by the duly authorized officers of the parties hereto as of the day and year first above written.

Signed and acknowledged in the presence of:

J & A ENTERPRISES

Print Name: \_\_\_\_\_

By: John H. Barney

Print Name: \_\_\_\_\_

Title: Partner

Signed and acknowledged in the presence of (as to both):

WENDY'S INTERNATIONAL, INC.

Print Name: Carolyn A. Loeffler  
CAROLYN A. LOEFFLER

By: George Condos

Print Name: Andrea M. McGeehan  
ANDREA M. MCGEEHAN

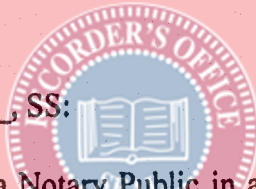
Title: Executive Vice President

By: W. Stephen Ward

Title: Vice President

Legal Dept. BCD

STATE OF INDIANA  
COUNTY OF Lake, SS:



The undersigned, a Notary Public in and for the above state and county, hereby certifies that on the 5th day of October, 1999, before me personally appeared John R. Barney, a partner of J & A ENTERPRISES, an Indiana partnership, who was known to me as the person and partner described in and who executed the foregoing instrument on behalf of said partnership, and who acknowledged that he signed the instrument on behalf of the partnership by proper authority, and the instrument was the act of the partnership for the purposes therein stated.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

(SEAL)

Carthia E. Colvin  
Notary Public  
Lake County Resident  
Commission Expiration = 11/20/01

STATE OF OHIO  
COUNTY OF FRANKLIN, SS:

The undersigned, a Notary Public in and for the above state and county, hereby certifies that on the 29<sup>th</sup> day of September, 1999, before me personally appeared

CECROE CONDOS and W. STEPHEN LUMPT, the  
Executive Vice President and Vice President

respectively, of **WENDY'S INTERNATIONAL, INC.**, an Ohio corporation, who are known to me as the persons and officers described in and who executed the foregoing instrument on behalf of said corporation, and who acknowledge that they held the positions or titles set forth in the instrument and certificate, that they signed the instrument on behalf of the corporation by proper authority, and that the instrument was the act of the corporation for the purposes therein stated.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.



CAROLYN A. LOEFFLER  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES OCT. 14, 2001

*Carolyn A. Loeffler*  
Notary Public

This instrument is prepared by:  
Beth L. Dreitler, Attorney at Law  
Wendy's International, Inc.  
4288 West Dublin-Granville Road  
P. O. Box 256  
Dublin, Ohio 43017



**EXHIBIT A**

**LEGAL DESCRIPTION - LOT 2**

**LOT 2 IN OMEGA PLAZA, A PLANNED UNIT DEVELOPMENT RECORDED IN PLAT BOOK 86, PAGE 57 IN THE RECORDER'S OFFICE OF LAKE COUNTY, INDIANA.**



**EXHIBIT A**