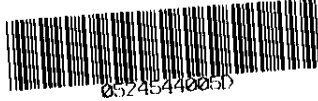


DEED IN TRUST - QUIT CLAIM

THIS INDENTURE, WITNESSETH, THAT THE GRANTOR, FNC Realty Corporation, a DE corp., f/k/a Frank's Nursery & Crafts, Inc., a DE corp, pursuant\* of the County of Cook and State of Illinois for and in consideration of the sum of Dollars (\$950,000 ) in hand paid, and of other good and valuable considerations, receipt of which is hereby duly acknowledged, convey and QUIT-CLAIM unto LASALLE BANK NATIONAL ASSOCIATION, a National Banking Association, whose address is 135 S. LaSalle St., Chicago, IL 60603, as Trustee under the provisions of a certain Trust Agreement dated 25 day of July, 2005 and known as Trust Number 134618 the following described real estate situated in County, Illinois, to wit:



Doc#: 0524544005 Fee: \$54.50 Eugene "Gene" Moore RHSP Fee: \$10.00 Cook County Recorder of Deeds Date: 09/02/2005 09:35 AM Pg: 1 of 16

(Reserved for Recorders Use Only)

\*name change attached hereto, & SEE ATTACHED LEGAL DESCRIPTION successor in interest by merger to Frank's Nursery & Crafts, Inc., a MI corp. Commonly Known As 7456 South State Road, Bedford Park, Illinois

Property Index Numbers 19-28-202-014

together with the tenements and appurtenances thereto belonging. TO HAVE AND TO HOLD, the said real estate with the appurtenances, upon the trusts, and for the uses and purposes herein and in said Trust Agreement set forth.

THE TERMS AND CONDITIONS APPEARING ON PAGE 2 OF THIS INSTRUMENT ARE MADE A PART HEREOF.

And the said grantor hereby expressly waives and releases any and all right or benefit under and by virtue of any and all statutes of the State of Illinois, providing for exemption or homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, the grantor aforesaid has hereunto set hand and seal this 19th day of August, 2005.

Seal

Seal Michael D. McBride, President

Seal

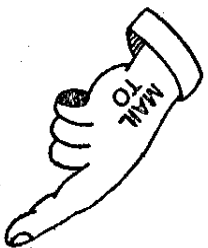
Seal

STATE OF Michigan ) I, Angela M. Dilley, a Notary Public in and for COUNTY OF Oakland ) said County, in the State aforesaid, do hereby certify Michael D. McBride,

personally known to me to be the same person whose name subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered of said instrument as a free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead. GIVEN under my hand and seal this 19th day of August, 2005

Angela M Dilley NOTARY PUBLIC

Angela M. Dilley Notary Public, State of Michigan County of Oakland My Commission Expires 04/10/2011 Acting in the County of Oakland



Prepared By: Proskauer Rose, LLP 1585 Broadway New York, NY 10036

MAIL TO: LASALLE BANK NATIONAL ASSOCIATION 135 S. LASALLE ST, SUITE 2500 CHICAGO, IL 60603

Mail to: LaSalle Bank National Association 135 S. LaSalle St., #2500 Chicago, IL 60603

VILLAGE OF BEDFORD PARK \$50.00 REAL ESTATE TRANSFER TAX

OR Cook County Recorder's Office Box 350

# UNOFFICIAL COPY

## TERMS AND CONDITIONS


Full power and authority is hereby granted to said Trustee to improve, manage, protect and subdivide said real estate or any part thereof, to dedicate parks, streets, highways or alleys, to vacate any subdivision or part thereof, and to resubdivide said real estate as often as desired, to contract to sell, to grant options to purchase, to sell on any terms, to convey either with or without consideration, to convey said real estate or any part thereof to a successor or successors in trust and to grant to such successor or successors in trust all of the title, estate, powers and authorities vested in said Trustee, to donate, to dedicate, to mortgage, pledge or otherwise encumber said real estate, or any part thereof, to lease said real estate, or any part thereof, from time to time, in possession or reversion, by leases to commence in present or in future, and upon any terms and for any period or periods of time, not exceeding in the case of any single demise the term of 198 years, and to renew or extend leases upon any terms and for any period or periods of time and to amend, change or modify leases and the terms and provisions thereof at any time or times hereafter; to contract to make leases and to grant options to lease and options to renew leases and options to purchase the whole or any part of the reversion and to contract respecting the manner of fixing the amount of present or future rentals, to partition or to exchange said real estate, or any part thereof, for other real or personal property, to grant easements or charges of any kind, to release, convey or assign any right title or interest in or about or easement appurtenant to said real estate or any part thereof, and to deal with said real estate and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter.


In no case shall any party dealing with said Trustee, or any successor in trust in relation to said real estate, or to whom said real estate or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by said Trustee, or any successor in trust, be obliged to see to the application of any purchase money, rent or money borrowed or advanced on said real estate, or be obliged to see that the terms of this trust have been complied with, or be obliged to inquire into the authority, necessity or expediency of any act of said Trustee, or be obliged or privileged to inquire into any of the terms of said Trust Agreement; and every deed, trust deed, mortgage, lease or other instrument executed by said Trustee, or any successor in trust, in relation to said real estate shall be conclusive evidence in favor of every person (including the Recorder of Deeds of the aforesaid county) relying upon or claiming under any such conveyance, lease or other instrument, (a) that at the time of the delivery thereof the trust created by this Indenture and by said Trust Agreement was in full force and effect, (b) that such conveyance or other instrument was executed in accordance with the trusts, conditions and limitations contained in this Indenture and in said Trust Agreement or in all amendments thereof, if any, and binding upon all beneficiaries thereunder, (c) that said Trustee, or any successor in trust, was duly authorized and empowered to execute and deliver every such deed, trust deed, lease, mortgage or other instrument and (d) if the conveyance is made to a successor or successors in trust, that such successor or successors in trust have been properly appointed and are fully vested with all the title, estate, rights, powers, authorities, duties and obligations of its, his or their predecessor in trust.

This conveyance is made upon the express understanding and condition that neither LaSalle Bank National Association, individually or as Trustee, nor its successor or successors in trust shall incur any personal liability or be subjected to any claim, judgment or decree for anything it or they or its or their agents or attorneys may do or omit to do in or about the said real estate or under the provisions of this Deed or said Trust Agreement or any amendment thereto, or for injury to person or property happening in or about said real estate, any and all such liability being hereby expressly waived and released. Any contract, obligation or indebtedness incurred or entered into by the Trustee in connection with said real estate may be entered into by it in the name of the then beneficiaries under said Trust Agreement as their attorney-in-fact, hereby irrevocably appointed for such purposes, or at the election of the Trustee, in its own name as Trustee of an express trust and not individually (and the Trustee shall have no obligation whatsoever with respect to any such contract, obligation, or indebtedness except only so far as the trust property and funds in the actual possession of the Trustee shall be applicable for the payment and discharge thereof.) All persons and corporations whomsoever and whatsoever shall be charged with notice of this condition from the date of the filing for record of this Deed.

The interest of each and every beneficiary hereunder and under said Trust Agreement and of all persons claiming under them or any of them shall be only in the earnings, avails and proceeds arising from the sale or any other disposition of said real estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, in or to said real estate as such, but only an interest in earnings, avails and proceeds thereof as aforesaid, the intention hereof being to vest in said LaSalle Bank National Association the entire legal and equitable title in fee simple, in and to all of the real estate above described.

If the title to any of the above real estate is now or hereafter registered, the Registrar of Titles is hereby directed not to register or note in the certificate of title or duplicate thereof, or memorial, the words "in trust," or "upon condition," or "with limitations," or words of similar import, in accordance with the statute in such case made and provided.

STATE TAX	<b>STATE OF ILLINOIS</b>	# 0000085671	<b>REAL ESTATE TRANSFER TAX</b>
	 SEP.-2.05		00950.00
	REAL ESTATE TRANSFER TAX DEPARTMENT OF REVENUE		FP326669

COUNTY TAX	<b>COOK COUNTY REAL ESTATE TRANSACTION TAX</b>	# 0000170551	<b>REAL ESTATE TRANSFER TAX</b>
	 SEP.-2.05		00475.00
	REVENUE STAMP		FP326670

**UNOFFICIAL COPY****LEGAL DESCRIPTION****PARCEL 1:**

**THAT PART OF THE NORTHEAST 1/4 OF SECTION 28, TOWNSHIP 38 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING SOUTHEAST OF THE CENTER OF STATE ROAD WEST OF THE WEST LINE OF THE EAST 57 FEET OF THE AFORESAID NORTHEAST 1/4 OF SECTION 28 AND SOUTH OF A LINE DRAWN AT RIGHT ANGLES THROUGH A POINT ON THE WEST LINE OF SAID EAST 57 FEET WHICH IS 300 FEET NORTH OF THE SOUTH LINE OF THE NORTHEAST 1/4 OF SAID SECTION 28 (EXCEPT THE WESTERLY 50 FEET OF THE TRACT DESCRIBED BEING A PART OF STATE ROAD AND ALSO EXCEPTING THEREFROM THE EASTERLY 475 FEET AS MEASURED ALONG THE NORTH AND SOUTH LINES THEREOF); EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS**

**PARCEL 2:**

**EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY TRUSTEE'S DEED FROM LASALLE NATIONAL BANK, A NATIONAL BANKING ASSOCIATION AS TRUSTEE UNDER TRUST AGREEMENT DATED AUGUST 1, 1972 AND KNOWN AS TRUST NUMBER 44261 TO PLYWOOD MINNESOTA MIDWESTERN, INC. DATED NOVEMBER 14, 1979 AND RECORDED DECEMBER 6, 1979 AS DOCUMENT 25270445 AND AS AMENDED BY DOCUMENT 88368844 AND RE-RECORDED AS DOCUMENT 88455718 FOR ALL LAWFUL PURPOSES OF INGRESS AND EGRESS OVER AND UPON THE FOLLOWING DESCRIBED LAND, TO WIT:**

**THAT PART OF THE NORTHEAST 1/4 OF SECTION 28, TOWNSHIP 38 NORTH, RANGE 13 OF THE THIRD PRINCIPAL MERIDIAN DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON A LINE DRAWN AT RIGHT ANGLES TO THE WEST LINE OF THE EAST 57.00 FEET OF SAID NORTHEAST 1/4 THROUGH A POINT 300.00 FEET NORTH (AS MEASURED ALONG THE SAID WEST LINE OF THE EAST 57.00 FEET) OF THE SOUTH LINE OF THE NORTHEAST 1/4 OF SAID SECTION 28, SAID POINT OF BEGINNING BEING 475.00 FEET WEST (AS MEASURED ALONG SAID RIGHT ANGLE LINE) OF THE SAID WEST LINE OF THE EAST 57.00 FEET THEREOF:**

**THENCE SOUTH 0 DEGREES 00 MINUTES 00 SECONDS WEST (AT RIGHT ANGLE TO LAST DESCRIBED RIGHT ANGLE LINE) 24.00 FEET TO A POINT; THENCE SOUTH 90 DEGREES 00 MINUTES 00 SECONDS EAST (24.00 FEET SOUTH OF AND PARALLEL WITH THE FIRST DESCRIBED RIGHT ANGLE LINE) A DISTANCE OF 429.58 FEET TO A POINT ON THE WESTERLY LINE OF AN EASEMENT DATED DECEMBER 20, 1965; THENCE NORTH 66 DEGREES 15 MINUTES 47 SECONDS WEST ALONG SAID WESTERLY LINE OF EASEMENT A DISTANCE OF 59.62 FEET TO A POINT ON THE FIRST DESCRIBED RIGHT ANGLE LINE; THENCE SOUTH 90 DEGREES 00 MINUTES 00 SECONDS WEST, ALONG SAID RIGHT ANGLE LINE 375.00 FEET TO THE POINT OF BEGINNING OF LAND HEREIN DESCRIBED;**

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ALSO:

THAT PART OF THE NORTHEAST 1/4 OF SECTION 28, TOWNSHIP 38 NORTH RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON A DRAWN AT RIGHT ANGLES TO THE WEST LINE OF THE EAST 57.00 FEET OF SAID NORTHEAST 1/4 THROUGH A POINT 300.00 FEET NORTH (AS MEASURED ALONG THE SAID WEST LINE OF THE EAST 57.00 FEET) OF THE SOUTH LINE OF THE NORTHEAST 1/4 OF SAID SECTION 28; THENCE SOUTH 90 DEGREES 00 MINUTES 00 SECONDS WEST, ALONG SAID RIGHT ANGLE LINE A DISTANCE OF 100.00 FEET TO A POINT ON THE WESTERLY LINE OF AN EASEMENT AGREEMENT DATED DECEMBER 20, 1965; THENCE SOUTH 66 DEGREES 15 MINUTES 47 SECONDS EAST ALONG SAID WESTERLY LINE OF EASEMENT A DISTANCE OF 71.00 FEET TO CURVED LINE CONVEX NORTHERLY HAVING A RADIUS OF 49.42 FEET, A DISTANCE 38.89 FEET (THE CHORD OF SAID CURVE BEARING SOUTH 67 DEGREES 27 MINUTES 30 SECONDS EAST) TO A POINT ON THE WEST LINE OF THE EAST 57.00 FEET, AFORESAID; THENCE NORTH 0 DEGREES 00 MINUTES 00 SECONDS EAST ALONG SAID WEST LINE OF THE EAST 57.00 FEET, A DISTANCE OF 43.11 FEET TO THE POINT OF BEGINNING. ALL IN COOK COUNTY, ILLINOIS.

Cook County Clerk's Office

## UNOFFICIAL COPY

*Delaware*

PAGE 1

*The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT "FNC REALTY CORPORATION" IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE NOT HAVING BEEN CANCELLED OR DISSOLVED SO FAR AS THE RECORDS OF THIS OFFICE SHOW AND IS DULY AUTHORIZED TO TRANSACT BUSINESS.

THE FOLLOWING DOCUMENTS HAVE BEEN FILED:

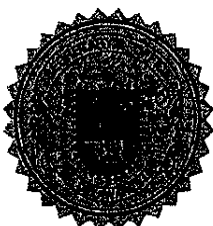
CERTIFICATE OF INCORPORATION, FILED THE THIRTIETH DAY OF APRIL, A.D. 2002, AT 9 O'CLOCK A.M.

CERTIFICATE OF MERGER, CHANGING ITS NAME FROM "NEW FRANK'S DELAWARE, INC." TO "FRANK'S NURSERY & CRAFTS, INC.", FILED THE SEVENTEENTH DAY OF MAY, A.D. 2002, AT 12:31 O'CLOCK P.M.

CERTIFICATE OF OWNERSHIP, FILED THE NINETEENTH DAY OF FEBRUARY, A.D. 2003, AT 9 O'CLOCK A.M.

RESTATED CERTIFICATE, CHANGING ITS NAME FROM "FRANK'S NURSERY & CRAFTS, INC." TO "FNC REALTY CORPORATION". FILED THE TWENTY-SEVENTH DAY OF JULY, A.D. 2005, AT 10:28 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID CORPORATION.



3516509 8310

050618219

*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 4049863

DATE: 07-27-05

# UNOFFICIAL COPY

# Delaware

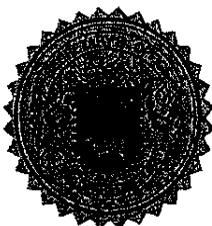
PAGE 2

*The First State*

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL REPORTS HAVE BEEN FILED TO DATE.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE BEEN PAID TO DATE.

Property of Cook County Clerk's Office



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

3516509 8310

AUTHENTICATION: 4049863

050618219

DATE: 07-27-05

**UNOFFICIAL COPY****Delaware**

PAGE 1

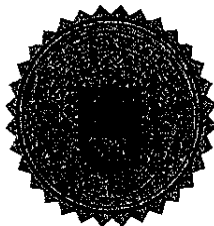
*The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "FRANK'S NURSERY & CRAFTS, INC.", CHANGING ITS NAME FROM "FRANK'S NURSERY & CRAFTS, INC." TO "FNC REALTY CORPORATION", FILED IN THIS OFFICE ON THE TWENTY-SEVENTH DAY OF JULY, A.D. 2005, AT 10:28 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

3516509 8100

050617978

*Harriet Smith Windsor*Harriet Smith Windsor, Secretary of State  
AUTHENTICATION: 4049639

DATE: 07-27-05

**UNOFFICIAL COPY**

State of Delaware  
 Secretary of State  
 Division of Corporations  
 Delivered 10:32 AM 07/27/2005  
 FILED 10:28 AM 07/27/2005  
 SRV 050617978 - 3516509 FILE

**AMENDED AND RESTATED**

**CERTIFICATE OF INCORPORATION**

**OF**

**FRANK'S NURSERY & CRAFTS, INC.**

**[Pursuant to Sections 242 and 245 of the Delaware General Corporation Law]**

Frank's Nursery & Crafts, Inc. (the "Corporation"), a corporation organized and existing under and by virtue of the provisions of the Delaware General Corporation Law (the "DGCL"),

**DOES HEREBY CERTIFY:**

1. That the name of the Corporation is Frank's Nursery & Crafts, Inc. and that the Corporation was originally incorporated pursuant to the DGCL on April 30, 2002 under the name New Frank's Delaware, Inc.

2. That the Board of Directors duly adopted resolutions approving the amendment and restatement of the Certificate of Incorporation of the Corporation pursuant to Sections 242 and 245 of the DGCL.

3. The Certificate of Incorporation of the Corporation shall be amended and restated in its entirety as follows:

**FIRST:** The name of the Corporation is "FNC Realty Corporation" (the "Corporation").

**SECOND:** The address of the Corporation's registered office in the State of Delaware is 2711 Centerville Road, Suite 400, Wilmington, County of New Castle, Delaware 19808. The name of its registered agent at such address is Corporation Service Company.

**THIRD:** The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL.

**FOURTH:** (a) The aggregate number of shares of capital stock which the Corporation shall have authority to issue is 285,000,000, of which 275,000,000 shares, par value \$0.001 per share, shall be designated Common Stock and 10,000,000, par value \$0.001 per share, shall be designated Preferred Stock.

(b) Authority is hereby expressly granted to the Board of Directors from time to time by vote of a majority of directors then in office to issue the Preferred Stock as Preferred Stock of any series and, in connection with the creation of each such series, to fix by resolution or resolutions providing for the issue of shares thereof, the number of shares of such series, and the designations, powers, preferences and rights, and the qualifications, limitations and



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restrictions, of such series, to the full extent now or hereafter permitted by the laws of the State of Delaware. The powers, preferences and relative, participating, optional and other special rights of each series of Preferred Stock, and the qualifications, limitations or restrictions thereof, if any, may differ from those of any and all other series at any time outstanding.

(c) The Corporation shall not be authorized to issue non-voting capital stock to the extent prohibited by Section 1123(a)(6) of Title 11 of the United States Code (the "Bankruptcy Code"); provided, however, that this section (b) will have no further force and effect beyond that required by Section 1123 of the Bankruptcy Code.

**FIFTH.** Election of directors need not be by written ballot.

**SIXTH.** The following provisions are included for the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its Board of Directors.

1. The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors.

2. The Board of Directors is expressly authorized, by vote of a majority of directors then in office, to adopt, amend, or repeal By-Laws of the Corporation (the "By-Laws") except, as and to the extent provided in the By-Laws, subject to the power of the stockholders to amend, alter, change, add to or repeal the By-Laws made by the Board of Directors.

**SEVENTH.** (a) To the fullest extent permitted by the laws of the State of Delaware (as may be hereafter amended, but only to the extent such amendment provides for broader indemnification rights or as a matter of law cannot be disregarded for purposes of this Article Seventh), any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (whether or not by or in the right of the Corporation) by reason of the fact that he is or was a director, officer or incorporator of the Corporation, or, while a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, incorporator, employee, partner, trustee, or agent of another corporation, partnership, joint venture, trust, limited liability company or other enterprise (including an employee benefit plan), shall be entitled to be indemnified by the Corporation, and to have his expenses advanced, to the full extent then permitted by law against expenses (including counsel fees and disbursements), judgments, fines (including excise taxes assessed on a person with respect to an employee benefit plan), and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the Corporation and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person's conduct was unlawful. Such right of indemnification shall inure

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whether or not the claim asserted is based on matters which antedate the adoption of this Article Seventh. Such right of indemnification shall continue as to a person who has ceased to be a director, officer or incorporator and shall inure to the benefit of the heirs and personal representatives of such a person. The indemnification provided by this Article Seventh shall not be deemed exclusive of any other rights which may be provided now or in the future under any provision currently in effect or hereafter adopted of the By-Laws, by any agreement, by vote of stockholders, by resolution of disinterested directors, by provision of law, or otherwise.

(b) The Corporation may purchase and maintain insurance on behalf of any person described in subsection (a) of this Article Seventh against any liability asserted against such person, whether or not the Corporation would have the power to indemnify such person against such liability under the provisions of this Article Seventh or otherwise.

(c) The provisions of this Article Seventh shall be deemed to be a contract between the Corporation and each director or officer who serves in such capacity at any time while this Article Seventh and the relevant provisions of the laws of the State of Delaware and other applicable law, if any, are in effect, and any repeal or modification hereof shall not affect any rights or obligations then existing with respect to any state of facts or any action, suit or proceeding then or theretofore existing, or any action, suit or proceeding thereafter brought or threatened based in whole or in part on any such state of facts. If any provision of this Article Seventh shall be found to be invalid or limited in application by reason of any law or regulation, it shall not affect the validity of the remaining provisions hereof.

(d) The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article Seventh to directors and officers of the Corporation.

**EIGHTH.** A director of the Corporation shall not be liable to the Corporation, its stockholders or creditors for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the DGCL as the same exists or may hereafter be amended. Any amendment, modification or repeal of the foregoing sentence shall not adversely affect any right or protection of a director of the Corporation hereunder in respect of any act or omission occurring prior to the time of such amendment, modification or repeal. For purposes of the prior sentence, the term "damages" shall, to the extent permitted by law, include without limitation, any judgment, fine, amount paid in settlement, penalty, punitive damages, excise or other tax assessed with respect to an employee benefit plan, or expense of any nature (including, without limitation, counsel fees and disbursements). Each person who serves as a director of the Corporation while this Article Eighth is in effect shall be deemed to be doing so in reliance on the provisions of this Article Eighth, and neither the amendment or repeal of this Article Eighth, nor the adoption of any provision of this Amended and Restated Certificate of Incorporation inconsistent with this Article Eighth, shall apply to or have any effect on the liability or alleged liability of any director or the Corporation for, arising out of, based upon, or in connection with any acts or omissions of such director occurring prior to such amendment, repeal or adoption of an inconsistent provision. The provisions of this Article Eighth are cumulative and shall be in addition to and independent of any and all other limitations on or eliminations of the liabilities of directors of the

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Corporation, as such, whether such limitations or eliminations arise under or are created by any law, rule, regulation, by-law, agreement, vote of shareholders or disinterested directors, or otherwise.

**NINTH.** (a) For purposes of this Article Ninth, the following terms shall have the meanings indicated below:

(i) "Agent" shall mean the Person designated by the Corporation for purposes of effectuating the transactions described in paragraph (c) of this Article Ninth.

(ii) "Board" shall mean the Board of Directors of the Corporation.

(iii) "Code" shall mean the Internal Revenue Code of 1986, as amended from time to time, or any successor statute, and the regulations thereunder.

(iv) "Certificate of Incorporation" shall mean the certificate of incorporation of the Corporation.

(v) "Corporation" shall mean FNC Realty Corporation.

(vi) "Excess Stock" shall mean, with respect to a Transfer of Stock, the amount of such Stock that is in excess of the amount of Stock that may be transferred without restriction pursuant to subparagraph (b)(i) of this Article Ninth.

(vii) "Expiration Date" shall mean the earlier of (x) August 1, 2008 or (y) January 1 of a taxable year of the Corporation to which the Board determines that no significant Tax Benefits that arose on or before the date hereof may be carried forward, unless the Board shall fix an earlier or later date in accordance with paragraph (g) of this Article Ninth.

(viii) "Initial Transferor" shall mean the Person who initially purported to Transfer Excess Stock to a Purported Acquirer.

(ix) "Optionee" shall mean any Person holding an Option Right to acquire Stock.

(x) "Option Right" shall mean any option, warrant or other right to acquire, convert into, or exchange or exercise for, or any similar interests in, shares of Stock.

(xi) "Ownership Change" shall have the meaning set forth in Section 382(g) of the Code.

(xii) "Ownership Interest Percentage" shall mean the sum of such Person's or Public Group's direct ownership interest in the Corporation, as determined under Treasury Regulation Section 1.382-2T(f)(8) (or any successor regulation), and such Person's or Public Group's indirect ownership interest in the Corporation, as determined under Treasury Regulation Section 1.382-2T(f)(15) or 1.1502-92(c) (or any successor regulations), except that, for purposes of determining a person's indirect ownership interest in the Corporation, Treasury Regulation Sections 1.382-2T(g)(2), 1.382-2T(g)(3), 1.382-2T(h)(2)(iii) and 1.382-2T(h)(6)(iii)

# UNOFFICIAL COPY

(or any successor regulations) shall not apply and any Option Right to acquire Stock shall be deemed to have been exercised only to the extent such exercise would cause an increase in ownership of Stock by such Person or Public Group

(xiii) "Person" shall mean any individual, corporation, estate, trust, association, company, partnership, joint venture, or other entity or organization, including, without limitation, any "entity" within the meaning of Treasury Regulation Section 1.382-3(a) (or any successor regulation).

(xiv) "Prohibited Distribution" shall mean dividends or other distributions made with respect to Stock received by a Purported Acquiror.

(xv) "Public Group" shall mean a group of individuals, entities or other Persons described in Treasury Regulation Section 1.382-2T(f)(13) (or any successor regulation).

(xvi) "Purported Acquiror" shall mean a Transferee of Excess Stock.

(xvii) "Sales Proceeds" shall mean the proceeds received upon a sale of Excess Stock.

(xviii) "Secretary" shall mean the secretary of the Corporation.

(xix) "Stock" shall mean shares of stock of the Corporation (other than stock described in Section 1504(a)(4) of the Code or stock that is not described in Section 1504(a)(4) solely because it is entitled to vote as a result of dividend arrearages), any Option Rights to acquire Stock, and all other interests that would be treated as stock of the Corporation pursuant to Treasury Regulation Section 1.382-2T(f)(13) (or any successor regulation).

(xx) "Tax Benefits" shall mean the Corporation's net operating loss carryovers, capital loss carryovers and built-in losses.

(xxi) "Transfer" shall mean any issuance, sale, transfer, gift, assignment, devise or other disposition, as well as any other event, that causes a Person or Public Group to acquire or increase an Ownership Interest Percentage in the Corporation, or any agreement to take any such actions or cause any such events, including, without limitation, (x) the granting or exercise of any Option Right with respect to Stock, (y) the disposition of any securities or rights convertible into or exchangeable or exercisable for Stock or any interest in Stock or any exercise of any such conversion or exchange or exercise right and (z) transfers of interests in other entities that result in changes in direct or indirect ownership of Stock, in each case, whether voluntary or involuntary, of record, by operation by law or otherwise.

(xxii) "Transferee" shall mean any Person to whom Stock is transferred.

(xxiii) "Treasury Regulation" shall mean any of the treasury regulations promulgated under the Code.

(b) In order to preserve the Tax Benefits to which the Corporation is entitled under the Code, the following restrictions shall apply until the Expiration Date:

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(i) No Person, other than the Corporation, shall engage in any Transfer of Stock with any other Person to the extent that such Transfer, if effective, would cause the Ownership Interest Percentage of any Person or Public Group to (x) increase to 4.9 percent or above, (y) increase from 4.9 percent or above to a greater Ownership Interest Percentage or (z) create a new Public Group under Treasury Regulation Section 1.382-2T(j)(3)(i) (or any successor regulation), except as otherwise permitted pursuant to subparagraph (b)(ii).

(ii) Any Transfer that would otherwise be prohibited pursuant to subparagraph (b)(i) shall nonetheless be permitted if (x) information relating to a specific proposed transaction is presented to the Board and the Board determines in its discretion that such transaction will not jeopardize or create a material limitation on the Corporation's then current or future ability to utilize its Tax Benefits, taking into account both the proposed transaction and potential future transactions or (y) the Board in its discretion determines that the waiver of the restrictions set forth in subparagraph (b)(i) would be in the best interests of the Corporation. Nothing in this subparagraph shall be construed to limit or restrict the Board in the exercise of its fiduciary duties under applicable law.

(c) (i) Any attempted Transfer of Excess Stock shall be void ab initio and not effective to transfer ownership of the Excess Stock to the Purported Acquiror thereof, who shall not be entitled to any rights as a stockholder of the Corporation with respect to the Excess Stock (including, without limitation, the right to vote or to receive dividends with respect thereto and, to the extent that a vote is cast by a Purported Acquiror, the vote shall be rescinded as void), or otherwise as the holder of the Excess Stock, unless approval of the Board is obtained as provided in subparagraph (b)(ii) of this Article Ninth.

(ii) Upon demand by the Corporation, the Purported Acquiror shall transfer any certificate or other evidence of purported ownership of the Excess Stock within the Purported Acquiror's possession or control, along with any Prohibited Distributions received by the Purported Acquiror, to the Agent. If, prior to the notification by the Agent of such demand, the Purported Acquiror has sold the Excess Stock to an unrelated party in an arm's-length transaction that would not constitute a prohibited Transfer pursuant to subparagraph (b)(i) of this Article Ninth if made by the Initial Transferor, the Purported Acquiror shall be deemed to have sold the Excess Stock on behalf of the Initial Transferor, and, in lieu of transferring the Excess Stock to the Agent, shall transfer the Sale Proceeds to the Agent, except to the extent that the Agent grants written permission to the Purported Acquiror to retain a portion of the Sale Proceeds not exceeding the amount that would have been payable by the Agent to the Purported Acquiror pursuant to subparagraph (c)(iii) if the Excess Stock had been sold by the Agent rather than by the Purported Acquiror. Any purported Transfer of the Excess Stock by the Purported Acquiror, other than a Transfer described in one of the two preceding sentences, shall not be effective to transfer any ownership of the Excess Stock.

(iii) The Agent may sell in an arm's-length transaction any Excess Stock transferred to the Agent by the Purported Acquiror to the extent such sale would be feasible and would not constitute a prohibited Transfer pursuant to subparagraph (b)(i) of this Article Ninth. The Sales Proceeds shall be allocated and paid to the Purported Acquiror up to the following amount: (x) where applicable, the purported purchase price paid or value of consideration surrendered by the Purported Acquiror for the Excess Stock and (y) where the

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purported Transfer of the Excess Stock to the Purported Acquiror was by gift, inheritance or any similar purported Transfer, the fair market value of the Excess Stock at the time of such purported Transfer. Any Sale Proceeds in excess of the amount allocable to the Purported Acquiror pursuant to the preceding sentence, shall be transferred to an entity designated by the Corporation that is described in Section 501(c)(3) of the Code. In no event shall any such amounts inure to the benefit of the Corporation or the Agent, but such amounts may be used to cover expenses incurred by the Agent in performing its duties under this paragraph. If the Agent is not able to sell such Excess Stock because such sale would constitute a prohibited Transfer or, if such sale would not constitute a prohibited Transfer, the Agent is not able to find a purchaser, then such Excess Stock shall be returned to the Initial Transferor which shall return to the Purported Acquiror, the Sale Proceeds, if any, received by the Initial Transferor from the purported Transfer of the Excess Stock to the Purported Acquiror.

(d) Within 30 business days after learning of a purported Transfer of Excess Stock to a Purported Acquiror, the Corporation (through its Secretary) shall demand that the Purported Acquiror surrender to the Agent the certificates representing the Excess Stock, or any Sale Proceeds, and any Prohibited Distributions. If such surrender is not made by the Purported Acquiror within 30 business days from the date of such demand, the Corporation may institute legal proceedings to compel such transfer; provided, however, that nothing in this paragraph (d) shall preclude the Corporation in its discretion from immediately bringing legal proceedings without a prior demand, and also provided that failure of the Corporation to act within the time periods set forth in this paragraph (d) shall not constitute a waiver of any right of the Corporation under this Article Ninth.

(e) The Corporation may require as a condition to the registration of the Transfer of any shares of its Stock that the proposed transferee furnish to the Corporation all information reasonably requested by the Corporation with respect to all the proposed Transferee's direct or indirect ownership interests in, or options to acquire, Stock

(f) All certificates evidencing ownership of shares of Stock shall bear substantially the following legend:

AS DESCRIBED IN ARTICLE NINTH OF THE CERTIFICATE OF INCORPORATION, THE SHARES OF STOCK REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER FOR THE PURPOSE OF THE PRESERVATION OF THE CORPORATION'S NET OPERATING LOSS CARRYOVERS AND RELATED TAX ATTRIBUTES PURSUANT TO SECTION 382 OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED. WITHOUT THE AUTHORIZATION OF THE BOARD OF DIRECTORS, NO PERSON, OTHER THAN THE CORPORATION, SHALL ENGAGE IN ANY TRANSFER OF STOCK WITH ANY OTHER PERSON TO THE EXTENT THAT SUCH TRANSFER, IF EFFECTIVE, WOULD CAUSE THE OWNERSHIP INTEREST PERCENTAGE OF ANY PERSON OR PUBLIC GROUP TO (I) INCREASE TO 4.9 PERCENT OR ABOVE, (II) INCREASE FROM 4.9 PERCENT OR ABOVE TO A GREATER OWNERSHIP INTEREST

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*PERCENTAGE* OR (III) CREATE A NEW *PUBLIC GROUP* UNDER TREASURY REGULATION SECTION 1.382-2T(j)(3)(i). (FOR THIS PURPOSE OWNERSHIP INCLUDES OWNERSHIP BY ATTRIBUTION AS WELL AS DIRECT OWNERSHIP). ITALICIZED TERMS IN THIS LEGEND HAVE THE MEANINGS DEFINED IN ARTICLE NINTH OF THE CERTIFICATE OF INCORPORATION. A COPY OF THE RESTRICTIONS ON *TRANSFER*, WILL BE SENT WITHOUT CHARGE TO EACH STOCKHOLDER WHO SO REQUESTS. IF THE RESTRICTIONS ON *TRANSFER* ARE VIOLATED, THE *TRANSFER* WILL BE VOID AB INITIO WITH THE CORPORATION RETAINING THE RIGHT TO REPOSSESS AND DISPOSE OF SUCH *STOCK* IN A PERMITTED *TRANSFER*.

(g) Nothing contained in this Article Ninth shall limit the authority of the Board to take such other action to the extent permitted by law as it deems necessary or advisable to protect the Corporation and the interests of the holders of its Stock in preserving the Tax Benefits. Without limiting the generality of the foregoing, in the event of a change in law making one or more of the following actions necessary or desirable, the Board may, by adopting a written resolution of the Board, (i) accelerate or extend the Expiration Date, (ii) modify the Ownership Interest Percentage in the Corporation specified in the first sentence of subparagraph (b)(i) or (iii) modify the definitions of any terms set forth in this Article Ninth; provided, however, that the Board shall not cause there to be such acceleration, extension, change or modification unless it concludes in writing that such action is reasonably necessary or advisable to preserve the Tax Benefits or that the continuation of these restrictions is no longer reasonably necessary for the preservation of the Tax Benefits. Such written resolution shall be filed with the Secretary of the Corporation and shall be mailed by the Secretary to all stockholders of this Corporation within 10 days after the date of any such resolution.

(h) The Corporation and the members of the Board shall be fully protected in relying in good faith upon the information, opinions, reports or statements of the chief executive officer, the chief financial officer or the chief accounting officer of the Corporation or of the Corporation's legal counsel, independent auditors, transfer agent, investment bankers or other employees and agents in making the determinations and findings contemplated by this Article Ninth and the members of the Board shall not be responsible for any good faith errors made in connection therewith.

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IN WITNESS WHEREOF, I have made, signed, and sealed this Amended and Restated Certificate of Incorporation this 27<sup>th</sup> day of July, 2005.

**FRANK'S NURSERY & CRAFTS, INC.**

/s/ Michael McBride  
Michael McBride  
President

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