

FLAT RATE LEASE

Approved by Council Resolution

No. ~~R-252404~~ Dated AUG 4 1980

THIS LEASE AGREEMENT is executed by and between THE CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY" and Betty L. Derbonne and Don R. Tusch dba Tusch-Derbonne Company, hereinafter called "LESSEE".

- I. DEMISED PREMISES. CITY hereby leases to LESSEE and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described and delineated on Exhibit "A" attached hereto and by this reference made part of this agreement. Said real property is hereinafter called the "premises".
- A. PERMITTED USE. Said premises are leased to LESSEE only for the purposes of construction, operation and maintenance of retail store and office and for such other related or incidental purposes as may first be approved in writing by CITY and for no other purpose.
- B. OBLIGATION TO DILIGENTLY USE. LESSEE covenants to use said premises for the above-specified purposes and to diligently pursue said purposes throughout the term hereof.
- C. RELATED COUNCIL ACTIONS. By the granting of this lease, the City Council of The City of San Diego is not obligating itself with regard to any other discretionary action relating to development or operation of said premises. Such discretionary action includes, but is not limited to, rezoning, variances, environmental clearances or any other governmental agency approvals which are required.

II. TERM OF AGREEMENT.

- A. COMMENCEMENT AND TERMINATION. The term of this agreement shall be fifty ^{five} (55) years commencing on the first day of the calendar month following the date of execution hereof by the City Manager of CITY.
- B. SURRENDER OF PREMISES. At the expiration or earlier termination of this lease, LESSEE shall execute, acknowledge and deliver to CITY, within five days after written demand by CITY, a valid and recordable quitclaim deed covering all of the leasehold premises free and clear of all liens and encumbrances.

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I N D E X
FLAT RATE LEASE

<u>SECTION</u>	<u>PAGE</u>
I. <u>DEMISED PREMISES</u>	1
A. PERMITTED USE	1
B. OBLIGATION TO DILIGENTLY USE	1
C. RELATED COUNCIL ACTIONS	1
II. <u>TERM OF AGREEMENT</u>	1
A. COMMENCEMENT AND TERMINATION	1
B. SURRENDER OF PREMISES	1
III. <u>CONSIDERATION</u>	2
A. RENT	2
B. DELINQUENT RENT	4
C. INSPECTION OF RECORDS	4
D. DEVELOPMENT AS ADDITIONAL CONSIDERATION	4
IV. <u>COVENANTS AND CONDITIONS</u>	5
A. CITY COVENANTS	5
1. Quiet Possession	5
2. Right to Assign and Sublet	5
3. Right to Encumber	6
B. LESSEE COVENANTS	6
4. Affirmative Action	6
5. Compliance With Law	7
6. Construction/Alterations	7
7. Construction Bond	7A
8. Development	8
9. Indemnity	8

DOCUMENT NO. RR-252404FILED ASG 3 1980OFFICE OF THE CITY CLERK
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	<u>PAGE</u>
10. Insurance Coverage	8
11. Labor and Materialmen's Bond	11
12. Legal Proceedings	11
13. Maintenance	11
14. Nondiscrimination	12
15. Utility Costs	12
16. Waste, Damage or Destruction	12
C. RESTRICTIVE CONDITIONS	12
17. Administration and Notices	12
18. City Approval and Consent	13
19. Eminent Domain	13
20. Entry and Inspection	14
21. Holding Over	15
22. Merger	15
23. Oral Representation	15
24. Ownership of Improvements	15
25. Remedies of City	16
26. Reservation of City Rights	19
27. Time is of the Essence	19
28. Waiver	20

III. CONSIDERATION.

- A. RENT. The rent for the first three years of this agreement shall be \$850 per month payable monthly in advance to the Office of the City Treasurer on the first day of the calendar month following execution by the City Manager of CITY. The rent for the entire term thereafter is payable to the Office of the City Treasurer monthly in advance beginning on the first anniversary date of the effective date hereof. The rent for the remaining term of this agreement shall be payable monthly in advance and shall be adjusted upward at the expiration of each three-year period, according to the following method of computation:

The rent shall be adjusted upward at the beginning of the fourth, seventh and tenth year of the agreement and at the beginning of each sixth year thereafter in accordance with the following method of computation:

The rent for the period following the adjustment until the next adjustment shall be determined by multiplying the rent which is effective immediately prior to said adjustment by the "Adjustment Figure" established in the method outlined in the following paragraph, provided that the increases shall not exceed an average of 6% per year.

The "Current Index" shall be a three month average of index figures published by the Bureau of Labor Statistics Consumer Price Index (CPI) for the Los Angeles-Long Beach-Anaheim area. The three months to be used to establish said average shall be the fourth, fifth, sixth calendar months preceding the adjustment date. When a similar CPI is available for the San Diego area, it may be substituted.

The "Base Figure" for the first such adjustment shall be a three month average of index figures from the same source as established above and using the fourth, fifth and sixth calendar months preceding the date of execution of this agreement.

Example: $\frac{\text{Current Index } 121}{\text{Base Figure } 110} = 1.10 \text{ (Adjustment Figure)}$

Effective Rent x 1.10 = Adjusted Rent

The "Base Figure" for each successive adjustment shall be the "Current Figure" used in the last preceding adjustment period. In the event the CPI for the Los Angeles-Long Beach-Anaheim or San Diego area, "All items", is no longer published, the index for the adjustment date shall be the one reported in the U.S. Department of Labor's Comprehensive Official Index most nearly answering the foregoing description of an index for the San Diego area. If an index is calculated from a base different from the base period 1967 = 100, the base figure used for calculating the adjustment percentage shall first be converted under a formula supplied by the Bureau.

If the above-specified Department of Labor indexes are no longer published, another index generally recognized as authoritative shall be substituted by agreement of the parties. If the parties hereto are unable to agree within 60 days after demand by either party, a substitute index will be selected by the Chief Officer of the San Francisco Regional Office of the Bureau of Labor Statistics or its successor.

Notwithstanding the publication dates of the index, the effective date of the rent adjustment shall be the commencement date of the fourth, seventh, and tenth year of the lease and at the beginning of every sixth year thereafter. Until said rent adjustment can be reasonably determined by index publication, LESSEE shall continue to make rental payments pursuant to this lease at the same rent in effect during the preceding rental period. In no event however, shall any rental adjustment result in a decrease in rents.

In addition to the above-stated adjustment, upon the first day of the eleventh year of this agreement and upon the first day of each eleventh year thereafter, the rent for the ensuing ten years shall be reviewed and determined by multiplying the City Council's approved capitalization rate as of the effective date of this lease, ten percent (10%), by the fair market value of the demised premises^{as} shall be determined by an appraisal made by a professional independent real estate appraiser selected by mutual consent of the parties to this agreement from the list of appraisers approved by the City Council of CITY. In the event the parties cannot reach agreement upon selection of a mutually acceptable appraiser, then CITY and LESSEE will each select a professional independent real estate appraiser who in turn will select a third independent real estate appraiser, which third appraiser will be employed to make the appraisal of the fair market value of the demised premises and which value will be utilized to determine the adjusted rent described previously in this paragraph. In the event the two selected appraisers fail to mutually select a third appraiser within sixty (60) days, then the selected appraisers will be discharged and the process repeated until mutuality is achieved and an appraiser is selected to complete the assignment. Each party shall pay the cost of its own selected appraiser and both CITY and LESSEE agree to equally share the cost of the mutually appointed first and third appraiser and CITY and LESSEE agree to accept and be bound by the valuation determined by the third selected appraiser.

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In establishing the fair market value of the demised premises, the appraiser shall consider the property as a fee simple absolute estate and as vacant and available for lease or sale for uses consistent with the authorized purposes of this lease at the commencement of the rental period under review.

The date of value of the appraisal shall be the date of rental adjustment as hereinabove established (at the beginning of the 11th year and every tenth year thereafter). In the event the appraisal is not completed in time to permit rental adjustment to be made upon the date specified, LESSEE agrees to continue to pay rent at the rate then in existence and said rental adjustment will be retroactive to the date of rental adjustment as hereinabove established.

Notwithstanding any of the foregoing, in no event, however, shall any rental adjustment result in a decrease in rents.

- B. DELINQUENT RENT. In the event LESSEE fails to pay the applicable rents when due, then LESSEE shall pay CITY, in addition to the delinquent rent, a sum of money equal to FIVE PERCENT (5%) of said delinquent rent; provided, however, in the event said delinquent rent is still unpaid after fifteen days of becoming delinquent, then LESSEE shall pay CITY, instead of said FIVE PERCENT, (5%), a sum of money equal to TEN PERCENT (10%) of said delinquent rent. It is the intent of this provision that CITY shall be compensated by such additional sums for loss resulting from rental delinquency including costs to CITY of servicing the delinquent account. The City Manager, at his option, may for good cause waive any such delinquency compensation required herein, upon written application of LESSEE.
- C. INSPECTION OF RECORDS. Whenever CITY desires to inspect the records and accounts of LESSEE in order to determine LESSEE'S compliance with the terms of this agreement, CITY shall have the right at all reasonable times to inspect any records pertinent to the subject under study. LESSEE agrees to cooperate in such inspection and to make the pertinent records available to CITY at LESSEE'S place of business in the City of San Diego.
- D. DEVELOPMENT AS ADDITIONAL CONSIDERATION. LESSEE agrees as additional consideration to develop the leased premises in accordance with the City-approved Development Plan described in Section IV, B 8 Development of this agreement.

IV. COVENANTS AND CONDITIONS.

A. CITY COVENANTS.

1. Quiet Possession. LESSEE, paying the said rent and performing the covenants and agreements herein, shall and may at all times during the said term peaceably and quietly have, hold and enjoy the said premises for the term hereof.

2. Right to Assign and Sublet. When in the opinion of the City Manager, and subject to the approval of the City Council whenever required, if it is deemed consistent with the best interests of the CITY, LESSEE may assign this lease or any interest therein and may sublease any portion thereof to an assignee or sublessee who has, in the opinion of City Manager, the financial capability and overall competence to successfully operate the assigned or subleased premises. The consent of the City Manager and/or City Council will not be unreasonably withheld. This lease and any interest herein shall not be assignable by operation of law without the written consent of the City Manager. Either or both of the following actions will be considered trafficking in the leasehold which is not a permitted activity under this contract and will be considered as contrary to the CITY'S best interests:
 - a. Assignment or subleasing by LESSEE for a consideration in excess of a reasonable return on the actual value of the LESSEE'S installed improvements and/or services rendered.
 - b. Subleasing of the primary function of the lease or subleasing of a major portion of the leasehold.

If CITY has been notified in writing of the existence of a trust deed or mortgage secured by the leasehold, CITY agrees to give the trustee or beneficiary notice of any sublease or assignment prior to CITY'S approval thereon.

Approval of any assignment or sublease shall be conditioned upon Assignee or Sublessee agreeing in writing that they will assume the rights and obligations thereby assigned or subleased and that they will keep and perform all covenants, conditions and provisions of this agreement which are applicable to the rights acquired.

3. Right to Encumber. CITY does hereby consent and agree that LESSEE may encumber this lease, its leasehold estate and its improvements thereon by deed of trust, mortgage, chattel mortgage or other security type instrument to assure the payment of a promissory note or notes of the LESSEE. Provided however, that the proceeds of any financing or refinancing shall be used exclusively for development of the leased premises for uses authorized herein. CITY further agrees that in the event said deed of trust or mortgage or other security type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, the CITY will accept the mortgagee or beneficiary thereof, if reputable, qualified and financially responsible, such as a State or Federal regulated financial institution, as its new tenant under this lease with all the rights, privileges and duties granted and imposed in this lease contract. In the event said mortgagee or beneficiary desires to assign this lease to its nominee, if nominee is a reputable, qualified and financially responsible person in the opinion of CITY, CITY hereby agrees that upon the filing of an application for consent to such assignment, CITY will give its consent thereto.

B. LESSEE COVENANTS

4. Affirmative Action. LESSEE agrees to take affirmative action to improve employment opportunities of minorities and women. When applicable, LESSEE agrees to abide by the Affirmative Action Program for lessees as it now exists or is hereafter amended. A copy of the program, effective as of the date of this agreement, is on file in the Office of the City Clerk as Document No. 746205 and by this reference is incorporated herein. Minorities are presently defined as Mexican-American, Black, Filipino, American Indian and Asian/Oriental. The goal of this program shall be the attainment of the employment of minorities and women in all areas of employment in a total percentage of employment approximately equal to the total level of minority and women employment as established by the City for its Affirmative Action Program each year.

5. Compliance with Law. LESSEE agrees, at its sole cost and expense, to comply and secure compliance with all the requirements now in force, or which may hereafter be in force, of all municipal, county, state and federal authorities, pertaining to the said premises, or the operations conducted thereon, and to faithfully observe and secure compliance with, in the use of the premises, all applicable county and municipal ordinances and state and federal statutes now in force or which may hereafter be in force, and to pay before delinquency all taxes, assessments, and fees assessed or levied upon the LESSEE or the leased premises including the land and any buildings, structures, machines, appliances or other improvements of any nature whatsoever, erected installed or maintained by LESSEE or by reason of the business or other activities of LESSEE upon or in connection with the leased premises. LESSEE recognizes and understands that this lease may create a possessory interest subject to property taxation and that the LESSEE may be subject to the payment of property taxes levied on such interest. LESSEE further agrees that such tax payment shall not reduce any rent due the CITY hereunder and that any such tax shall be paid by the LESSEE before becoming delinquent. The judgment of any court of competent jurisdiction, or the admission of LESSEE or any sublessee or permittee in any action or proceeding against them, or any of them, whether CITY be a party thereto or not, that LESSEE, sublessee or permittee has violated any such ordinance or statute in the use of the premises shall be conclusive of that fact as between CITY and LESSEE.
6. Construction/Alterations. LESSEE agrees not to construct or install any buildings or structures on said premises or otherwise improve or alter said premises in any manner except in accordance with plans and specifications previously submitted to the City Manager and approved by him in writing. LESSEE shall not make any major structural or architectural design alterations to approved buildings, structures or improvements installed on said premises except in accordance with plans and specifications previously approved in writing by the City Manager. This provision shall not limit or set aside any obligation of LESSEE under this lease to maintain said premises in a decent, safe, healthy and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this lease to make any improvements or alterations to said premises or to assume any expense therefor.

7. Construction Bond. LESSEE agrees to file with CITY, prior to commencement of any construction performed upon the premises a faithful performance bond in the amount of 100% of the construction costs of the work to be performed. Said bond may be in cash or may be a corporate surety bond satisfactory to CITY or in a combination of both. Said bond shall insure that the construction commenced by LESSEE shall be completed in accordance with approved plans, or at option of the CITY, that the uncompleted construction be removed and the premises restored to a condition satisfactory to CITY. The surety bond will be filed with CITY and any cash used as a part of the bond may be deposited with CITY to be held in trust for the purpose specified above or may be placed in an escrow or other trust approved by CITY. Upon application by LESSEE, CITY may waive this requirement to file a bond. In the event that LESSEE fails to file any such required bond, this lease may be terminated by CITY.

8. Development. LESSEE agrees to develop the leased premises in accordance with the General Development Plan approved by the City Manager and filed in the Office of the City Clerk. To the extent applicable to the proposed development, said plan shows the design, materials of construction, elevations and colors of all structures, the plot plan of all structures and above-ground improvements, the uses of all facilities, the schedule of development, the estimated construction costs, which for purposes of this agreement shall not be less than \$300,000, and financing plan and such other factors as are necessary or desirable in the opinion of the City Manager. The City Manager or his designee shall have the authority to authorize changes to the plan provided that the basic concept may not be modified without City Council approval and a document evidencing any approved changes shall be filed in the Office of the City Clerk.
9. Indemnity. LESSEE agrees that CITY, its agents, officers and employees, shall not be liable for any claims, alleged liabilities, penalties, fines or for any damage to the goods, properties or effects of LESSEE, its sublessees or representatives, agents, employees, guests, licensees, invitees, patrons or clientele or of any other person whomsoever, nor for personal injuries to, or deaths of any persons, whether alleged to have been caused by or resulting from any acts or omission of LESSEE or its sublessees in or about the leased premises, or any act or omission of any person or from any defect in any part of the leased premises or from any other cause or reason whatsoever. LESSEE agrees to indemnify and save free and harmless CITY and its authorized agents, officers, and employees against any of the foregoing alleged liabilities and any costs and expenses incurred by CITY on account of any claim or claims therefor.
10. Insurance Coverage. During the entire term of this lease, LESSEE agrees to procure and maintain public liability insurance which names CITY as an additional insured with an insurance company satisfactory to CITY licensed to do business in California to protect against loss from liability imposed by law for damages on account of bodily injury, including death therefrom, suffered or alleged to be suffered by any person or persons whomsoever, resulting directly or indirectly from any act or activities of CITY or LESSEE, its sublessees or any person acting for CITY,

or LESSEE or under its control or direction, and also to protect against loss from liability imposed by law for damages to any property of any person caused directly or indirectly by or from acts or activities of CITY, or LESSEE, or its sublessees, or any person acting for CITY or LESSEE, or under its control or direction. Such PD and PL insurance shall also provide for and protect CITY against incurring any legal cost in defending claims for alleged loss. Such public liability and property damage insurance shall be maintained in full force and effect during the entire term of this lease in the amount of not less than ONE MILLION DOLLARS (\$1,000,000)

COMBINED SINGLE LIMIT LIABILITY. LESSEE agrees to submit a policy of said insurance to the CITY on or before the effective date of this agreement indicating full coverage of the contractual liability imposed by this agreement and stipulating that the insurance company shall not terminate, cancel or limit said policy in any manner without at least thirty days prior written notice thereof to CITY. If the operation under this agreement results in an increased or decreased risk in the opinion of the City Manager, then LESSEE agrees that the minimum limits hereinabove designated shall be changed accordingly upon request by the City Manager. LESSEE agrees that provisions of this paragraph as to maintenance of insurance shall not be construed as limiting in any way the extent to which the LESSEE may be held responsible for the payment of damages to persons or property resulting from LESSEE'S activities, the activities of its sublessees or the activities of any person or persons for which LESSEE is otherwise responsible.

LESSEE also agrees to procure and maintain during the entire term of this lease, a policy of fire, extended coverage and vandalism insurance on all permanent property of an insurable nature located upon the leased premises. Said policy shall name the CITY as an additional insured and shall be written by an insurance company satisfactory to CITY licensed to transact business in the State of California and shall be in an amount sufficient to cover at least 90% of the replacement costs of said property. LESSEE agrees to submit a certificate of said policy to the CITY on or before the effective date of this lease. Said policy shall contain a condition that it is not to be terminated or cancelled without at least thirty (30) days prior written notice to CITY by the insurance company. LESSEE agrees to pay the premium for such insurance and shall require that any insurance proceeds resulting from a loss under said policy are payable jointly to CITY and LESSEE and said proceeds shall constitute a trust fund to be reinvested in rebuilding or repairing the damaged property or said proceeds may be

disposed of as specified in Section IV, 16, Waste, Damage or Destruction, hereof; provided, however, that within the period during which there is in existence a mortgage or deed of trust upon the leasehold, then and for that period all policies of fire insurance, extended coverage and vandalism shall be made payable jointly to the mortgagee or beneficiary, the named insured, and CITY, and shall be disposed of jointly by the parties for the following purposes:

- a. As a trust fund to be retained by said mortgagee or beneficiary and applied in reduction of the debt secured by such mortgage or deed of trust with the excess remaining after full payment of said debt to be paid over to LESSEE and CITY to pay for reconstruction repair, or replacement of the damaged or destroyed improvements in progress payments as the work is performed. The balance of said proceeds shall be paid to LESSEE.

Provided, further however, nothing herein shall prevent LESSEE, at its option and with the approval of said mortgagee or beneficiary, from filing a faithful performance bond in favor of said mortgagee or beneficiary and CITY in an amount equivalent to said insurance proceeds in lieu of surrendering said insurance proceeds to said mortgagee or beneficiary; and CITY.

- b. In the event that this lease is terminated by mutual agreement and said improvements are not reconstructed, repaired or replaced, the insurance proceeds shall be jointly retained by CITY and said mortgagee or beneficiary to the extent necessary to first discharge the debt secured by said mortgage or deed of trust and then to restore the premises in a neat and clean condition. Said mortgagee or beneficiary shall hold the balance of said proceeds for CITY and LESSEE as their interests may appear.

LESSEE agrees to increase the limits of liability when, in

the opinion of CITY, the value of the improvements covered is increased, subject to the availability of such insurance at the increased limits. LESSEE agrees, at his sole expense, to comply and secure compliance with all insurance requirements necessary for the maintenance of reasonable fire and public liability insurance covering said premises, buildings and appurtenances.

11. Labor and Materialmen's Bond. LESSEE agrees to save CITY free and harmless, indemnify it against all claims for labor and materials in connection with improvements, repairs or alterations to the leased premises, and the cost of defending against such claims, including reasonable attorney's fees. In the event that improvements, repairs or alterations are constructed on the leased premises by other than the CITY, and a lien is filed, LESSEE agrees to file with CITY within five days a bond sufficient to pay in full all claims of all persons seeking relief under the lien. The bond shall be acknowledged by LESSEE as principal and by a corporation satisfactory to CITY licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company as surety.
12. Legal Proceedings. LESSEE agrees that should it become necessary for CITY to commence legal proceedings to collect rent, recover possession, or enforce any other provision of this lease, the prevailing party will be entitled to legal costs in connection therewith, including reasonable attorney's fees as determined by the court. The parties agree that the law of the State of California shall be used in interpreting this lease agreement and will govern all disputes under this lease agreement and will determine all rights and obligations hereunder. Personal service either within or without the State of California shall be sufficient to give personal jurisdiction to any court in which an action is filed for litigation of rights under this lease agreement.
13. Maintenance. LESSEE agrees to assume full responsibility for the operation and maintenance of said premises throughout the term hereof without expense to CITY unless otherwise specified herein, and to perform all repairs and replacements necessary to maintain and preserve said premises in a decent, safe, healthy and sanitary condition in a manner satisfactory to CITY and in compliance with all applicable laws. LESSEE agrees that CITY shall not be required to perform any maintenance, repairs or services or to assume any expense not specifically assumed herein in connection with said premises and LESSEE hereby waives all rights to make repairs or to cause any work to be performed at the expense of CITY as provided for in Sections 1941 and 1942 of the California Civil Code.

14. Nondiscrimination. LESSEE agrees not to discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, physical handicap or medical condition in LESSEE'S use of the premises, including, but not limited to, the providing of goods, services, facilities, privileges, advantages and accommodations, and the obtaining and holding of employment.
15. Utility Costs. LESSEE agrees to order, obtain and pay for all utilities and service and installation charges in connection therewith. All utilities installed by LESSEE shall be installed underground.
16. Waste, Damage or Destruction. LESSEE agrees to give notice to the CITY of any fire or other damage that may occur on the leased premises within ten days of such fire or damage. LESSEE agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash and rubbish in a manner satisfactory to the CITY. If the leased premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage, or LESSEE agrees to clear and remove from the leased premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to the CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage.

LESSEE agrees that preliminary steps toward performing repairs, restoration or replacement of the premises shall be commenced by LESSEE within thirty days and the required repairs, restoration or replacement shall be completed within a reasonable time thereafter. CITY may determine an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenable by reason of such damage.

C. RESTRICTIVE CONDITIONS

17. Administration and Notices. Control and administration of this lease is under the jurisdiction of the City Manager of CITY as to CITY'S interest herein and any communication relative to the terms or conditions or any changes thereto or any notice or notices provided for by this lease or by

law to be given or served upon CITY may be given or served by registered letter deposited in the United States mails, postage prepaid, and addressed to the City Manager, Attention Property Director, City Administration Building, 202 "C" Street, San Diego, California 92101. Any notice or notices provided for by this lease or by law to be given or served upon LESSEE, Mortgagee, Trustee or Beneficiary may be given or served by depositing in the United States mails, postage prepaid, a letter addressed to said LESSEE at the leased premises or at such other address designated in writing by LESSEE, Mortgagee, Trustee or Beneficiary or may be personally served upon them or any person hereafter authorized by them to receive such notice. Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the principals of the parties so served upon personal service or forty-eight hours after mailing in the manner required herein.

18. City Approval and Consent. The approval or consent of the CITY, wherever required in this agreement, shall mean the approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.

19. Eminent Domain. In the event the leased premises or any part thereof shall be taken for public purposes by condemnation as a result of any action or proceeding in eminent domain, then the interests of CITY and LESSEE (or Beneficiary or Mortgagee if there is a Trust Deed or Mortgagee then in effect), in the award and the effect of the taking upon this lease agreement shall be as follows:

a. In the event of such taking of only a part of the leased premises, leaving the remainder of said premises in such location and in such form, shape and size as to be used effectively and practically in the opinion of CITY for the conduct thereon of the operations permitted hereunder, this lease shall terminate and end as to the portion of the leased premises so taken as of the date title to such portion vests in the condemning authority, but shall continue in full force and effect as to the portion of the leased premises not so taken and from and after such date the contract rent, or in the event there is a minimum rent specified herein, then the minimum rental required by this lease to be paid by LESSEE to CITY shall be reduced in the proportion to which the value of the leased premises so taken bears to the total value of the devised premises; provided, however, CITY shall have the right, with the consent of LESSEE, to substitute like adjacent property and maintain the rent schedule without diminution.

- b. In the event of the taking of ~~any~~ a part of the leased premises, leaving the remainder of said premises in such location, or in such form, shape or reduced size as to render the same not effectively and practicably usable, in the opinion of CITY, for the conduct thereon of the operations permitted hereunder, this lease and all right, title and interest thereunder shall cease on the date title to said premises or the portion thereof so taken vests in the condemning authority.
- c. In the event the entire leased premises are so taken, this lease and all of the right, title and interest thereunder shall cease on the date title to said premises so taken vests in the condemning authority.
- d. In the event of any taking under Subparagraphs a, b, or c, hereinabove, the only portion of any award of compensation which shall be paid to LESSEE shall be the fair market value of LESSEE'S interest in the improvements placed upon that portion of the leased premises which are taken by the condemning agency. It is the intention of this provision that LESSEE shall not in any condemnation receive any bonus or penalty by reason of LESSEE'S contractual rights in connection with the property condemned.
- e. Notwithstanding the foregoing provisions of this section, CITY may, in its discretion and without affecting the validity and existence of this lease, transfer the CITY'S interests in said premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. In the event of such transfer by CITY, LESSEE shall retain whatever rights it may have to recover from the said authority the fair market value of LESSEE'S interest in the improvements taken by the authority and which LESSEE has placed upon the leased premises in accordance with the provisions of this lease.
20. Entry and Inspection. CITY reserves and shall always have the right to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy and sanitary condition, CITY shall have the right, after ten days written notice to LESSEE, to have any necessary maintenance work done for and at the expense of LESSEE and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done in order to keep said premises in a decent, safe, healthy and sanitary condition. Further, if at any time the CITY determines that said premises are not in a decent, safe, healthy and sanitary condition, CITY may at its sole option, without additional notice, require

LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy and sanitary. Said bond shall be in an amount adequate in the opinion of the CITY to correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this lease imposed on CITY.

21. Holding Over. The occupancy of the demised premises after the expiration of the term of this agreement shall be construed to be a tenancy from month to month, and all other terms and conditions of this agreement shall continue in full force and effect.
22. Merger. The voluntary or other surrender of this lease by LESSEE, or a mutual cancellation thereof, shall not work a merger and shall, at the option of CITY, terminate all or any existing subleases or subtenancies or may, at the option of CITY, operate as an assignment to it of any or all such subleases or subtenancies.
23. Oral Representation. It is specifically understood and agreed hereby that this lease contains the complete expression of the whole agreement between the parties hereto, and that there are no promises, representations, agreements, warranties or inducements, either expressed orally or implied by the said parties, except as are fully set forth herein; and further, that this lease cannot be enlarged, modified or changed in any respect except by written agreement duly executed by and between the said parties.
24. Ownership of Improvements. All improvements, except such fixtures as are hereinafter described on the attached addendum, which have been installed by LESSEE in accordance with the provisions of this agreement, shall at the option of CITY become the property of CITY upon expiration or sooner termination of this agreement. LESSEE shall have the right to remove from the demised premises only those fixtures described on the attached addendum at any time prior to the expiration or earlier termination of the agreement, provided that such removal would not, in the opinion of CITY, restrict the operation of the demised premises to the extent that the rent paid to CITY is reduced as a direct result therefrom. LESSEE'S removal of any said fixtures shall be at LESSEE'S own expense and shall be conditioned upon LESSEE'S repairing any damage to the remaining improvements and upon LESSEE leaving the demised premises in good order and condition. In the event LESSEE does not so remove said fixtures prior to the expiration of this agreement, CITY may remove, sell or destroy the same at

the expense of LESSEE, and if the proceeds of the sale are not adequate, LESSEE shall promptly pay to CITY its reasonable cost of any such removal, sale or destruction together with the reasonable cost of repair of damages to CITY'S property resulting from such removal, sale or destruction. At the option of CITY, any such fixtures not removed by LESSEE may be deemed abandoned and may be removed and sold by CITY and all income received by CITY therefrom shall be the property of CITY exclusively. Said addendum may be changed from time to time upon approval of the City Manager, without further resolution by the City Council.

25. Remedies of City.

a. Default by Lessee. In the event that:

- (1) LESSEE shall default in the performance or fulfillment of any covenant or condition herein required to be performed or fulfilled by LESSEE and shall fail to cure said default within thirty days following the service on LESSEE of a written notice from CITY specifying the default complained of; or
- (2) LESSEE shall voluntarily file or have involuntarily filed against him any petition under any bankruptcy or insolvency act or law; or
- (3) LESSEE shall be adjudicated a bankrupt; or
- (4) LESSEE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon LESSEE or upon any person claiming through LESSEE, immediately terminate this lease and all rights of LESSEE and of all persons claiming rights through LESSEE in or to the said premises or in or to further possession thereof and CITY may thereupon enter and take possession of said premises and expel LESSEE and all persons so claiming rights thereto. Provided, however, in the event that any default described in Part a, (1) of this section is not curable within thirty (30) days after the service of a written notice upon LESSEE, CITY shall not terminate this lease pursuant to said default if LESSEE immediately commences to cure said default and diligently pursues such cure to completion.

Provided, further, in the event that there is a deed of trust or mortgage on the leasehold interest, CITY shall not terminate this lease until it first shall have served upon the mortgagee or beneficiary written notice of the default or defaults complained of, and the

mortgagee or beneficiary shall have thirty (30) days from service of such notice within which to commence such cure as may be necessary and this lease shall not terminate if said mortgagee or beneficiary shall prosecute said cure with reasonable diligence thereafter, and said thirty-day period shall be extended during the time required for said mortgagee or beneficiary to perfect, through litigation or through foreclosure, its rights to cure.

Provided however, that in the event rent paid to CITY is calculated on the basis of a percentage or percentages of LESSEE'S gross income, and during said period required for mortgagee or beneficiary to perfect a cure of any default or defaults which have been caused by LESSEE'S failure to pay said rent; then in those events if CITY is paid the minimum rent due under this agreement, CITY will not prosecute its right to terminate the mortgagee's or beneficiary's interest. Provided further, that when the mortgagee or beneficiary has secured control of said premises, and before an assignment to a new LESSEE, mortgagee or beneficiary shall cause to be paid to CITY, any amounts due CITY as a result of the gross income of the said premises exceeding that amount necessary for payment of the minimum rent. In computing the gross rent upon which the computation of the CITY rent is based, reasonable administrative expenses of a court appointed receiver may first be deducted.

b. City Recourse. If the mortgagee or beneficiary shall be required to perfect its right to cure said default or defaults through litigation or through foreclosure, then CITY shall have the option of the following courses of action in order that such default or defaults may be expeditiously corrected:

(1) CITY may correct or cause to be corrected said default or defaults and charge the costs therefor (including costs incurred by CITY in enforcing this provision) to the account of the LESSEE, which charge shall be due and payable on the date that the rent is next due after presentation by CITY of a statement of all or part of said costs.

(2) CITY may correct or cause to be corrected said default or defaults and may pay the costs thereof (including costs incurred by CITY in enforcing this provision) from the proceeds of any insurance fund held by CITY and LESSEE or by CITY and mortgagee or beneficiary or CITY may use said funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent

to correct said default or defaults or to pay the costs of such correction performed by or at the direction of CITY.

- (3) CITY may terminate this lease as to the rights of LESSEE herein by assuming liability for any trust deed or mortgage. LESSEE will assume and agrees to pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition for early payoff of the related notes by CITY. CITY may, as an alternative, substitute for said terminated LESSEE a new LESSEE reasonably satisfactory to the mortgagee or beneficiary.

Should said default or defaults be noncurable by LESSEE, then any lender holding a beneficial interest in said leasehold whose qualifications have been approved by CITY for assignment of the leasehold interest shall have the absolute right to substitute itself to the estate of the LESSEE hereunder and to commence performance of this lease and this lease shall not terminate if such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself and commence performance within said thirty-day period after service upon it of said written notice by CITY of the default. In the event of the election by the mortgagee or beneficiary to so substitute itself to LESSOR'S estate hereunder, the CITY expressly consents to said substitution and authorizes said mortgagee or beneficiary to perform under this lease with all the rights, privileges and obligations of the original LESSEE hereunder, subject to cure of the default if possible by mortgagee or beneficiary, and LESSEE expressly agrees to assign all its interest in and to its leasehold estate in that event.

- c. Abandonment by Lessee. Even though LESSEE has breached the lease and abandoned the property, this lease shall continue in effect for so long as CITY does not terminate LESSOR'S right to possession, and CITY may enforce all its rights and remedies under said lease, including, but not limited to, the right to recover the rent as it becomes due under the lease. For purposes of this section, the following do not constitute a termination of LESSEE'S right to possession

- (1) Acts by CITY of maintenance, or preservation, or efforts to relet the property.
- (2) The appointment of a receiver upon initiative of CITY to protect the CITY'S interest under the lease.

- d. Damages. Damages which CITY may recover in the event of default under this lease include the worth, at the time of award, of the amount by which the unpaid rent for the balance of the term after the date of award, or for any shorter period of time specified in this lease, exceeds the amount of such rental loss for the same period that the LESSEE proves could be reasonably avoided. The remedies provided by this section are not exclusive and shall be cumulative to all other rights and remedies possessed by CITY, and nothing contained herein shall be construed so as to defeat any other rights or remedies to which CITY may be entitled.
26. Reservation of City Rights. CITY hereby reserves all rights, title and interest in any and all gas, oil, minerals and water beneath said leased premises. CITY shall have the right to enter said leased premises for the purpose of making repairs to or developing municipal services. CITY hereby reserves the right to grant and use such easements or establish and use such rights of way over, under, along and across said leased premises for utilities, thoroughfares, or access as it may deem advisable for the public good. Provided, however, CITY shall not unreasonably interfere with LESSEE'S use of the premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements of LESSEE located on the leased premises resulting from CITY'S exercising the rights retained in this paragraph. Such reimbursement shall include a reduction in the annual rent proportionate to the amount of said physical damage as determined by the City Manager. CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to the rights reserved herein.
27. Time is of the Essence. Time is of the essence of each and all of the terms and provisions of this lease and this lease shall inure to the benefit of and be binding upon the parties hereto and any successor of LESSEE as fully and to the same extent as though specifically mentioned in each instance, and all covenants, stipulations and agreements in this lease shall extend to and bind any assigns or sublessees of LESSEE.

28. Waiver. The waiver by CITY of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition, or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by CITY shall not be deemed to be a waiver of any preceding breach by LESSEE of any term, covenant or condition of this lease, regardless of CITY'S knowledge of such preceding breach at the time of acceptance of such rent. Failure on the part of CITY to require or exact full and complete compliance with any of the covenants, conditions or agreements of this lease shall not be construed as in any manner changing the terms hereof and shall not prevent CITY from enforcing any provision hereof.

IN WITNESS WHEREOF, this lease agreement is executed by CITY, acting by and through the City Manager, and by LESSEE, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date

8-4-80

BY Elaine M. Balsh
ASSISTANT TO THE City Manager

LESSEE: Tusch-Derbonne Company

BY

Betty L. Derbonne
Betty L. Derbonne

BY

Don R. Tusch
Don R. Tusch

APPROVED as to form and legality this 13 day of August, 1980.

JOHN W. WITT, City Attorney

BY

[Signature]
Deputy

JH/dac

_____, LESSEE,
DATED 8/4/80.

The Lessee, in accordance with this section hereof, has the right to remove from the demised premises only those fixtures as described below: (if none, write none)

NONE

LESSEE'S Initials

R-252404

RESOLUTION No.

R-252404

(R- 81-95)

Adopted on AUG 4 1980

BE IT RESOLVED, by the Council of The City of San Diego as follows:

That the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a 55-year Lease Agreement with BETTY L. DERBONNE and DON R. TUSCH dba TUSCH-DERBONNE COMPANY, for the purpose of construction, operation and maintenance of a retail store and office building on City-owned property at Channel Way and Hancock Street, under the terms and conditions set forth in that Lease Agreement on file in the office of the City Clerk as Document No. RR-252404.

APPROVED: JOHN W. WITT, City Attorney

By


Harold O. Valderhaug, Deputy

HOV:ps:731
7/16/80
Or.Dept. Property
Job: 15490

Passed and adopted by the Council of The City of San Diego
on AUG 4 1980, by the following vote:

YEAS: Cleator, Lowery, Williams, Schnaubelt, Gotch,
Stirling, Killea, Wilson.

NAYS: None.

NOT PRESENT: Mitchell.

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California.

(SEAL)

By MAYDELL L. PONTECORVO, Deputy.

I HEREBY CERTIFY that the above and foregoing is a full,
true and correct copy of RESOLUTION NO. R- 252404
passed and adopted by the Council of The City of San Diego,
California, on AUG 4 1980.

CHARLES G. ABDELNOUR
City Clerk of The City of San Diego, California.

(SEAL)

By Maydell L. Pontecorvo, Deputy.

Property 503
Barone

RESOLUTION No. R- 251503

(R- 80-1582)

Adopted on MAR 31 1980

BE IT RESOLVED, by the Council of The City of San Diego as follows:

That the City Manager is hereby authorized and empowered to negotiate a proposed lease of certain City-owned property at Hancock Street and Channel Way, in the Midway/Frontier area, to TUSCH, DERBONNE COMPANY for construction, operation and maintenance of a retail store and office building.

APPROVED: JOHN W. WITT, City Attorney

By 
Harold O. Valderhaug, Deputy

HOV:ps:731
2/28/80
Or.Dept. Property
Job 15490

Property
Randolph 503

RESOLUTION No. R-252404 (R- 81-95)

Adopted on AUG 4 1980

BE IT RESOLVED, by the Council of The City of San Diego as follows:

That the City Manager is hereby authorized and empowered to execute, for and on behalf of The City of San Diego, a 55-year Lease Agreement with BETTY L. DERBONNE and DON R. TUSCH dba TUSCH-DERBONNE COMPANY, for the purpose of construction, operation and maintenance of a retail store and office building on City-owned property at Channel Way and Hancock Street, under the terms and conditions set forth in that Lease Agreement on file in the office of the City Clerk as Document No. RR-252404.

APPROVED: JOHN W. WITT, City Attorney

By H. O. Valderhaug
Harold O. Valderhaug, Deputy

HOV:ps:731
7/16/80
Or.Dept. Property
Job: 15490

RECORDING REQUESTED BY:

WHEN RECORDED MAIL TO:

DOCUMENT NO. **769045**
FILED **OCT 09 1984**
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

This memorandum of agreement is executed by and between The City of San Diego a municipal corporation, Lessor, and Betty L. Derbonne and Don R. Tusch, dba Tusch-Derbonne Company, Lessee.

Whereas, Lessor and Lessee have entered into agreement for lease of certain real property described therein dated August 4, 1980, as City Clerk Document No. RR252404.

Whereas, Lessor and Lessee wish to execute a memorandum of said lease.

Now therefore, The City of San Diego, a municipal corporation, as Lessor, does hereby lease and let to Betty L. Derbonne and Don R. Tusch, dba Tusch-Derbonne Company, Lessee, and Lessee does hereby lease from Lessor the real property described in Exhibit "A" attached hereto, made a part hereof and incorporated herein. This memorandum is subject to and incorporates herein all terms and conditions contained in the above mentioned lease dated August 4, 1980.

This memorandum may be recorded in the office of the County Recorder of San Diego at the request of either Lessor or Lessee.

The City of San Diego

J. P. Fowler
By: John P. Fowler,
Deputy City Manager

10-4-84
Dated

Betty L. Derbonne
Betty L. Derbonne

9-14-84
Dated

Don R. Tusch
Don R. Tusch

9-14-84
Dated

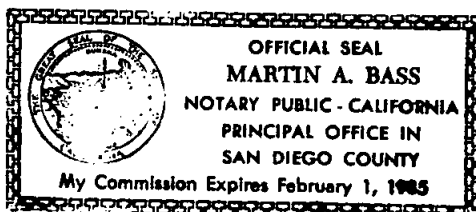
CORPORATE ACKNOWLEDGMENT

NO. 202

State of California }
County of San Diego } SS.

On this the 4th day of October 1984, before me,
Martin A. Bass
the undersigned Notary Public, personally appeared

John P. Fowler
☒ personally known to me
☐ proved to me on the basis of satisfactory evidence
to be the person(s) who executed the within instrument as
Deputy City Manager or on behalf of the corporation therein
named, and acknowledged to me that the corporation executed it.
WITNESS my hand and official seal.



Martin A. Bass
Notary's Signature

THIS CERTIFICATE is issued by The City of San Diego, a Municipal Corporation (hereinafter "Landlord") the present owner of all of the lessor's interest under that certain lease dated 8-4-1980, between The City of San Diego, a Municipal Corporation, City Clerk Document No. RR252404 as lessor, and Betty L. Derbonne and Don R. Tusch DBA Tusch-Derbonne Company as lessee, a copy of which lease is attached hereto as Exhibit "B" and made a part hereof, with respect to the following facts:

A. Betty L. Derbonne and Don R. Tusch DBA Tusch-Derbonne Company (hereinafter "Tenant"), the present owner and holder of the leasehold estate under said lease, has requested Great American First Bank, a California Corporation (hereinafter "Bank") to make a loan secured, in part, by an encumbrance of said leasehold estate.

B. Bank requires, as a condition of making said loan, that Landlord provide Bank with the assurances herein set forth.

NOW, THEREFORE, Landlord hereby acknowledges and confirms the following:

1. Said lease is currently in full force and effect and has not been modified in whole or in part, except as provided by that (those) certain amendment(s) described and dated as follows: (write "NONE" if no amendments)

X NONE

copies of which amendment (s) have been furnished by Landlord to the Bank (The Lease and all said amendments are hereinafter referred to as the "lease").

2. The Lease constitutes the only agreement between Landlord and Tenant with respect to the premises thereunder.

3. As of the date of this Certificate, Tenant and all persons now holding or claiming an interest in said premises, or any portion thereof, are not in default or breach under the provisions of the Lease.

4. Landlord has no knowledge or notice of any other assignment or hypothecation of said leasehold estate, or any pledge or assignment of rents with respect to said premises, except any security interest therein created in favor of the Bank.

5. Landlord has not assigned, hypothecated or otherwise transferred any rents or other interest in the Lease or said premises, or any portion thereof.

6. Landlord has no knowledge of any fact which may or will affect or impair the value of said leasehold estate or the security for said loan by the Bank.

7. This Certificate is given by Landlord with the understanding that the statements herein made will be relied upon by the Bank in the event the Bank makes the above requested loan.

X Executed this 4 day of Oct 1984

THE CITY OF SAN DIEGO
a municipal corporation

X [Signature]
John P. Fowler,
Deputy City Manager

Approved as to form and legality

this 26 day of September, 19 84

JOHN W. WITT, City Attorney

By [Signature]
Deputy City Attorney

LEGAL DESCRIPTION

That portion of Pueblo Lot 259, as said Pueblo Lot is shown on the Map of the Pueblo Lands of San Diego, made by James Pascoe in 1870, in the City of San Diego, County of San Diego, State of California, a certified copy of said Pascoe's Map is filed in the Office of the County Recorder of San Diego County as Miscellaneous Map No. 36, which lies Northwesterly of the Northwesterly line of Hancock Street, Northerly of the Northerly line of Channel Way as described under Parcels 1 and 3, respectively, in Resolution No. 197563 on July 24, 1969 by the Council of the City of San Diego, recorded July 30, 1969 as File No. 137836 and which lies Southerly of the Southerly boundary of 11-SD-109, Highway 109 as described under Parcel 2 in Deed to the State of California, recorded March 26, 1968 as File No. 49552.

CG

8/9/84

EXHIBIT "A"

Individual Acknowledgement

STATE OF CALIFORNIA

COUNTY OF San Diego

} SS.

On September 14, 19 84, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Don R. Tusch and Betty Lou Derbonne

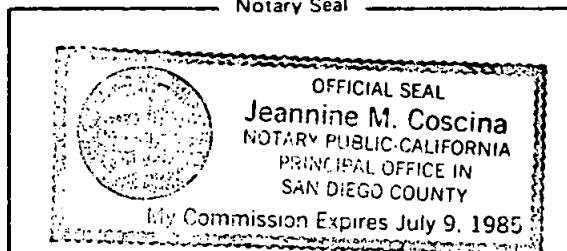
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person S whose name s are subscribed to this instrument and acknowledged that they executed it.

WITNESS my hand and official seal.

Jeannine M. Coscina

Notary Public in and for said County and State

Notary Seal



TT-14 Rev. 8-82

Individual Acknowledgement

STATE OF CALIFORNIA

COUNTY OF

} SS.

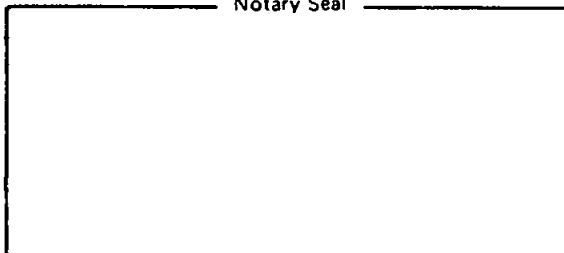
On _____, 19 _____, before me, the undersigned, a Notary Public in and for said County and State, personally appeared _____

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person _____ whose name _____ subscribed to this instrument and acknowledged that _____ executed it.

WITNESS my hand and official seal.

Notary Public in and for said County and State

Notary Seal



TT-14 Rev. 8-82