



Heatherbrooke Mortgage

1651

Heatherbrooke Apartments  
Birmingham, Alabama

MORTGAGE AND SECURITY AGREEMENT

BETWEEN

EQUITY PARTNERS JOINT VENTURE,  
A Joint Venture Formed Pursuant  
To The Alabama Partnership Act

AND

SMA LIFE ASSURANCE COMPANY  
a Massachusetts Corporation

Dated as of FEBRUARY 26, 1988

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Land Title

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STATE OF ALABAMA     )  
                              )  
COUNTY OF SHELBY    )

**MORTGAGE AND SECURITY AGREEMENT**

*26<sup>th</sup>* THIS INDENTURE, made and entered into on this the day of February, 1988 by **EQUITY PARTNERS JOINT VENTURE**, a joint venture formed pursuant to the Alabama Partnership Act, with a mailing address c/o Colonial Properties, Inc., No. 2 Perimeter Park South, Suite 450, Birmingham, Alabama 35243 (herein called "Borrower") and **SMA LIFE ASSURANCE COMPANY** ("SMA Life"), a Delaware corporation duly organized and existing according to law, with its principal office (and mailing address) at 440 Lincoln Street, Worcester, Massachusetts 01605 (herein called "Lender"), (herein called "this mortgage"),

**W I T N E S S E T H:**

WHEREAS, Borrower is indebted to Lender for money loaned in the amount of Three Million Four Hundred Thousand and no/100 Dollars (\$3,400,000) ("Loan") as evidenced by a promissory note ("Note") of even date herewith; the Note is secured by this mortgage, that certain Assignment of Leases and Rents of even date herewith (the "Assignment") encumbering the mortgaged premises (as herein defined), and by a guaranty agreement (the "Guaranty Agreement") of even date herewith executed by Robert E. Lowder, James K. Lowder, and Thomas H. Lowder to Lender; the Note, this mortgage, the Assignment and the Guaranty Agreement, together with any amendments, modifications and replacements thereof and all other documents now or hereafter evidencing or securing the Note and all certificates, documents and instruments now or hereafter executed by Borrower or its partners in favor of Lender, are collectively referred to herein as the "Loan Instruments"; and

WHEREAS, Borrower is desirous of securing the prompt payment of the indebtedness evidenced by said Note, and the several installments of principal and/or interest therein provided for; and

WHEREAS, Borrower may hereafter become indebted to said Lender for additional sums loaned and/or on account of indebtedness which may accrue to Lender on account of any future payments, advances or expenditures made by Lender under the provisions of this mortgage; and Borrower wishes to execute this conveyance for the security and enforcement of the payment both of said present and any such future indebtedness;

NOW, THEREFORE, the undersigned, in consideration of the Loan and said premises, the receipt and sufficiency of which is acknowledged, to secure the prompt payment of said indebtedness with interest thereon, and all renewals, extensions, modifications and replacements thereof, and the payment of any further sum or sums for which Borrower may hereafter become indebted to Lender under the provisions hereof or of any of the other Loan Instruments; and further to secure the performance of the covenants, conditions and agreements hereinafter and in the Note set forth, and those set forth in any other instruments now or hereafter securing said Note, Borrower has bargained and sold and hereby grants, bargains, sells and conveys to Lender, its successors and assigns, all that certain real estate, lying and being in Shelby County, Alabama and described in Exhibit "A" hereto, (such property and all of the property and interests hereinafter described being referred to herein as the "mortgaged premises"),

TOGETHER WITH all and singular the rights, members, privileges and appurtenances thereunto belonging or in anywise appertaining, and all rights, title and interests, if any, of Borrower in and to any streets, alleys, roads or highways abutting the described premises; and

TOGETHER WITH Borrower's right, title and interest in all oral and written leases with, or other agreements for use and occupancy made or agreed to by, any person or entity pertaining to all or any part of the property herein mortgaged whether such leases have been heretofore or are hereafter made or agreed to and all rents, issues and profits of the mortgaged premises, the property described in this clause being hereby pledged primarily and on a parity with the mortgaged premises and not secondarily.

TOGETHER WITH all buildings and structures, now or hereafter constructed thereon, and all building materials, equipment, and fittings of every kind or character now owned or hereafter acquired by Borrower for the purpose of constructing buildings and structures thereon, and located at the mortgaged premises, and all improvements, fixtures and Borrower's articles of personal property now or hereafter attached to or used or adapted for use in the operation of the mortgaged premises, all of which shall be deemed part of the realty (to the extent permitted by law), including, but without being limited to, all furniture, furnishings, carpeting, underpadding and drapes (except that owned by tenants in the mortgaged premises), heating and incinerating apparatus and equipment whatsoever, all boilers, engines, motors, dynamos, generating equipment, wiring, piping,

plumbing fixtures, cooling, air conditioning, ventilating, incinerating, sprinkling, inter-communicating, and vacuum cleaning systems and equipment, fire extinguishing apparatus, gas and electric fixtures, and cleaning and maintenance equipment; and

TOGETHER WITH any awards, claims, damages, settlements and considerations hereafter made or given for or in anticipation of any taking of or injury to the mortgaged premises through eminent domain or otherwise, including awards or damages for change of grade, (the "Condemnation Proceeds") and also all proceeds, unearned premiums, dividends and other payments upon any insurance at any time provided for the benefit of Lender, (the "Insurance Proceeds") all of which awards, claims, damages, settlements, considerations, proceeds, premiums, dividends and payments are hereby assigned to Lender and may be at any time collected by it;

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TOGETHER WITH all of Borrower's rights further to encumber the mortgaged premises for debt except by such encumbrance which by its actual terms and specifically expressed intent shall be and at all times remain subject and subordinate to (i) any and all tenancies in existence when such encumbrance becomes effective and (ii) any tenancies thereafter created; Borrower hereby (i) representing as a special inducement to the Lender to make the loan secured hereby that as of the date hereof there are no encumbrances to secure debt junior to this mortgage and (ii) covenanting that there are to be none as of the date this mortgage becomes of record, except in either case encumbrances having the prior written approval of Lender herein. This provision shall not be construed to in any way affect or detract from any of the restrictions contained in Sections 1.11, 1.17, and 1.18 hereof whereby junior liens and secondary financing are not permitted without the written consent of Lender.

TO HAVE AND TO HOLD all of the aforescribed property and interests in property, and every part thereof, unto Lender, its successors and assigns, forever.

PROVIDED, HOWEVER, that if Borrower shall pay the indebtedness secured by this mortgage including without limitation any future payments, advances, or expenditures made by Lender under the provisions of this mortgage or any of the other Loan Instruments, and shall reimburse Lender, its successors and assigns, for any amounts it may have expended pursuant to any authorizations contained in this mortgage, or any of the other Loan Instruments including, without limitation, sums spent in payment of taxes,

assessments, insurance, other liens, and repairs, and interest thereon, and shall pay any other sums required to be paid by it under any of the provisions of this mortgage or any of the other Loan Instruments, and shall do and perform all other acts and things herein agreed to be done, then, and only then, shall this conveyance be null and void; otherwise it shall remain in full force and effect.

**ARTICLE ONE: COVENANTS, AGREEMENTS,  
AND REPRESENTATIONS**

This mortgage is made and accepted on the understanding that Borrower covenants, agrees, and represents as follows:

1.01 Title. (a) Borrower covenants with Lender that it is lawfully seized of the mortgaged premises and has a good right to sell and convey the same as aforesaid; that the mortgaged premises are free of all liens, charges or encumbrances of any nature except as herein set out on Exhibit B which is attached hereto and incorporated herein by reference, and Borrower will warrant and forever defend the title to the mortgaged premises unto Lender, its successors and assigns, against the lawful claims of all persons whomsoever.

(b) Borrower shall, at the cost of Borrower, and without expense to Lender, do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, notices of assignments, transfers and assurances as Lender shall from time to time require, for the better assuring, conveying, assigning, transferring and confirming unto Lender the property and rights hereby conveyed or assigned or intended now or hereafter so to be, or which Borrower may be or may hereafter become bound to convey or assign to Lender, or for carrying out the intention or facilitating the performance of the terms of this mortgage, or for filing, registering or recording this mortgage and, on demand, shall execute and deliver, and hereby authorizes Lender, if Borrower fails so to do, to execute in the name of Borrower to the extent it may lawfully do so, one or more financing statements, continuation statements, chattel mortgages or comparable security instruments, and any other agreements or assurances of title deemed advisable by Lender to effectuate, confirm and evidence a first lien on and a validly perfected paramount security interest in the mortgaged premises. In the event Lender does execute any documents on behalf of Borrower pursuant to the terms of this Section 1.01(b), Lender shall promptly notify Borrower and send Borrower copies of any such documents.

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(c) Should it be discovered, after the execution and delivery of this mortgage, that there is an error or defect in the Note or this mortgage or in the execution or the acknowledgement thereof, Borrower shall, within thirty days after demand by Lender, correct any error in the Note or this mortgage on its execution and otherwise cure any such defect or error.

1.02 Payment of Note, Mortgage, and Other Loan Instruments. Borrower will pay all indebtedness secured hereby whether presently existing or hereafter incurred. Borrower shall comply with the terms and conditions of this mortgage and all other Loan Instruments.

1.03 Payment of Reserves. Borrower will pay to the Lender upon request, and concurrently with payments of principal and interest, monthly commencing on the first day of the first month after the date hereof, and until the principal sum secured hereby is fully paid, a sum equal to taxes, assessments, and casualty insurance premiums next due on the mortgaged premises (all as reasonably estimated by the Lender) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such taxes and assessments will become delinquent. Such sums shall be held by Lender, without interest, to pay said taxes and special assessments, and such sums may be commingled with other assets of Lender. In the event of a default in the payment of the indebtedness secured hereby or in the performance of any of the covenants, conditions and agreements hereof, Lender may apply such sums collected hereunder as Lender may determine and/or to such taxes, assessments and insurance premiums, as Lender may elect. Borrower shall, promptly upon receipt, deliver to Lender all bills for such taxes, assessments and insurance premiums received by Borrower. The Lender, upon receipt of the bills, shall pay from such fund all such taxes, assessments and insurance premiums as they become due. Lender shall not be required to determine the accuracy of any bill or the validity of any such taxes, assessments and insurance premiums.

Any excess funds accumulated under the provisions of this Section 1.03 remaining after payment of the items herein mentioned shall be credited at Lender's option to subsequent monthly payments of the same nature required hereunder or utilized to effect an adjustment in the subsequent monthly payments; but if any such item shall exceed the estimate therefor, the Mortgagor shall make good the deficiency and failure to do so shall be a default hereunder. If the mortgaged premises are sold under foreclosure or are

otherwise acquired by Lender after default, any remaining balance of the accumulations under this Section 1.03 shall be credited to the principal and/or accrued interest on the indebtedness secured by this mortgage as of the date of commencement of foreclosure proceedings or as of the date the mortgaged premises are otherwise acquired, unless such shall have been previously applied by Lender in accordance with the foregoing provisions of this Section 1.03.

1.04 Insurance. For the benefit of Lender, Borrower will constantly keep in force "all risks" coverage, flood and rent coverage insurance policies and, when reasonably available and reasonably required by Lender, (bearing in mind what other institutional lenders are requiring for comparable projects) other hazard insurance, with respect to any and all of the mortgaged premises in the amount of the full insurable value thereof on a replacement costs basis, and Borrower will also constantly keep in force liability insurance pertaining to the mortgaged premises. Such insurance policies shall contain an agreement by the issuer thereof that no party thereto may cancel or modify any policies without at least thirty (30) days' prior written notice to Lender, shall be endorsed with a standard non-contributory mortgagee clause, and shall contain such other reasonable terms, provisions and endorsements as shall be satisfactory to Lender. All such insurance shall be provided in such reasonable manner, in such companies, in such form and substance and in such amounts as are reasonably required by Lender, with loss, if any, payable to said Lender as its interest may appear, and Borrower hereby transfers, assigns, sets over and delivers to Lender the fire and other insurance policies covering the mortgaged premises and shall transfer, assign, set over and deliver any and all renewals and replacements thereof to Lender and will provide evidence of payment of all premiums no later than thirty (30) days prior to the expiration of any then existing policy (unless funds held by Lender for such purpose pursuant to the provisions of Section 1.03 hereof are sufficient to pay such premiums), and it is further agreed that all such insurance and insurance policies shall be held by Lender as a part of the security for said indebtedness, and, together with any insurance claims in process, shall pass to, and become the property of, the purchaser at any foreclosure sale hereunder, without the necessity of specifically describing said insurance or insurance policies or claims in process in the foreclosure notice, sale, deed or other proceedings in consummation of such foreclosure. If the Borrower fails to keep the mortgaged premises insured as above specified, then Lender may, at its option, insure the mortgaged premises for such

amounts as it shall determine against loss by fire, "all risk" coverage and other hazards, casualties and contingencies, for its own benefit, and any amount which may be expended for premiums on such insurance policies shall be secured by the lien of this mortgage, be payable on demand of Lender and bear interest at a rate equal to the Default Rate provided for in the Note from the date of payment by Lender. It is further understood and agreed between the parties hereto that any sum, or sums, of money received for any damage by fire or other casualty to any part of the mortgaged premises herein conveyed may be retained by the Lender and applied toward payment of the indebtedness secured by this mortgage in such order as Lender may elect either in whole or in part, or, at the option of the Lender, same may be applied in payment for any repair or replacement of the mortgaged premises, upon such terms and conditions pertaining to the completion of such repairs and replacement and the payment of all costs thereof as Lender shall require, without affecting the lien of this mortgage for the full amount hereby secured.

Borrower agrees to give Lender notice in writing of any damage to the mortgaged premises caused by fire or other casualty within ten (10) days after the occurrence of any such damage. In case of loss or damage the proceeds of claims under rental interruption insurance policies pertaining to the mortgaged premises shall be paid to Lender for application to amounts due under the Note, this mortgage and any other Loan Instruments as such amounts become due and payable, with the balance, if any, paid to Borrower subject to such controls as Lender may reasonably impose to assure that such balance is first used, to the extent necessary, for payment of expenses of operation and maintenance of the mortgaged premises. After giving written notification to Borrower of its intention so to do, Lender is hereby authorized (but not obligated) to act as attorney-in-fact for Borrower in obtaining, adjusting, settling and cancelling all insurance on the mortgaged premises, in endorsing any checks or drafts drawn by insurers of the mortgaged premises and in directing Borrower to endorse any such checks or drafts as Lender may direct. All proceeds of insurance policies, except to the extent such proceeds exceed the total indebtedness then secured by this mortgage, shall be paid to Lender solely, and not to Borrower and Lender jointly. Notwithstanding any other provision of this mortgage or the Note, no application of insurance proceeds to the indebtedness shall result in a prepayment premium or have the effect of curing any default or extending the time for making any payment due hereunder or under the Note. Lender shall not be held responsible for failure to collect

any insurance proceeds due under the terms of any policy provided for herein regardless of the cause of such failure.

1.05 Care of the Property. The mortgaged premises including the improvements thereon shall be kept in good condition and no waste committed or permitted thereon. No building, other improvement, fixture or personal property included in the mortgaged premises shall be structurally or materially altered, removed or demolished without the Lender's prior written consent, nor shall any fixture or chattel covered by this mortgage and adapted to the proper use and enjoyment of the mortgaged premises be removed nor sold at any time without like consent unless actually replaced by an article of equal suitability and value owned by Borrower free and clear of any lien or security interest.

1.06 Taxes, Assessments, and Fees. Taxes and assessments or other charges which may be levied upon or accrue against said premises, as well as all other sums which may be or become liens or charges against same, shall be paid and discharged by Borrower promptly as and when so levied or assessed, and shall not be permitted to become delinquent or to take priority over the lien of this mortgage except as to the lien for taxes which becomes a lien before they are due and payable; provided, however, that Borrower, upon first furnishing to Lender such security as shall be reasonably satisfactory to Lender for the payment of all liability, costs and expenses of the litigation, may in good faith contest, at Borrower's expense, the validity of any such taxes or assessments. Borrower covenants and agrees to pay when due any recording fees or taxes in connection with this mortgage.

1.07 Liens. Any lien which may be filed under the provisions of the statutes of Alabama, relating to the liens of mechanics and materialmen, shall be promptly paid and discharged by Borrower and shall not be permitted to take priority over the lien of this mortgage, provided that Borrower, upon first furnishing to Lender such security as shall be reasonably satisfactory to Lender for the payment of all liability, costs and expenses of the litigation, may in good faith contest, at Borrower's expense, the validity of any such lien or liens. In those instances where Lender's title policy protects it against such lien or liens such title policy shall be deemed to be sufficient security. Determination of whether said title policy protects Lender shall be made solely by Lender and shall be binding upon Borrower.

1.08 Compliance with Laws, Easements, etc. (a) Any and all legal requirements of the city, town, and/or county wherein the mortgaged premises are located and any department thereof and all state and federal laws, regulations, rules, licenses, and permits including without limitation any such pertaining to any Applicable Environmental Laws (as hereinafter defined), subdivisions, zoning, and environmental controls shall be fully complied with by Borrower. Borrower shall also comply with all covenants, restrictions, easements and other agreements affecting the mortgaged premises and shall not take any action which would constitute a breach of, or detract from the benefits to the mortgaged premises of, such covenants, restrictions, easements and other agreements. This covenant shall survive the foreclosure of this mortgage or the taking of a deed in lieu of foreclosure by Lender.

(b) Borrower represents to Lender that the mortgaged premises are located within the limits of Shelby County, Alabama, and that they comply with all such governmental zoning and subdivision ordinances (including, without limitation, so-called bulk and dimensional coverages and the like) and other governmental regulations without reliance on adjoining or other properties other than dedicated easements and rights of way for public streets and utility and storm drainage satisfactory to Lender, and without reliance on any "Grandfather" provisions. In the event the mortgaged premises shall hereafter become subject to any such ordinances under which the mortgaged premises and/or the use thereof is placed in a "Grandfather" status, Borrower shall provide and maintain such insurance endorsements as Lender shall require including, without limitation, demolition and contingent liability endorsements.

(c) Borrower covenants and agrees to provide and maintain, during the term of the Loan secured hereby, paved parking area on the mortgaged premises sufficient to comply with all governmental requirements.

1.09 Acceleration in the Event of Lender Liability for Additional Taxes. In the event of the enactment of any law by the State of Alabama after the date of this mortgage imposing any liability upon Lender, in respect of the indebtedness secured hereby, or changing in any way the laws now in force for the taxation of mortgages, or debts secured by mortgages, or the manner of collection of any such taxes, so as to affect this mortgage, Borrower shall continually thereafter pay any such obligation imposed on Lender thereby (and such will be included in the payments provided for in Section 1.03), and in the event Borrower fails to pay such

obligation or is prohibited by law from making such payment (in the reasonable opinion of counsel for Lender), the whole of the indebtedness secured by this mortgage, together with the interest due thereon, but without any prepayment premium, shall, at the option of Lender, without notice to any party, become immediately due and payable. Anything hereinabove to the contrary notwithstanding, in the event Borrower is prohibited by law from making such payment, Lender agrees to notify Borrower at least ninety (90) days prior to the date Lender elects to exercise its option to accelerate the indebtedness secured by this mortgage. Nothing herein shall be deemed to require Borrower to pay the income taxes of Lender.

1.10 Assignment of Awards, Settlements and Considerations. Notwithstanding that the assignment of claims, awards, damages, settlements and considerations hereinabove referred to in the granting clauses of this mortgage shall be deemed to be self-executing, Borrower shall execute, at Lender's request, and forthwith deliver to Lender, such valid assignments in recordable form if required by Lender, assigning all condemnation claims, awards, damages, settlements and considerations to Lender. All such condemnation claims, awards, damages, settlements and considerations shall be applied toward payment of the indebtedness secured by this mortgage, in such order as Lender may elect in whole or in part, but not in excess of an amount sufficient to pay, satisfy and discharge all indebtedness then secured by this mortgage, including without limitation any advances made by Lender as herein provided then remaining unpaid, whether such indebtedness is then due or not by the terms of the Note or of this mortgage.

1.11 Mortgage as First Lien. It is expressly agreed that any indebtedness at any time secured hereby may be extended, rearranged or renewed, and that any part of the security herein described may be waived or released, without in anywise altering, varying or diminishing the force, effect or lien of this mortgage; and this mortgage shall continue as a first lien on the mortgaged premises and any other rights and interests covered hereby and not expressly released until all sums with interest and charges hereby secured are fully paid; and no other security now existing or hereafter taken to secure the payment of said indebtedness or any part thereof shall in any manner be impaired or affected by the execution of this mortgage; and no security subsequently taken by Lender or other holder or holders of said indebtedness shall in any manner impair or affect the security given by this instrument; and all security for the

payment of said indebtedness or any part thereof shall be taken, considered and held as cumulative.

If the Borrower shall grant any lien of any nature on the property conveyed hereby junior to this mortgage, such junior lien shall be subject to the condition that the time for the payment of the indebtedness hereby secured and the manner and amount of payment thereof, the rate of interest payable thereon, and the benefits of the security afforded hereby and by the Loan Instruments, or any obligation contained in an instrument substituted therefor, may, without the consent of such junior lienholder, and without any obligation to give notice of any kind thereto, be changed, increased, extended, re-extended or suspended on any terms whatsoever for the payment of the indebtedness secured hereby. This provision shall not be deemed to permit Borrower to create further liens on the mortgaged premises without the prior written consent of the holder of the note secured by this mortgage.

1.12 Lender Access. Borrower shall permit Lender and its agents to have reasonable access to the mortgaged premises at all reasonable times subject to the rights of tenants.

1.13 Possessory Interests Subsequent to Foreclosure. Borrower agrees for itself and any and all persons or concerns claiming by, through or under Borrower that if it or any one or more of them shall hold possession of the mortgaged premises or any part thereof subsequent to foreclosure hereunder, it or the parties so holding possession shall become and be considered as tenants at will of the purchaser or purchasers at such foreclosure sale, and any tenant failing or refusing to surrender possession upon demand shall be guilty of forcible detainer and shall be liable to such purchaser or purchasers for reasonable rental of the mortgaged premises, and shall be subject to eviction and removal, forcible or otherwise, with or without process of law, and all damages which may be sustained by any such tenant as a result thereof are hereby expressly waived. Nothing herein shall be deemed to limit the applicability and enforceability of any subordination or non-disturbance and attornment agreements which may be entered into between Lender and tenants.

1.14 Assignment of Leases. The mortgaged premises are improved with buildings being used for garden apartments and other appurtenances which are leased to various tenants. By an agreement executed contemporaneously herewith Borrower has assigned all leases presently existing, or hereafter

made, including without limitation, rentals payable in respect thereof, to Lender as additional security for the repayment of the indebtedness; Borrower agrees not to permit any lease to be made on all of the mortgaged premises, without the prior written consent of Lender as to the form and other financial terms thereof and to permit any material modification, termination or concession, other than concessions given in the ordinary course of business at the beginning of the term of a Lease in order to induce tenants to locate on the mortgaged premises, with respect to any approved or existing lease without the prior written consent of Lender. Borrower agrees not to collect rent under any of said leases for more than each current month in advance and to faithfully perform the covenants imposed on Borrower by the said leases and by said Assignment. Borrower agrees that the default by Borrower, in its performance of the Landlord obligations, with respect to five (5) or more leases within any twelve (12) month period, which default is of a nature which would permit such lessee to terminate lessee's lease, shall constitute a default or an Event of Default under this mortgage, and that a default or Event of Default under the Assignment shall constitute a default or an Event of Default under this mortgage.

1.15 Financial Statements. Borrower shall furnish to Lender within one hundred twenty (120) days after the close of each fiscal year of Borrower a certified audited annual statement of the operation of the mortgaged premises which shall include, without limitation, a detailed statement of income and expenditures. Such statement shall be prepared in accordance with generally accepted accounting principles consistently applied and shall be certified and prepared by a certified public accountant acceptable to Lender. In the event of any default or Event of Default, or if Borrower fails to comply with the provisions of this paragraph, the Lender may conduct its own audit using either its internal auditing staff or, at its option, other certified public accountants and, in either such case, Borrower agrees to cooperate with such auditors and to pay all fees, costs and/or charges imposed by such auditors and any money which Lender shall have so paid or become obligated to pay in connection therewith shall constitute a debt of Borrower to Lender additional to the indebtedness hereby specially secured, shall be secured by this Mortgage, shall bear interest at a rate equal to the Default Rate provided for in the Note from the date paid or incurred, and, at the option of the Lender, shall be immediately due and payable.

1.16 Applicable Environmental Law Covenant. The term "Applicable Environmental Law" shall be defined as any statutory law or case law pertaining to health or the environment, or petroleum products, or oil or hazardous substances including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") as codified at 42 U.S.C. § 9601 et. seq. (1982) and the Hazardous Wastes Management Act of 1978 as codified at Ala. Code §§ 22-30-1 et. seq. (1984 and Supp. 1986); the terms "hazardous substance" and "release" shall have the meanings specified in CERCLA; provided, in the event CERCLA is amended to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment; and provided, to the extent that the laws of the State of Alabama establish a meaning for "hazardous substance" or "release" which is broader than that specified in CERCLA such broader meaning shall apply. Borrower represents and warrants to Lender that the mortgaged premises and Borrower are not in violation of or subject to any existing, pending or threatened investigation or inquiry by any governmental authority or any response costs or remedial obligations under any Applicable Environmental Law and this representation and warranty would continue to be true and correct following disclosure to the applicable governmental authorities of all relevant facts, conditions and circumstances, if any, pertaining to the mortgaged premises; that Borrower has not obtained and is not required to obtain any permits, licenses or similar authorizations to construct, occupy, operate or use any buildings, improvements, fixtures or equipment forming a part of the mortgaged premises by reason of any Applicable Environmental Law; that Borrower has taken all steps necessary to determine and has determined that no petroleum products, oil, or hazardous substances have been disposed of or otherwise released on the mortgaged premises; and that the use which Borrower has made, makes or intends to make of the mortgaged premises will not result in the location on or disposal or other release of any petroleum products, oil, or hazardous substances on or to the mortgaged premises. Borrower hereby agrees to pay any fines, charges, fees, expenses, damages, losses, liabilities, and response costs arising from or pertaining to the application of any such Applicable Environmental Law to the mortgaged premises. Borrower may, however, upon first furnishing to Lender such security as shall be reasonably satisfactory to Lender for the payment of all such fines, charges, fees, expenses, damages, losses, liabilities, and response costs and expenses which may be incurred in pursuing any contest of any such fines, charges, fees, expenses, damages, losses, liabilities and response

costs, in good faith contest, at Borrower's expense, the validity of any such fines, charges, fees, expenses, damages, losses, liabilities or response costs provided that Borrower promptly commences and pursues any such contest with diligence and pays any such fines, charges, fees, expenses, damages, losses, liabilities and response costs promptly upon the final resolution of such contest. Borrower further agrees to indemnify and forever save Lender harmless from any and all judgments, fines, charges, fees, expenses, damages, losses, liabilities, response costs, and attorneys' fees and expenses arising from the application of any such Applicable Environmental Law to the mortgaged premises or Lender; and this indemnity shall survive any repayment or foreclosure of this mortgage or the taking by the Lender of a deed in lieu of foreclosure but only as to any state of facts existing as of or prior to the date of such repayment or foreclosure of this mortgage or taking by the Lender of a deed in lieu of foreclosure. Borrower agrees to notify Lender in the event that any governmental agency or other entity notifies Borrower that it may not be in compliance with any Applicable Environmental Law. Borrower agrees to permit Lender to have access to the mortgaged premises at all reasonable times in order to conduct, at Lender's expense, any tests which Lender deems are necessary to ensure that Borrower and the mortgaged premises are in compliance with all Applicable Environmental Laws.

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1.17 Secondary Financing. Borrower recognizes that any secondary or junior financing placed upon the mortgaged premises could (i) divert funds which would otherwise be used to pay the indebtedness evidenced and secured by the Loan Instruments; (ii) result in acceleration and foreclosure by any such junior encumbrance, which could force the Lender to take measures and incur expenses to protect its security; and (iii) impair Lender's right to accept a deed in lieu of foreclosure from the Borrower, as a foreclosure by the Lender would be necessary to clear the title to the mortgaged premises. Borrower covenants and agrees that, so long as the indebtedness secured by this mortgage is outstanding, there will be no secondary financing, mortgage or encumbrance with respect to the mortgaged premises without Lender's prior written approval. If Borrower should violate this covenant, the Lender shall be entitled to accelerate the indebtedness secured hereby, and, in the event of any default by Borrower in the payment thereof, Lender shall be entitled to exercise the remedies herein provided the Lender in the case of default in the observance of and compliance with the terms and conditions of this mortgage.

1.18 Transfer of Title. Borrower acknowledges that Lender, in determining whether or not to make the loan secured hereby, examined the qualifications and credit-worthiness of the Borrower and its general partners, found them to be acceptable, and relied and will continue to rely upon the same as the means of repayment of the indebtedness evidenced and secured by the Loan Instruments. Borrower also acknowledges that Lender evaluated the background and experience of the Borrower and its general partners in owning and operating property such as the mortgaged premises, found it acceptable and relied and will continue to rely upon the same as the means of maintaining the value of the mortgaged premises. The Borrower acknowledges that it and its general partners are business persons or entities well-experienced in borrowing money and owning and operating property such as the mortgaged premises, were ably represented by licensed attorneys-at-law in the negotiation and documentation of the loan secured hereby and bargained at arm's length, in good faith, and without duress of any kind for all of the terms and conditions of the Loan Instruments, including without limitation this section.

Borrower represents and acknowledges as follows: the original Borrower hereunder is a joint venture governed by the Alabama Partnership Act, (the "Joint Venture") whose sole general partners are Colonial Properties, Inc., an Alabama corporation, and Colonial Properties Management Association, an Alabama general partnership; that the sole owner of the stock of Colonial Properties, Inc. is The Colonial Company, an Alabama corporation; that the sole owners of the Colonial Company, in equal shares, are Robert E. Lowder, James K. Lowder, and Thomas H. Lowder; and that the sole general partners of Colonial Properties Management Association, in equal shares, are Robert E. Lowder, James K. Lowder, and Thomas H. Lowder. Any encumbrance, pledge, transfer or other alienation upon or of the mortgaged premises or any ownership interest in Borrower, or in Colonial Properties, Inc., The Colonial Company, Colonial Properties Management Association or any issuance of additional interests in any of such entities as a result of which Robert E. Lowder, James K. Lowder, and Thomas H. Lowder shall no longer be the sole owners, in equal shares, of the Borrower and such entities shall, at the option of the Lender, constitute an Event of Default hereunder. Notwithstanding the above, so long as Colonial Properties, Inc. and Colonial Properties Management Association together own 100% of the Borrower, their relative percentage ownership of the Borrower may be varied.

Notwithstanding the foregoing, and as an alternative to the permission provided in the paragraph immediately following, the Joint Venture shall have a one time right to transfer no more than a 75% interest in the mortgaged premises to a limited partnership provided that: (i) the Joint Venture shall be the sole managing general partner and shall have and retain during the term of the Loan at least 25% of all interests in such partnership; (ii) the Joint Venture shall be, and continue during the period of the Loan to be, owned, directly or indirectly, entirely by Thomas H., James K. and Robert E. Lowder in equal shares; (iii) the arrangements and agreements between such limited partnership and the Joint Venture as continuing owner of a 25% interest in the mortgaged premises shall be subject to Lender's approval; (iv) Colonial Properties, Inc. shall be, and continue to be during the term of the Loan, the managing and leasing agent for the mortgaged premises pursuant to an agreement to be approved by Lender, such approval to be not unreasonably withheld or delayed, and Colonial Properties, Inc. shall be, and continue to be during the term of the Loan, owned as stated hereinabove; and (v) all documentation pertaining to any of the foregoing shall be satisfactory to Lender, including, without limitation, endorsements to existing or new "all risks" and other insurance policies, UCC Financing Statements and assumption agreement (subject to exculpatory provisions) to be executed by such limited partnership.

As an alternative to the permission provided for in the immediately preceding paragraph, Lender will permit a one time transfer of the mortgaged premises to a joint venture (the "Joint Venture Transferee") which shall own the mortgaged premises provided that: (i) the Joint Venture shall have and retain during the term of the Loan at least a 25% interest in all aspects of such Joint Venture Transferee, including profits, losses, cash flow, capital, tax benefits and proceeds of capital transactions such as sale or refinancing; (ii) the Joint Venture shall, and continue during the period of the Loan to, exercise complete decision-making control with respect to the business of such Joint Venture Transferee; (iii) the Joint Venture shall be, and continue during the period of the Loan to be, owned, directly or indirectly, entirely by Thomas H., James K. and Robert E. Lowder, in equal shares; (iv) Colonial Properties, Inc. shall be, and continue to be during the term of the Loan, the managing and leasing agent for the mortgaged premises; (v) Colonial Properties, Inc. shall be, and continue to be during the term of the Loan, owned as stated hereinabove; and (vi) all documentation pertaining to any of the foregoing shall be satisfactory to Lender, including,

without limitation, endorsements to existing or new "all risks" and other insurance policies, UCC Financing Statements and assumption agreement (subject to exculpatory provisions) to be executed by such Joint Venture Transferee.

In the event that Lender shall give its written approvals to any transfer referred to in the two paragraphs immediately preceeding, (the "Permitted Transfers"), the provisions of this Section 1.18 will continue to apply with respect to any further change in the ownership of all or any part of the mortgaged premises or any interest therein or of the then Borrower and with respect to any further sale, conveyance, encumbrance, pledge, transfer or other alienation upon or of the mortgaged premises or any ownership interests in the then Borrower.

Except for the Permitted Transfers, it is expressly understood and agreed that Lender shall not consent to (i) any transfer of less than the entire mortgaged premises, or (ii) any transfer in any form, including but not limited to a sale and leaseback, which has the effect of creating additional liens on or expense to or charges against the mortgaged premises.

Except for the Permitted Transfers, it is further expressly understood and agreed that Lender may condition its consent to any transfer requiring the consent of the Lender required in this Section 1.18 upon the fulfillment of certain requirements including, but not limited to, the following: (i) that the proposed transferee be acceptable in all respects to Lender in Lender's sole discretion; (ii) that the purchaser specifically assume liability for the outstanding balance of the indebtedness secured hereby and the obligations to be performed under this mortgage to the extent provided for herein and in the other Loan Instruments; (iii) that fees and other payments and/or charges be paid to Lender at the time of the transfer; (iv) that the interest rate payable under the obligation be increased; (v) that the term of the Loan be modified or that other modifications and/or amendments be made to the Loan Instruments; (vi) that a new policy of Lender's title insurance be obtained; (vii) that new financing statements be filed; (viii) that endorsements to existing or new "all risks" and other insurance policies be obtained; and (ix) that this mortgage be appropriately amended, in a manner and to the extent required by Lender, in order to more specifically provide for the continuing application of the provisions of this Section 1.18 to the then Borrower.

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In addition, the adjoining Phase I of the Heatherbrooke Apartments (the "Adjoining Property") shall at all times during the term of this loan be managed by entities which are controlled in their entirety directly or indirectly by Robert E. Lowder, James K. Lowder, and Thomas H. Lowder. In the event of a breach of this provision, Lender shall have the option, in its sole discretion, to require that the Note be prepaid within a period not to exceed four (4) months from the date of such sale of Phase I. Failure of Borrower to so prepay shall constitute an Event of Default hereunder.

Borrower shall at all times engage a professional manager which shall manage both the mortgaged premises and the Adjoining Property and which shall be acceptable to and approved by Lender, such approval not to be unreasonably withheld or delayed, (it being understood that Colonial Properties, Inc., as presently owned, is acceptable as such professional manager).

1.19. Attorneys' Fees and Expenses. The Borrower agrees to pay all reasonable expenditures, including attorneys' fees and expenses, should the Lender:

(a) Be involved in court or administrative proceedings, including, without limitation, foreclosure, probate, bankruptcy, creditors' arrangements, insolvency, condemnation, or housing authority proceedings, or any suits involving the title to the mortgaged premises, or any kind of proceedings involving any Applicable Environmental Laws, to which Lender may be a party by reason of this mortgage or the indebtedness secured hereby or in which the mortgaged premises are involved directly or indirectly; or

(b) Make preparations or take any action for the commencement of any suit for the foreclosure hereof or for the exercise of any remedies under this mortgage or under the Assignment of Leases executed concurrently herewith, irrespective of whether any such suit is actually commenced; or

(c) Enter into negotiations with Borrower or agents of Borrower in connection with the existence of or the curing of any default or Event of Default, the assumption of liability for any of the indebtedness represented by the Note, the transfer of the mortgaged premises in lieu of foreclosure, or the obtaining of Lender's approval of actions taken or proposed to be taken by the Borrower or its agents which approval is required by the terms of this mortgage or the other Loan Instruments; or

(d) Employ an attorney to collect any indebtedness secured by this mortgage and Lender prevails in the lawsuit; or

(e) In the event that an actual threat of litigation has been made, make preparations for the defense of any threatened proceeding which might affect the mortgaged premises or the priority, validity or effectiveness of the lien created or intended to be created hereby, which proceeding may or may not be actually commenced; or

(f) Employ an attorney to settle or remove any cloud on the title to the mortgaged premises that purports to be superior to, inferior to, or in parity with the lien of mortgage in any respect, except for any second mortgage which has been previously approved by Lender.

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All reasonable expenditures (which may be estimated as to items to be expended after sale under power of sale or after judgment) incurred by Lender in connection with any of the foregoing for (i) attorneys' fees and expenses, (ii) appraisers' fees and expenses, (iii) expert evidence, (iv) expenses of procuring title examinations, policies and certificates, (v) court costs, and (vi) all other like and unlike costs which the Lender deems to be reasonably necessary or desirable, shall be paid by the Borrower to Lender, when same becomes due, and if such reasonable expenses are paid by Lender the same shall be secured by the lien of this mortgage in addition to the indebtedness specially secured hereby, and shall bear interest at a rate equal to the Default Rate provided for in the Note from the date such fees and expenses are paid and shall be immediately due and payable. Wherever Borrower has an obligation to pay attorneys' fees and expenses in this mortgage, such obligation shall also include all fees and expenses in connection with an appeal from any judgment. Notwithstanding the foregoing, Borrower shall only be responsible for such fees and expenses if Lender can establish the expenditures were reasonably required in order to protect its security hereunder or were incurred in connection with the collection of the indebtedness secured hereby.

## ARTICLE TWO: DEFAULTS AND REMEDIES

2.01 Events of Default. Whenever used in this mortgage or in the Note which this mortgage secures or in any of the other Loan Instruments the words "default" or "Event of Default" shall mean any one or more of the following events, notwithstanding any action which Lender may have taken to protect its interests under Section 2.02 hereof, and shall entitle Lender to all of the rights and remedies referred to

in this mortgage, including without limitation, Section 2.03, 2.08, and 2.09 hereof:

(a) The failure of Borrower to make any payment required under the Note or under the Loan Instruments within ten (10) days after the due date thereof; or

(b) The failure of Borrower to perform in a full and timely manner any of the other covenants, obligations, agreements, terms or conditions of this mortgage, the Note, or any of the other Loan Instruments within thirty (30) days after written notice from Lender to Borrower specifying such failure; provided that if any such default shall be a default that cannot be cured by the payment of money and cannot with diligence be cured within such thirty day period, and if the cure of such default shall be promptly commenced and prosecuted with diligence, the period within which such default may be cured shall be extended for an additional period of time, not to exceed sixty (60) days, as may be reasonably necessary to cure such default so long as (i) the defaulting party prosecutes such cure with diligence and continuity, and (ii) the Lender shall receive periodic reports with respect thereto; provided, further, however, that Lender shall have no obligation to Borrower to give such notice of a default by the Borrower in the covenant to carry insurance as provided in Section 1.04 hereof, or for an intentional breach of or default in the covenants, agreements or conditions of this mortgage by the Borrower and that there shall be no grace period in the event of any such default; or

(c) The untruth in any material respect of any representation made herein or the breach of any of Borrower's material warranties or representations contained herein or in any of the other Loan Instruments or in the Submissions referred to in the loan commitment dated November 17, 1987, as amended, or in any other document executed in connection with the loan secured hereby; or

(d) Any uninsured loss, damage, destruction or the taking by eminent domain or other condemnation proceedings of any substantial portion of the mortgaged premises or of any part of the mortgaged premises which materially impairs any of the present or then existing uses of the mortgaged premises ("Such Damages"); provided however that Such Damages shall not be an Event of Default if Borrower: (1) notifies Lender of its intent to restore Such Damages; (2) validly bonds the performance of such restoration with a bond satisfactory to Lender as to its issuer, terms, and amount; and (3) in fact restores Such Damages within one

hundred eighty (180) days of the occurrence of Such Damages;  
or

(e) The attachment of a levy or execution upon all or any part of the mortgaged premises which is not dismissed within ninety (90) days; or

(f) The appointment of a trustee or conservator of all or any part of the mortgaged premises or of Borrower's business pertaining to the operation of the mortgaged premises which is not dismissed within ninety (90) days; or

(g) The occurrence of any of the following events:

(i) An admission in writing by Borrower or any partners of Borrower of inability to pay debts as they become due; or

(ii) The institution by Borrower or any partners of Borrower of bankruptcy, reorganization, insolvency or arrangement proceedings of any kind under federal bankruptcy statutes or any similar law (state or federal) now or hereafter existing; or

(iii) The institution against the Borrower or any partners of Borrower of bankruptcy, reorganization, insolvency or arrangement proceedings of any kind under federal bankruptcy statutes or any similar law (state or federal) now or hereafter existing which proceedings are not dismissed within ninety (90) days of filing; or

(iv) The making of a general assignment for the benefit of creditors by the Borrower or any partners of Borrower; or

(v) The issuance of a writ or warrant of attachment or any similar process against all or a major part of the mortgaged premises which is not stayed within ninety (90) days of issuance or the lapse of any such stay; or

(h) Any transfer of interest which is not permitted by Section 1.18 or any other violation of the terms of Section 1.18 herein; or

(i) The occurrence of a default or an Event of Default, not cured within any applicable grace period, under the Note or any of the other Loan Instruments.

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2.02 Performance by Lender of Defaults of Borrower. If Borrower fails to insure the mortgaged premises as hereinabove provided, or to pay all or any part of the taxes or assessments levied, accrued or assessed upon or against the mortgaged premises or the indebtedness secured hereby, or any interest of Lender in either, or fails to pay immediately and discharge any and all liens, debts, and/or charges which might become liens superior to, inferior to, or in parity with, the lien of this mortgage, or to keep the mortgaged premises in good repair, or to perform any other covenant, condition, or agreement of this mortgage, or of any of the other Loan Instruments, Lender may, at its option, insure the mortgaged premises and/or pay said taxes, assessments, debts, liens and/or charges, and/or after first notifying Borrower (unless Holder is in possession) of any such state of disrepair and allowing Borrower a reasonable opportunity (not to exceed fifteen (15) days) to cure same, (except in case of emergency), repair the mortgaged premises and/or perform such other covenant, condition or agreement; and any money which Lender shall have so paid or become obligated to pay in connection therewith shall constitute a debt of Borrower to Mortgagee additional to the indebtedness hereby specially secured, shall be secured by this mortgage, shall bear interest at a rate equal to the Default Rate provided for in the Note from date paid or incurred, and, at the option of the Lender, shall be immediately due and payable.

2.03 Acceleration of Maturity. If a default or Event of Default should occur hereunder or under the other Loan Instruments, then and in that event and notwithstanding any other action Lender may have taken to protect its interests pursuant to Section 2.02, the whole of said indebtedness, with interest thereon, and all other sums secured hereby, including the prepayment premium in the Note, shall, at the option of the then holder of said indebtedness, be and become immediately due and payable without notice or demand, time being of the essence.

2.04 Lender's Right to Collect Rent. Subject to any grace periods contained in Section 2.01 of this mortgage, if a default or Event of Default shall occur in the performance of any of the covenants, agreements or conditions hereof or of any of the other Loan Instruments, or if Borrower shall default in the payment of any of the indebtedness hereby secured, Lender may, in addition to any other remedies available at law or in equity to Lender, proceed to collect the rent, income and profits from the mortgaged premises, either with or without the appointment of a receiver. Any rents, income and profits collected by Lender prior to

foreclosure of this mortgage, less the reasonable cost of collecting same, including any real estate commission or attorneys' fees and expenses incurred, shall be credited to such portions of all the indebtedness secured hereby and in such order as Lender may determine.

2.05 Right of Lender to Enter and Take Possession. In the event of any default or Event of Default, irrespective of whether (i) the right to foreclose the mortgage has accrued to Lender, (ii) the entire debt has then been accelerated or (iii) foreclosure proceedings have been commenced, Lender may, without notice to or demand upon Borrower, take possession of the mortgaged premises. While in possession of the mortgaged premises, Lender shall have the following rights and powers:

(i) To collect the rents and manage, lease, alter and repair the mortgaged premises, cancel or modify existing leases, obtain insurance and in general have all powers and rights customarily incident to absolute ownership; and

(ii) To pay out of the rents so collected any management and repair charges, taxes, insurance, commissions, fees and all other expenses and, after creating reasonable reserves, apply the balance (if any) on account of the indebtedness secured hereby in such order as the Lender may determine.

Lender shall incur no liability for, nor shall Mortgagor assert any claim or set-off as a result of, any action taken while Lender is in possession of the mortgaged premises, except only for Lender's own gross negligence or willful misconduct. In the event no foreclosure proceedings are commenced, Lender may remain in possession as long as there exists a default or Event of Default.

2.06 Lender's Power of Enforcement. If a default or an Event of Default should occur hereunder or under any of the other Loan Instruments the Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or any other appropriate proceeding or remedy (i) to enforce payment of the Note or the performance of any term thereof or any other right, (ii) to foreclose this mortgage and to sell, as an entirety or in separate lots or parcels, the mortgaged premises, as provided by law, and (iii) to pursue any other remedy available to it, all as the Lender shall deem most effectual for such purposes. The Lender shall take action either by such proceedings or by the exercise of

its powers with respect to entry or taking possession, as the Lender may determine.

2.07 Receiver. Following an Event of Default, either before or after the foreclosure sale, a receiver may be appointed by the court without notice, without regard to the solvency or insolvency of Borrower, the then value of the mortgaged premises or whether they are then occupied as a homestead. The receiver shall have the power to collect the rents and income from the mortgaged premises during the pendency of the foreclosure sale and, in the case of a sale and a deficiency, during the full statutory period of redemption (if any), whether there be redemption or not. The receiver shall have all other powers for the protection, possession, management and operation of the mortgaged premises which an absolute owner would have, but the net rents in the hands of the receiver shall be applied to all the indebtedness secured hereby in such order as the Lender shall determine and/or to such expenses of the receivership or foreclosure suit as the court may direct.

2.08 Power of Sale. If a default or Event of Default should occur hereunder, the holder of the debt hereby secured shall have the right to enter upon and take possession of the mortgaged premises and after, or without, taking such possession of the same, sell the mortgaged premises at public outcry, in front of the courthouse door of the county wherein the mortgaged premises are located, to the highest bidder for cash, either in person or by auctioneer, after first giving notice of the time, place and terms of such sale by publication once a week for three (3) successive weeks in some newspaper published in said county, and, upon the payment of the purchase money, the Lender or any person conducting said sale for it is authorized and empowered to execute to the purchaser at said sale a deed to the mortgaged premises so purchased in the name and on behalf of the Borrower, and the certificate of the holder of the mortgage indebtedness appointing said auctioneer to make such sale, shall be prima facie evidence of his authority in the premises. Alternatively, the equity of redemption from this mortgage may be foreclosed by suit in any court of competent jurisdiction as now provided by law in the case of past due mortgages. The Lender, or the then holder of the indebtedness hereby secured, may bid at any such sale and become the purchaser of the mortgaged premises if the highest bidder therefor.

2.09 Application of Foreclosure Proceeds. The proceeds of any such sale referred to in Section 2.08 shall be applied: (a) to the expenses incurred in making the sale

and in all prior efforts to effect collection of the indebtedness secured hereby, including reasonable attorneys' fees and expenses for such services as may be, or have been, performed in any one or more of (i) the foreclosure of this mortgage, or (ii) the collection of said indebtedness, including any sums due hereunder, the Loan Instruments, or (iii) the pursuit of any efforts theretofore directed to that end, including, but without limitation to, the defense of any proceedings instituted by the Borrower, or anyone liable for said indebtedness, or interested in the mortgaged premises, to prevent or delay, by any means, the exercise of said power of sale or the foreclosure of this mortgage; (b) to the payment of whatever sum or sums Mortgagee may have paid out or become liable to pay in accordance with the provisions of this mortgage, together with interest thereon at the Default Rate provided in the Note; (c) to the payment and satisfaction of said indebtedness and interest thereon to the day of sale; in such order of application to the items of indebtedness referred to in clauses (b) and (c) as the Lender shall determine; and (d) the balance, if any, shall be paid over to Borrower, or Borrower's successors or assigns. Borrower hereby expressly waives, to the extent permitted by law, all rights it may have under Alabama Code Sections 35-11-2 through 35-11-4, or any other applicable law, to require marshalling of assets by Lender or to require Lender, upon a foreclosure, to first resort to the sale of any portion of the mortgaged premises which might have been retained by Borrower before foreclosing and selling any other portion as may be conveyed by Borrower subject to this mortgage. In any event, the purchaser under any foreclosure sale, as provided herein, shall be under no obligation to see to the proper application of the purchase money.

2.10 Delay or Omission No Waiver. No delay or omission of Lender to exercise any option herein given to declare the maturity of the indebtedness hereby secured shall be taken or construed as a waiver of its right to exercise such option or to declare such maturity by reason of any past, present or future default on the part of Borrower; and the procurement of insurance or the payment of taxes or other liens, debts or charges by Lender, or the making of any repairs or the performance of any other agreement, condition or covenant of this mortgage shall not be taken or construed as a waiver of its right to any remedies to which Lender may be entitled including, without limitation to, the right to declare the maturity of the indebtedness hereby secured by reason of the failure of Borrower to procure such insurance or to pay such taxes, debts, liens or charges or to perform any such other obligations.

2.11 Remedies Cumulative. No right, power, or remedy conferred upon or reserved to the Lender by this mortgage is intended to be exclusive of any other right, power or remedy given hereunder or under the other Loan Documents or now or hereafter existing at law or in equity or by statute, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or in any of the other Loan Instruments or now or hereafter existing at law or in equity or by statute.

**ARTICLE THREE: RIGHTS OF LENDER UNDER THE**  
**UNIFORM COMMERCIAL CODE OF ALABAMA**

Borrower and Lender are respectively the Debtor and Secured Party in certain Uniform Commercial Code Financing Statements covering personal property referred to or described herein; and it is agreed that:

(a) This instrument shall also constitute a Security Agreement under the Uniform Commercial Code as in force in the State of Alabama.

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(b) In order to further secure the payment of the indebtedness described herein and the performance of all the obligations, agreements, terms and conditions of this mortgage and of the Note and any of the other Loan Instruments, the Borrower hereby grants to Lender a security interest in all goods, equipment, furnishings, fixtures, furniture, chattels and personal property of whatever nature owned by Borrower now or hereafter attached or affixed to or used in and about the building or buildings now or hereafter erected or placed on the property and intended to be attached thereto or installed therein, together with all accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing, all of which are hereinafter collectively called the "Collateral," and together with all proceeds of the Collateral.

(c) Borrower represents that it is the owner of the Collateral and has good right and authority to grant a security interest in the Collateral, that there is no presently outstanding adverse lien, security interest or encumbrance in or on the Collateral or its proceeds (except for the security interest granted in this mortgage), and that there is no financing statement covering the Collateral or its proceeds on file in any public office; and Borrower agrees not to permit any adverse lien, security interest, encumbrance, or financing statement to be outstanding with

respect to the Collateral (except for the security interest granted in this mortgage).

(d) So long as the indebtedness secured hereby or any part thereof remains unpaid, Borrower covenants and agrees with the Lender as follows:

(i) Borrower shall account fully and faithfully for and, if the Lender so elects, shall promptly pay or turn over to the Lender the proceeds in whatever form received from the disposition in any manner of any of the Collateral. Borrower shall at all times keep any proceeds from the Collateral separate and distinct from other property of Borrower and shall keep accurate and complete records of such proceeds.

(ii) Borrower shall sign and execute alone or with the Lender any financing statement or other document or procure any document, and pay all reasonably related costs, deemed advisable by the Lender to protect the security interest hereunder against the rights or interests of third persons.

(iii) The Collateral will be used in the business of Borrower and shall remain in Borrower's possession or control at all times at Borrower's risk of loss and shall be located and maintained on the property described herein except for its temporary removal in connection with its ordinary use or unless Borrower notifies the Lender in writing and the Lender consents in writing in advance of its removal to another location.

(iv) Borrower may sell or dispose of Collateral upon replacing the same by, or substituting for the same, other Collateral of at least equal value and serviceability to the mortgaged premises, which shall forthwith become, without further action, subject to the lien of this Mortgage.

(e) Upon the occurrence of any default or Event of Default under this mortgage or under the Note or under any of the other Loan Instruments, Lender may, with respect to the Collateral, exercise its rights of enforcement under the Uniform Commercial Code; and, in conjunction with, in addition to, or in substitution for those rights and remedies and all other rights and remedies provided under this instrument:

(i) Lender may enter upon any premises of the Borrower to take possession of, assemble and collect the

Collateral; and (ii) Lender may require Borrower to assemble the Collateral and make it available at a place the Lender designates which is mutually convenient to allow the Lender to take possession or dispose of the Collateral; and

(ii) Lender may remedy any default in any reasonable manner without waiving the default remedied and without waiving any other prior or subsequent default; and

(iii) Written notice mailed to Borrower as provided herein five (5) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; and

(iv) Any sale of all or any part of the Collateral shall be deemed to have been conducted in a commercially reasonable manner if held contemporaneously with, or included with, the sale of real property described herein under power of sale as provided in this mortgage; and

(v) In the event of a sale, whether made by Mortgagee under the terms hereof, or under judgment of a court, the Collateral and all other property constituting the premises may, at the option of the Lender, be sold as a whole or in part; and

(vi) It shall not be necessary that the Lender take possession of the Collateral or any part thereof prior to the time that any sale pursuant to the provisions of this paragraph is conducted and it shall not be necessary that the Collateral or any part thereof be present at the location of such sale.

(f) The Collateral is intended to be and shall be subject to all the other provisions of this Mortgage and the other Loan Instruments, and the terms and provisions of this paragraph shall not in any way limit any rights or remedies of the Lender with respect to the Collateral under other provisions of this Mortgage and the other Loan Instruments.

#### ARTICLE FOUR: MISCELLANEOUS

4.01 Late Charges. In the event that any payment due under this mortgage shall become overdue for a period in excess of five (5) days, a late charge of four cents (\$0.04) for each dollar (\$1.00) of principal and interest so overdue may be charged by the Mortgagee for the purpose of defraying the expenses incident to handling such delinquent payment.

4.02 Limitation of Recourse. Except as otherwise provided in this Section 4.02 and in any other substantially identical provision in any of the other Loan Instruments, and except for the obligations of the Guarantors pursuant to the terms of the Guaranty Agreement, Lender waives any right to any money judgment against Borrower, whether by an action brought upon the Note as secured hereby or by an action brought for a deficiency judgment against Borrower or any partner thereof, or any successor of Borrower in title to the mortgaged premises, and the extent of liability on the part of said Borrower or its successor in title is limited to the mortgaged premises and other security granted to Lender under the Loan Instruments, including without limitation, the Insurance Proceeds and the Condemnation Proceeds, Lender agreeing to look solely to such mortgaged premises and security, policies, proceeds and awards in satisfaction of the indebtedness evidenced by the Note in the case of a default or an Event of Default herein or therein, or in any of the other Loan Instruments, except that Borrower and its successor in title shall be subject to personal liability (i) to the extent that the rents, issues and profits of the mortgaged premises are received by such party after a breach of condition or covenant in this mortgage or any of the other Loan Instruments and are not applied to the indebtedness evidenced by the Note or the normal operating expenses of the mortgaged premises; (ii) to the extent that the rents, issues and profits of the mortgaged premises are received by such party after acceleration of the maturity of the indebtedness evidenced by the Note pursuant to a right on the part of Lender so to accelerate the same, and are not applied to the indebtedness evidenced by the Note or to the normal operating expenses of the mortgaged premises; (iii) to the extent that rents from the mortgaged premises are collected for more than each current month in advance or to the extent payments in the nature of security for the performance of any of lessee's obligations under any lease of all or a part of the mortgaged premises are held, at the time of the occurrence of a breach of condition or covenant referred to in clause (i) above or acceleration referred to in clause (ii) above; (iv) to the extent that Lender may suffer any damages as a result of any material misrepresentation made herein or in any of the other Loan Instruments or any other document executed in connection with the loan secured hereby; (v) to the extent that any Condemnation Proceeds or Insurance Proceeds shall be misapplied; and (vi) to the extent that any fines, charges, fees, expenses, damages, losses, liabilities or response costs are incurred by Borrower or Lender arising from or pertaining to the application or claims of application of any Applicable Environmental Laws

(as herein defined), to either of them or to the mortgaged premises. Borrower's liabilities under this paragraph shall survive repayment of the loan secured hereby or discharge of this mortgage by foreclosure or otherwise but only as to any state of facts existing as of or prior to the date of such repayment or discharge by foreclosure or otherwise. In addition, nothing contained in this paragraph shall in any manner or way constitute or be deemed to be a release or impairment or affect the obligations and personal liability of Robert E. Lowder, James K. Lowder, or Thomas H. Lowder under the Guaranty Agreement.

4.03 Notices. Whenever notice may appropriately be given under this mortgage, such notice: (i) shall be in writing; (ii) shall be posted by express mail or by registered or certified mail, postage prepaid, return receipt requested; (iii) when posted by express mail, shall be considered received on the business day following posting or when posted by registered or certified mail shall be considered received three business days following posting; and (iv) such notice shall always be treated as having adequately been given:

BOOK 172 PAGE 858  
(a) When intended for the Borrower, upon deposit in the mail, addressed to the Borrower at the address given in this mortgage as the Borrower's address (or to such other address of which it shall have sent the Lenders, by express mail, or by registered or certified mail, notice of the desire of the Borrower to have notices so sent);

A notice so sent to the Borrower shall have been adequately given, notwithstanding notice to the Lender that title to the equity of redemption of the mortgaged premises covered by the Loan Instruments has been transferred, except that, in the event of a change in the ownership of the mortgaged premises which has been consented to by the Lender, such notice shall be sufficient notice if sent to the address specified in the notice to the Lender of the change in such ownership; or

(b) When intended for the Lender, upon deposit in the mail of written notice sent to the mailing address of which it shall have sent the Borrower by express mail or by registered or certified mail except that the Borrower agrees that the notice address of Lender is that set out at the beginning of this mortgage: Attention: Real Estate Investments.

4.04 Headings, etc. The headings of the Articles and sections of this mortgage are for convenience of reference

only, are not to be considered a part hereof, and shall not limit or otherwise affect any of the terms hereof. Singular or plural words used herein to designate the Borrower shall be construed to refer to the maker or makers of this mortgage, whether one or more persons or a corporation, and all covenants and agreements herein contained shall bind the heirs, executors, administrators of Borrower, and their successors and assigns in title, and every option, right and privilege herein reserved or secured to Lender shall inure to the benefit of its successors and assigns. All references herein to "Borrower" and "Lender" shall include all such respective heirs, executors, administrators, and successors and assigns in title of Borrower and successors and assigns of Lender.

4.05 Severability Rights and Remedies Cumulative. The unenforceability or invalidity of any provision or provisions of this mortgage shall not render any other provision or provisions herein contained enforceable or invalid. If any application of any term, restriction or covenant to any person or circumstance is deemed unenforceable or invalid, the application of such term, restriction, or covenant to any other person or circumstances shall remain unaffected to the extent permitted by law. All rights or remedies of Lender hereunder are cumulative and not alternative, and are in addition to those provided by law.

4.06 Alabama Law Governs. This mortgage shall be governed by and construed in accordance with the laws of the State of Alabama.

IN WITNESS WHEREOF, Borrower has caused this instrument to be executed for and in its name by its duly authorized general partners on this, the 26<sup>TH</sup> day of FEBRUARY, 1988.

EQUITY PARTNERS JOINT VENTURE,  
a joint venture formed pursuant to  
the Alabama Partnership Act

By: COLONIAL PROPERTIES MANAGEMENT  
ASSOCIATION

By: 

Robert E. Lowder

  
James K. Lowder

  
Thomas H. Lowder

(Its General Partners)

By: COLONIAL PROPERTIES, INC.

By:   
Its President

ATTEST:

  
Its Secretary

ASSR

(Constituting all its general partners)

STATE OF ALABAMA     )  
JEFFERSON COUNTY    )

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that Robert E. Lowder, James K. Lowder, and Thomas H. Lowder, whose names as general partners of Colonial Properties Management Association, an Alabama general partnership, as general partner of Equity Partners Joint Venture, an Alabama general partnership, are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they as such general partners of said General Partnership and with full authority, executed the same voluntarily for and as the act of said general partnership, acting in its capacity as General Partner of said general partnership, and for and as the act of said general partnership.

Given under my hand and official seal this 24<sup>th</sup> day of February, 1988.

  
Notary Public

My Commission Expires MY COMMISSION EXPIRES APRIL 30, 1991

STATE OF ALABAMA     )  
JEFFERSON COUNTY    )

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that Thomas H. Louder, whose name as President of Colonial Properties, Inc., as general partner of Equity Partners Joint Venture, an Alabama general partnership, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation, acting in its capacity as general partner of said general partnership and for and as the act of said general partnership.

Given under my hand and official seal this 24<sup>th</sup> day of February, 1988.

Cynthia J. Franks  
Notary Public

My Commission Expires ~~MY COMMISSION~~ EXPIRES APRIL 30, 1991

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EXHIBIT "A"

HEATHERBROOKE, PHASE II

MORTGAGED PREMISES

A parcel of land situated in the Northwest 1/4 of the Northeast 1/4 of Section 36, Township 18 South, Range 2 West, Shelby County, Alabama, being more particularly described as follows:

Begin at the Southeast corner of the Northwest 1/4 of the Northeast 1/4 of Section 36, Township 18 South, Range 2 West, Shelby County, Alabama, and from the East line of said 1/4-1/4 section turn an angle to the left of 68 degrees, 16' 22" and run in a Northwesterly direction a distance of 104.15 feet to a point; thence turn an interior angle of 203 degrees, 16' 04" and run to the left in a Westerly direction a distance of 66.00 feet to a point; thence turn an interior angle of 90 degrees, 00' 00" and run to the right in a Northerly direction a distance of 70.00 feet to a point; thence turn an interior angle of 270 degrees, 00' 00" and run to the left in a Westerly direction a distance of 7.5 feet to a point; thence turn an interior angle of 90 degrees, 00' 00" and run to the right in a Northerly direction a distance of 6.0 feet to a point; thence turn an interior angle of 90 degrees, 00' 00" and run to the right in a Easterly direction a distance of 7.5 feet to a point; thence turn an interior angle of 270 degrees, 00' 00" and run to the left in a Northerly direction a distance of 58.00 feet to a point; thence turn an interior angle of 270 degrees, 00' 00" and run to the left in a Westerly direction a distance of 10.0 feet to a point; thence turn an interior angle of 270 degrees, 00' 00" and run to the right in a Northerly direction a distance of 10.70 feet to a point; thence turn an interior angle of 253 degrees, 37' 30" and run to the left in a Westerly direction a distance of 327.05 feet to a point; thence turn an interior angle of 103 degrees, 30' 15" and run to the right in a Northerly direction a distance of 230.00 feet to a point; thence turn an interior angle of 226 degrees, 21' 56" and run to the left in a Northwesterly direction a distance of 251.21 feet to a point; thence turn an interior angle of 94 degrees, 29' 04" and run to the right in a Northeasterly direction a distance of 142.56 feet to a point; thence turn an interior angle of 186 degrees, 55' 00" and run to the left in a Northeasterly direction a distance of 230.34 feet to a point; thence turn an interior angle of 198 degrees, 31' 00" and run to the right in a Northeasterly direction a distance of 132.54 feet to a point; thence turn an interior angle of 223 degrees, 56' 00" and run to the left in a Northwesterly direction a distance of 94.44 feet to a point; thence turn an interior angle of 231 degrees, 03' 00" and run to the left in a Northwesterly direction a distance of 65.07 feet to a point; thence turn an interior angle of 185 degrees 11' 00" and run to the left in a Westerly direction a distance of 77.06 feet to a point; thence turn an interior angle of 162 degrees 35' 00" and run to the right in a Northwesterly direction a distance of 107.00 feet to a point; thence turn an interior angle of 70 degrees 49' 13" and run to the right in a Northeasterly direction a distance of 164.21 feet to a point; thence turn an interior angle of 101 degrees 45' 33" and run to the right in a Southeasterly direction a distance of 676.55 feet to a point on the East line of the Northwest 1/4 of the Northeast 1/4 of Section 36; thence turn an interior angle of 119 degrees 43' 03" and run to the right in a Southerly direction along the East line of said 1/4-1/4 section a distance of 1029.58 feet to the point of beginning.

Together with all rights, title and interest of Borrower in and to those certain rights contained in those certain Easements recorded in:

Real Volume 140, page 380, *and amended by Real Volume 172, page 787,*  
Real Volume 164, page 433,  
Real Volume 140, page 401 and amended by Real Volume 172, page 801,  
Real Volume 164, page 382 and amended by Real Volume 172, page 807,  
Real Volume 164, page 375 and amended by Real Volume       , page       ,  
Real Volume 164, page 408, and amended by Real Volume       , page       ,

in the Probate Office of Shelby County, Alabama.

EXHIBIT "B"  
HEATHERBROOKE  
LIST OF ENCUMBRANCES

1. Advalorem taxes for the year 1988 which said taxes are not due and payable until October 1, 1988.
2. Mineral and mining rights and rights incident thereto as recorded in Volume 113, page 148 in the Probate Office of Shelby County, Alabama.
3. Easement for ingress and egress as recorded in Real 140, page 367 and Real 164, page 465 in the Probate Office of Shelby County, Alabama, as amended by Real Volume 172, page 794.
4. Sanitary sewer easement as recorded in Real 140, page 391 and Real 164, page 398 in the Probate Office of Shelby County, Alabama.
5. General Utilities Easement as recorded in Real 172, page 812 in the Probate Office of Shelby County, Alabama.
6. Grant of Easements as recorded in Real 172, page 821 in the Probate Office of Shelby County, Alabama.

STATE OF ALA. SHELBY  
I CERTIFY THIS  
INSTRUMENT WAS FILED

88 FEB 26 AM 9:48

*Thomas D. Shoultz, Jr.*  
JUDGE OF PROBATE

1. Deed Tax \$ \_\_\_\_\_  
2. Mig. Tax \$100.00  
3. Recording Fee 87.50  
4. Indexing Fee 6.00  
TOTAL \$188.50

Heatherbrooke

1652

ASSIGNMENT OF LEASES AND RENTS

STATE OF ALABAMA )  
SHELBY COUNTY )

THIS ASSIGNMENT OF LEASES AND RENTS, dated the 26th day of February, 1988, by and between EQUITY PARTNERS JOINT VENTURE, a joint venture formed pursuant to the Alabama Partnership Act (herein referred to as "Borrower") with a mailing address at c/o Colonial Properties, Inc., No. 2 Perimeter Park South, Suite 450, Birmingham, Alabama 35243 and SMA LIFE ASSURANCE COMPANY, a Delaware corporation duly organized and existing according to law, with its principal office (and mailing address) at 440 Lincoln Street, Worcester, Massachusetts 01605 ("Lender").

I.

Recitals

1.1 Description of Note. Borrower has contemporaneously herewith executed and delivered to Lender a note (the "Note") in the principal sum of Three Million Four Hundred Thousand Dollars (\$3,400,000) payable as provided in the Note and with a final payment of all outstanding indebtedness after a period of approximately six (6) years. The Note contains certain prohibitions with respect to prepayment and requires a prepayment premium in amounts stated in the Note on certain prepayments (including prepayments as a result of foreclosure and otherwise).

1.2 Description of Loan Instruments. The payment of the Note is secured by this Assignment of Leases and Rents (this "Assignment"), by a Mortgage and Security Agreement (the "Mortgage"), which encumbers certain property (the "mortgaged premises"), more particularly described therein and in Exhibit A which is attached hereto, by a Guaranty Agreement executed by Robert E. Lowder, James K. Lowder, and Thomas H. Lowder, (the "Guaranty Agreement") and certain other security instruments executed of even date herewith. The Note, the Mortgage, the Assignment, the Guaranty Agreement, together with any amendments, modifications and replacements thereof, and all other instruments now or hereafter evidencing or securing the Loan, and all other certificates, documents, and instruments now or hereafter executed by Borrower in favor of Lender, are collectively referred to herein as the "Loan Instruments."

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*Land Title*