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CRAVEN County,North Carolina
Sherri B. Richard Register of Deeds
Bk 3596 Pg 2058

STATE OF NORTH CAROLINA

DEED OF PRESERVATION EASEMENT

CRAVEN COUNTY

Tax Parcel ID No.: 8-001-C-056

This **DEED OF PRESERVATION EASEMENT** (the "Easement") is made this 27th day of December, 2019 (the "Effective Date"), by and between **O'MARKS 2014, LLC**, a North Carolina Limited Liability Company (hereinafter "Grantor") having a mailing address of 329-A Middle Street, New Bern, North Carolina 28560; and **NEW BERN PRESERVATION FOUNDATION, INC.**, a North Carolina nonprofit corporation having a mailing address of 510 Pollock Street, New Bern, North Carolina 28562 (hereinafter "Grantee").

WITNESSETH:

WHEREAS, Grantor owns all of the real property (the "Property") and improvements thereon (the "Structure") located at 233 Middle Street, New Bern, Craven County, North Carolina, more commonly referred to as "The O'Marks Building," and more particularly described in Exhibit A, attached hereto and incorporated herein; and

WHEREAS, Grantee is a nonprofit corporation whose purposes include the preservation and conservation of sites, buildings, and objects of national, regional or local architectural, historic or cultural significance, and is a qualifying recipient of qualified conservation contributions under Section 170(h) of the Internal Revenue Code of 1986, as amended, and the regulations thereunder (collectively, the "Code"); and

WHEREAS, the Grantee certifies under penalty of perjury that: (i) it is a qualified organization under the Code with a purpose of environmental protection, land conservation, open space preservation, or historic preservation; and (ii) it has the resources to manage and enforce the restrictions contained herein and a commitment to do so; and

WHEREAS, the Structure and Property (collectively, the "Project") have certain architectural, historic, and/or cultural significance, which attributes are collectively, described in

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Prepared By
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Attorneys at Law
416 Pollock Street
New Bern, North Carolina 28560

Exhibit B attached hereto and incorporated herein by reference (the "Conservation Values"), and the Structure is listed in the National Register or is located in a certified state or local historic district and has been certified by the Secretary of the United States Department of the Interior or his designee as being of historic significance to the district; and

WHEREAS, the grant of this Easement by Grantor to Grantee on the Structure will assist in preserving and maintaining the Structure and the Conservation Values for the benefit of the general public.

NOW, THEREFORE, in consideration of the mutual covenants, conditions and restrictions contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and pursuant to Section 170(h) of the Code, Grantor does hereby give, grant, release, transfer and convey to Grantee, its successors and assigns, an easement (the "Easement" or "Deed of Preservation Easement") to preserve the Structure and the Conservation Values as hereinafter described. The area of the Easement encompasses the entire exterior of the Structure, including but not limited to wall surfaces, railings, decorative metalwork, doors, windows, roofs, decorative elements, front, side, rear and height (collectively, the "Easement Area").

TOGETHER WITH the right to implement said Easement in the manner hereinafter provided.

TO HAVE AND TO HOLD the Easement, to Grantee and its successors and assigns in perpetuity, reserving to Grantor and their successors and assigns forever, the fee title to the Property and Structure and incidents of ownership therein other than this Easement, including the right to exclusive use and occupancy of the Structure, all to the extent not inconsistent with the terms and purposes of the Easement granted herein.

AND Grantor and Grantee for themselves, their successors and assigns, hereby covenant and agree as follows:

1. Scope of Easement. This Easement conveys to Grantee an interest in the Structure as hereinafter specifically provided, which includes the benefit of the following covenants, conditions and restrictions:

(a) The exterior of the Structure is not to be visually or structurally altered in any way inconsistent with the historical character of the exterior as of the Effective Date of this Easement without the Grantee's Consent, except as provided in this Easement and with respect to structural alterations which have no visual impact whatsoever with respect to the exterior of the Structure. Provided that no such alterations shall be permitted if they would cause the Deed of Preservation Easement to fail to qualify as a qualified conservation contribution under the Code. Nothing shall be erected on the Property that impairs the visibility of the Structure from the street or grade level.

(b) The Structure shall not be demolished. No new structures or additions of any kind to the exterior of the Structure may be constructed at the Property without the Grantee's Consent, except as set forth in this Easement and as may be required by law. Provided that no new structures or additions shall be permitted if they would cause the Deed of

Preservation Easement to fail to qualify as a qualified conservation contribution under the Code.

(c) The Project shall be maintained in a good and sound state of repair in accordance with *The Secretary of the Interior's Standards for the Treatment of Historic Properties* as modified from time to time (the "Standards"), to prevent deterioration in its exterior appearance existing on the date hereof, as described in Exhibit B. Such maintenance and repair includes replacement, repair, and reconstruction by Grantor whenever reasonably necessary to preserve the Project in substantially the same condition and state of repair as that existing on the date hereof.

(d) Grantor at its expense shall keep the Project insured by a reputable insurance company licensed and in good standing in the State of North Carolina, with a replacement cost insurance policy against loss or damage resulting from fire, windstorm, vandalism, explosion and such other hazards as typically required by prudent property owners in the same geographic area as the Project; and will carry and maintain comprehensive public liability insurance under a policy issued by an insurance company which names Grantee as an additional insured party thereunder.

(e) The Project shall not be subdivided or otherwise divided into more than one parcel without Grantee's consent, unless the resulting property interests remain subject to this Easement in all respects. Provided that any proposed subdivision or division described in this paragraph (e) shall not be allowed if they would cause the Deed of Preservation Easement to fail to qualify as a qualified conservation contribution under the Code.

2. Grantee Review Procedures. Grantee has the discretion when reviewing applications under Section 1, to give or withhold its Consent, conditionally or unconditionally, but such consent shall not be unreasonably withheld, conditioned or delayed. "Consent" as used herein, means that Grantee shall have given or withheld its prior written consent to the requested action, or approval. The basis for Grantee's review of and Consent to proposed changes to the Project shall be the Standards.

3. Right of Entry. Grantor agrees that representatives of Grantee may upon prior reasonable notice and at times reasonably acceptable to Grantor inspect the Project. Inspections will normally occur outside the Project, except if Grantee determines interior access is reasonably necessary to establish compliance with this Easement.

4. Obligations of Grantor. Grantor shall pay before delinquency all real estate taxes, assessments, fees or charges properly levied upon the Project and shall furnish Grantee with evidence of payment upon request. Grantor shall keep the Project free of any liens or encumbrances for obligations incurred by Grantor, other than liens or encumbrances secured by the Project which are subordinate to this Easement. Grantee has no liability or responsibility of any kind related to the Project including the ownership, operation, insurance, or maintenance of the Project.

5. Percentage Interests. For purposes of allocating proceeds under Paragraphs 6 and 7, Grantor and Grantee stipulate that as of the date of recordation of this Easement in the applicable real property records (the "Effective Date"), Grantor and Grantee shall each immediately own a

vested real property interests in the Project. Grantor and Grantee agree that each of them owns a specified percentage interest of the fair market value of the Project determined by the ratio of the value of the Easement as of the Effective Date (numerator) to the aggregate value of the Project as of the Effective Date (denominator). For purposes of this paragraph, the ratio of the value of the Easement to the value of the Project unencumbered by the Easement (the "Easement Ratio Value") shall remain constant, and the percentage interests of Grantor and Grantee in the fair market value of the Project thereby determinable shall remain constant.

6. Extinguishment. If unexpected circumstances arise after the Effective Date which render impossible or impractical the purposes of this Easement, then this Easement may be extinguished by a judicial proceeding, provided that any proceeds from any subsequent sale, exchange, involuntary conversion or disposition of the Project shall be allocated to Grantee by multiplying such proceeds by the Easement Ratio Value. All proceeds shall be used by Grantee in a manner consistent with the conservation purposes of the original contribution. Proceeds shall also include, without limitation, insurance proceeds and condemnation proceeds.

7. Condemnation. Grantor shall notify Grantee of any condemnation proceeding with respect to the Project. Grantee has the option (but not the obligation) to participate in any action or settlement with respect to any condemnation and to claim the Easement Ratio Value of any proceeds calculated in accordance with the provisions of paragraph 6.

8. Remedies for Breach.

   (a) Upon a breach of any provision of this Easement, Grantee may pursue all available legal and equitable remedies, including injunction, to prevent or seek remedy for such violation.

   (b) If the Project has substantially deteriorated as a result of a breach of subparagraph 1(c), then Grantee may send written notice to Grantor requesting that the Project be repaired to achieve a level of maintenance consistent with subparagraph 1(c). If, within ninety (90) days of receipt of such notice, the Grantor fails to commence the implementation of repair actions reasonably satisfactory to Grantee, then Grantee, or its agents, may (without being obligated), enter upon the Property and have repairs made at the Grantor's sole expense. Any amounts expended by Grantee to further the purposes of this Easement and not reimbursed by Grantor within ten (10) days after receipt by Grantor of an invoice for same with reasonable supporting documentation, shall to the maximum extent permitted by law constitute a lien on the Project, accruing interest at the lesser of the maximum per annum rate permitted by law or 12% per annum. Upon payment by Grantor of any such amounts due, including accrued interest as herein provided, Grantee shall simultaneously therewith deliver to Grantor a release of lien or waiver of mechanics lien, as the case may be, in the customary form and duly executed and acknowledged for recording.

9. Nature and Duration. The covenants, conditions and restrictions in this Easement run with the land constituting the Project in perpetuity and are binding upon Grantor and the successors and assigns of Grantor for the benefit of Grantee.

10. Assignment, Successors and Assigns. The Grantee is prohibited from subsequently transferring the Easement, whether or not for consideration, unless the Grantee, as a condition of the subsequent transfer, requires that the conservation purpose which the Easement was originally intended to advance continues to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee under paragraph (c)(1) of 26 CFR § 1.170A-14.

11. Indemnity. Grantor shall hold harmless, indemnify and defend Grantee and its members, directors, officers, employees, agents and contractors, successors and assigns of each of them (collectively, "Indemnified Parties") from and against all liabilities, penalties, costs, damages, expenses, causes of action, claims, or judgments of any nature whatsoever (individually or collectively a "Claim" or "Claims"), including, without limitation, reasonable attorneys' fees, in any way connected with the Structure or the Property or any aspect thereof, including without limitation: (1) any real property taxes and general or special assessments assessed and levied against the Project; or (2) this Easement, the conveyance or possession thereof or the exercise of any rights hereunder, excluding, however, any Claims based in whole or in part upon the gross negligence or willful misconduct of any Indemnified Party, provided that the Indemnified Party gives Grantor prompt notice of each such Claim, cooperates in the defense thereof, and Grantor shall have the sole right to defend and/or settle each such Claim.

12. Entire Agreement and Severability. This instrument, the attached Exhibits and the Conservation Values contain the entire agreement of the parties with respect to the Easement and supersedes any prior agreements relating to the Easement. If any provision of this Easement is held unenforceable by a court of competent jurisdiction, the remainder of the Easement shall continue in full force and effect.

13. Subordination. Grantor represents and warrants to the best of its knowledge that the only mortgage or deed of trust encumbering the Project is the security instrument(s) identified in Exhibit C attached hereto. Concurrently herewith, the holder of the security instrument(s) hereto has agreed, by separate instrument to be recorded immediately after this Easement, to subordinate its rights in the Project to this Easement to the extent necessary to permit Grantee to enforce the purpose of the Easement in perpetuity and to prevent any extinguishment of this Easement by the holder thereof.

14. Notices. All notices given pursuant to this Easement shall be in writing and sent to the other party at the address set forth in the first paragraph hereof, by US Mail or overnight express courier. Either party may change its notice address by notice to the other party. Either party may, from time to time, specify one additional party to receive written notice in order for such notice to be binding.

15. Amendments. No amendment or modification of this Easement shall be permitted if said amendment or modification: (i) could adversely affect the perpetual duration of the Easement, (ii) is not consistent with the conservation and preservation purposes of this Easement, or (iii) would cause the Easement to not qualify as a qualified conservation contribution under the Code or any applicable Federal or state laws, rules or regulations.

IN WITNESS WHEREOF, the undersigned have executed and accepted this Deed of Preservation Easement as of the Effective Date.

GRANTOR:

O'MARKS 2014, LLC

By: _____(SEAL)
STEVEN L. BENGEL, Member/Manager

By: _____(SEAL)
SABRINA D. BENGEL, Member

By: _____(SEAL)
RICHARD BENGEL, Member

By: _____(SEAL)
REBECCA BENGEL, Member

GRANTEE:

NEW BERN PRESERVATION FOUNDATION, INC.

By: _____(SEAL)
ERVIN TIMOTHY THOMPSON, President

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NORTH CAROLINA
CRAVEN COUNTY

I, the undersigned Notary Public of the County and State aforesaid, certify that **STEVEN L. BENGEL, SABRINA D. BENGEL, RICHARD BENGEL, and REBECCA BENGEL** personally appeared before me this day and acknowledged that they are all of the Members and Managers of **O'MARKS 2014, LLC**, a North Carolina limited liability company, and further acknowledged the due execution of this document on behalf of **O'MARKS 2014, LLC**.

Witness my hand and Notarial stamp or seal this 27 day of December, 2019.

Anella J. Niewenhous
NOTARY PUBLIC

My Commission Expires: Sept. 29, 2021

ANELLA J. NIEWENHOUS
Notary Public
Commission Expires
September 29, 2021
CRAVEN COUNTY, NORTH CAROLINA

NORTH CAROLINA
CRAVEN COUNTY

I, the undersigned Notary Public of the County or City of New Bern and State of North Carolina, do hereby certify that **Ervin Timothy Thompson** personally appeared before me this day and acknowledged (i) that he is the President of the **NEW BERN PRESERVATION FOUNDATION, INC**, a North Carolina non-profit corporation, and (ii) that by authority duly given and as the act of such corporation, he signed the foregoing instrument in the name of such corporation on such corporation's behalf as its act and deed; and that he made a vow of truthfulness on penalty of perjury while invoking a deity or using a form of the word "swear".

WITNESS my hand and notarial seal, this 23 day of December, 2019.

Ann W. Buckner
NOTARY PUBLIC

My Commission Expires: 12/16/24

ANN W. BUCKNER
NOTARY
PUBLIC
CRAVEN COUNTY, N.C.

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

All that certain tract or parcel of land lying and being situate in the City of New Bern, Number Eight (8) Township, Craven County, North Carolina, and being more particularly described as follows:

Beginning at a point in the eastern right-of-way line of Hancock Street, said point being located North 10° 00' East 255.20 feet from the intersection of the eastern right-of-way line of Hancock Street and the northern right-of-way line of Tryon Palace Drive; thence from said point of beginning so located, North 10° 00' East 167.95 feet along the eastern right-of-way line of Hancock Street to a point which is the intersection of the eastern right-of-way line of Hancock Street and the southern line of Church Alley; thence along and with the southern line of Church Alley, South 80° 02' East 433.78 feet to a point in the western right-of-way line of Middle Street, said point being the intersection of the western right-of-way line of Middle Street and the southern line of Church Alley; thence along and with the western right-of-way line of Middle Street South 10° 00' West 102.50 feet to a point; thence North 80° 02' West 217.95 feet to a point; thence South 10° 00' West 65.53 feet to a point; thence North 80° 02' West 215.83 feet to the eastern right-of-way line of Hancock Street, the point or place of beginning.

Together with a right-of-way and easement 8 feet in width, said right-of-way and easement being more particularly described as follows:

Beginning at an iron stake in the eastern right-of-way line of Hancock Street, said point being located 24.20 feet measured North 10° 00' East along and with the eastern right-of-way line of Hancock Street from the intersection of the eastern right-of-way line of Hancock Street and the northern right-of-way line of Tryon Palace Drive; thence from this point of beginning so located South 80° 02' East 214.5 feet; thence North 10° 00' East 8 feet thence North 80° 02' West 214.5 feet to the eastern right-of-way line of Hancock Street; thence along and with the eastern right-of-way line of Hancock Street South 10° 00' West 8 feet to the point of beginning.

Subject to a right-of-way and easement 12 feet in width heretofore granted to George R. Scott, et ux, et als by instrument recorded in the Office of the Register of Deeds of Craven County, North Carolina in Book 610, Page 610.

Said tract or parcel of land and the easements hereinabove described are shown on a site plan entitled "O. MARKS SQUARE", dated October 9, 1985, prepared by Eastern Engineering & Associates, said site plan and map being incorporated herein by reference.

EXHIBIT B:

DESCRIPTION OF CONSERVATION VALUES

O. Marks Building- This building was constructed ca. 1915-1916 for 0.Marks and Son to house their expanded dry goods and shoe sales operations. Business declined in the 1920s after the death of Oscar Marks, and by 1927, the firm had closed its doors. The relatively new building sat vacant for several years afterwards; by 1931 it housed a Chrysler automobile dealership . As constructed, the building had a pressed-brick facade, three bays wide, with its storefront divided by massive brick piers having limestone caps and bases. All facade window openings have prominent lintels with keystones, flat arched at the second story and segmentally arched at the third. These window openings originally contained wood windows divided into three sections by heavy vertical mullions. The parapet is decorated with the corbeled and paneled brickwork detailing typical of the period. Belk's Department Store purchased the building in 1937, at which time the original storefront was replaced and the interior modified. During the 1940s or 1950s the original windows at the second and third story levels were removed and replaced with glass blocks. Many of the original exterior features were restored during the recent rehabilitation of the building.

Coplon Building- Built in 1029, this two story yellow brick structure combines elements of traditional commercial design with the somewhat modern 1920s use of broad horizontal window openings at the second floor level. It has a three bay facade defined by slightly projecting pilasters which terminate above the parapet. At the second floor level, each bay has a full width opening which originally contained wood frames with multiple sash; these were replaced with glass blocks during the period 1940-1950. The recessed panels above the window opening display the patterned brickwork detailing so typical of the period.

Note that these two buildings have been joined together and are now recognized with one postal address of 233 Middle Street.

The United States Department of the Interior- National Park Service has determined that this building contributes to the significance of the New Bern Historic District as a "certified historic structure" for a charitable contribution for conservation purposes and according to the Tax Treatment Extension Act of 1980.

EXHIBIT C:
SECURITY INSTRUMENT INFORMATION

1. Deed of Trust recorded in Book 3287, Page 391 of the Craven County Register of Deeds.

2. Assignment of Leases and Rents recorded in Book 3287, Page 401 of the Craven County Register of Deeds.

3. Deed of Trust recorded in Book 3332, Page 807 of the Craven County Register of Deeds.

4. Deed of Trust recorded in Book 3595, Page 721 of the Craven County Register of Deeds.

5. Assignment of Rents recorded in Book 3595, Page 739 of the Craven County Register of Deeds.

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