

STATE OF ALABAMA §  
SHELBY COUNTY §

1343

THIS IS A FUTURE  
ADVANCE MORTGAGE.

MORTGAGE, SECURITY AGREEMENT  
AND ASSIGNMENT OF RENTS AND LEASES

This Mortgage, Security Agreement and Assignment of Rents and Leases (hereinafter called this "Mortgage") is made and entered into on December 14, 1988, by and between KEN LOKEY HOMES, INC., a Texas corporation (hereinafter called the "Mortgagor"), whose address is 1800 Bering Drive, Suite 220, Houston, Texas 77057 and SOUTHMARK MORTGAGE CORPORATION OF AMERICA, a Nevada corporation (hereinafter called the "Mortgagee"), whose address is 6800 West Loop South, East Building, 3rd Floor, Bellaire, Texas 77401.

Recitals

A. The Mortgagor is or hereinafter shall be justly indebted to the Mortgagee in the principal sum of NINETY-SIX THOUSAND AND NO/100 DOLLARS (\$96,000.00) as evidenced by a promissory note (the "Note") of even date herewith, which Note bears interest as provided therein and is payable in full on December 14, 1989.

B. This is a FUTURE ADVANCE MORTGAGE, and the loan evidenced by the Note (the "Loan") is to be advanced by the Mortgagee to the Mortgagor pursuant to a Construction Loan Agreement dated November 18, 1988 (as same may be amended, the "Construction Loan Agreement") for the construction of Improvements (as defined in the Construction Loan Agreement) to be located on the Real Estate hereinafter described.

C. The Mortgagor, in order to secure the Note, and in order to induce the Mortgagee to extend credit to the Mortgagor under the Construction Loan Agreement on the strength of the security provided by this Mortgage and convey the property herein described to the Mortgagee as hereinafter set forth, has agreed to execute and deliver this Mortgage to the Mortgagee.

Agreement

NOW, THEREFORE, in consideration of the premises, and in order to induce the Mortgagee to extend credit from time to time to the Mortgagor under the Construction Loan Agreement, the Mortgagor hereby agrees with the Mortgagee:


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I. DEBT, GRANTING CLAUSES, ASSIGNMENTS, ETC.

SECTION 1.01. Debt. This Mortgage is given to secure and shall secure the following (hereinafter sometimes collectively referred to as the "Debt"):

(a) the payment of all advances against the Loan now or hereafter evidenced by the Note, and all interest thereon and any and every extension, renewal, modification and amendment thereof;

INITIAL:

 (b) ~~the payment of any and all other fees, charges and other sums now or hereafter becoming due and payable by the Mortgagor to the Mortgagee under the terms of the Construction Loan Agreement, this Mortgage or the other Loan Documents (as hereinafter defined);~~

(c) the payment of any and all sums now or hereafter becoming due and payable by the Mortgagor under the terms of this Mortgage, including, but not limited to advancements made by the Mortgagee pursuant to the terms and conditions of this Mortgage;

(d) the full and complete performance of and compliance with all of the stipulations, covenants, agreements, representations, warranties and conditions contained in this Mortgage; and

(e) other indebtedness of the Mortgagor to the Mortgagee whether now existing or hereinafter incurred in an amount not to exceed \$25,000.00.

SECTION 1.02. Granting Clauses. As security for the Debt the Mortgagor does hereby grant, bargain, sell, assign and convey unto the Mortgagee, its successors and assigns, the property and interests in property described in the following Granting Clauses (a) through (h), both inclusive, and does grant to the Mortgagee, its successors and assigns, a security interest in said property and interests in property:

(a) The real estate described on Exhibit A attached hereto and made a part hereof (the "Real Estate") and all improvements, structures, buildings and fixtures now or hereafter situated thereon (the "Improvements"), which Real Estate is located in Shelby County, Alabama.

(b) All minerals, oil, gas and other hydrocarbon substances, development rights, air rights, water, water rights, water stock, permits, licenses, rights-of-way, contracts, privileges, immunities, estates, tenements, hereditaments and appurtenances now or hereafter belonging or pertaining to, or affecting, the Real Estate or the Improvements, including without limitation all rights of the Mortgagor in and to any streets, roads and public places, easements and rights of way.

(c) (i) All leases and subleases, written or oral, and all agreements for use or occupancy of any portion of the Real Estate or the Improvements with respect to which the Mortgagor is the lessor or

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sublessor, including any existing leases (the "Existing Leases"), any and all extensions and renewals of said leases, subleases and agreements and any and all further leases or agreements, now existing or hereafter made, including subleases thereunder, upon or covering the use or occupancy of all or any part of the Real Estate or the Improvements, all such leases, subleases, agreements and tenancies heretofore mentioned (including but not limited to the Existing Leases) being hereinafter collectively referred to as the "Leases";

(ii) any and all guaranties of the lessee's and any sublessee's performance under any of the Leases;

(iii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or to which the Mortgagor may now or shall hereafter (including during the period of redemption, if any) become entitled or may demand or claim, arising or issuing from or out of the Leases or from or out of the Real Estate or any of the Improvements, or any part thereof, including but not limited to minimum rents, additional rents, percentage rents, common area maintenance charges, parking charges, tax and insurance premium contributions, and liquidated damages following default, the premium payable by any lessee upon the exercise of any cancellation privilege provided for in any of the Leases, and all proceeds payable under any policy of insurance covering loss of rents resulting from untenability caused by destruction or damage to the Real Estate or the Improvements, together with any and all rights and claims of any kind that the Mortgagor may have against any such lessee under the Leases or against any subtenants or occupants of the Real Estate or any of the Improvements, all such moneys, rights and claims in this paragraph described being hereinafter referred to as the "Rents"; provided, however, so long as no Event of Default has occurred, the Mortgagor shall have the right under a license granted hereby to collect, receive and retain the Rents, but no Rents shall be collected in advance of the due date thereof; and

(iv) any award, dividend or other payment made hereafter to the Mortgagor in any court procedure involving any of the lessees under the Leases in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by lessees in lieu of rent. The Mortgagor hereby appoints the Mortgagee as the Mortgagor's irrevocable attorney in fact to appear in any action and/or to collect any such award, dividend or other payment.

(d) All building materials, equipment, tools, apparatus, fittings and other personal property and fixtures, both tangible and intangible (including replacements, substitutions and after-acquired property), of every kind or character now owned or hereafter acquired by the Mortgagor for the purpose of, or used or useful in connection with, the Improvements, or for which the proceeds of the Loan have been or are to be advanced, wherever the same may be located, including, without limitation, all lumber and lumber products, bricks, stones, building blocks, sand, cement, roofing materials, paint, doors, windows, window coverings, carpets, hardware, nails, wires, wiring, engines, boilers,

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furnaces, tanks, motors, generators, switchboards, elevators, escalators, plumbing, plumbing fixtures, air-conditioning and heating equipment and appliances, electrical and gas equipment and appliances, facilities used to provide utility services (including sewer or septic facilities), refrigeration, ventilation, laundry, drying, dishwashing, garbage disposal, recreation or other services to the Real Estate or the Improvements, stoves, refrigerators, dishwashers, hot water heaters, garbage disposers, trash compactors, laundry equipment and appliances, other appliances, carpets, rugs, floor coverings, window treatments, lighting, fixtures, pipes, piping, decorative fixtures, recreation facilities (such as tennis courts, golf courses and swimming pools) and all other building materials, equipment, fixtures and amenities of every kind and character used or useful in connection with the Real Estate or any of the Improvements.

(e) All proceeds and claims arising on account of any damage to or taking of the Real Estate or any of the Improvements or any part thereof, and all causes of action and recoveries for any loss or diminution in the value of the Real Estate or any of the Improvements.

(f) All general intangibles relating to the development or use of the Real Estate or any of the Improvements, or the management and operation of any business thereon, including but not limited to all governmental permits relating to construction, renovation or operation of the Real Estate or any of the Improvements, all names under or by which the Real Estate or any of the Improvements may at any time be operated or known, and all rights to carry on business under any such names or any variant thereof, and all trademarks and goodwill in any way relating to the Real Estate and any of the Improvements.

(g) All leasing, management and other contracts and agreements related to the use and operation of the Real Estate or any of the Improvements, or any part thereof.

(h) All plans and specifications for the Improvements; all contracts and subcontracts relating to the Improvements, all deposits, funds, accounts, contract rights, instruments, documents, general intangibles (including trademarks, trade names and symbols used in connection therewith), and notes or chattel paper arising from or by virtue of any transactions related to the Improvements; all proceeds arising from or by virtue of the sale, lease or other disposition of any of the real or personal property described herein;

(i) All proceeds (including insurance proceeds) of the foregoing, or of any part thereof, and any and all other real or personal property of every kind and nature from time to time hereafter by delivery or by writing of any kind conveyed, mortgaged, pledged, assigned or transferred to Mortgagee, or in which the Mortgagee is granted a security interest, as and for additional security hereunder by the Mortgagor, or by anyone on behalf of, or with the written consent of, the Mortgagor.

(All of the property and interests in property described in the foregoing Granting Clauses (a) through (i), both inclusive, of this Section 1.02 are herein sometimes collectively called the "Property". The personal property described in Granting Clause (d) of this Section 1.02 and all other personal property covered by this Mortgage is herein sometimes collectively called the "Personal Property".)

SUBJECT, HOWEVER, to the liens, easements, rights-of-way and other encumbrances described on Exhibit B hereto ("Permitted Encumbrances").

TO HAVE AND TO HOLD the Property, together with all the rights, privileges and appurtenances thereunto belonging, unto the Mortgagee, its successors and assigns forever.

SECTION 1.03. Assignment of Insurance Policies, etc. As further security for the Debt, the Mortgagor hereby assigns and pledges to the Mortgagee each and every policy of hazard insurance now or hereafter in effect which insures the Property, or any part thereof (including without limitation the Personal Property and Improvements, or any part thereof), together with all right, title and interest of the Mortgagor in and to each and every such policy, including, but not limited to, all the Mortgagor's right, title and interest in and to any premiums paid on each such policy, including all rights to return premiums and all proceeds of the foregoing.

SECTION 1.04. Assignment of Condemnation Proceeds, etc. As further security for the Debt, the Mortgagor hereby assigns to the Mortgagee any and all awards or payments, including all interest thereon, together with the right to receive the same, that may be made to the Mortgagor with respect to the Property as a result of (a) the exercise of the right of eminent domain, (b) the alteration of the grade or of any street or (c) any other injury to or decrease in value of the Property. Subject to the rights of the holders of any prior mortgages, all such damages, condemnation proceeds and consideration shall be paid directly to the Mortgagee, and after first applying said sums to the payment of all costs and expenses (including reasonable attorneys' fees) incurred by the Mortgagee in obtaining such sums, the Mortgagee may, at its option, apply the balance on the Debt in any order and amount and whether or not then due, or hold such balance as a cash collateral reserve against the Debt, or apply such balance to the restoration of the Property, or release the balance to the Mortgagor. No such application, holding in reserve or release shall cure or waive any default of the Mortgagor.

## II. REPRESENTATIONS AND WARRANTIES

The Mortgagor represents and warrants to the Mortgagee that:

SECTION 2.01. Valid Title, etc. (a) The Mortgagor is lawfully seized in fee simple of the Real Estate and is the lawful owner of, and has good title to, the Personal Property, Improvements and other Property and has a good right to sell and convey the Property as aforesaid; (b) the Property is free of all encumbrances, liens, charges, mortgages, assignments and security interests other than Permitted Encumbrances; and

(c) the Mortgagor will forever warrant and defend the title to the Property unto the Mortgagee against the lawful claims of all persons whomsoever, except those claiming under Permitted Encumbrances.

SECTION 2.02. Rents and Leases.

(a) The Mortgagor has good title to the Rents and Leases hereby assigned and good right to assign the same, and no other person, corporation or entity has any right, title or interest therein.

(b) The Mortgagor has duly and punctually performed all and singular the terms, covenants, conditions and warranties of the Existing Leases on the Mortgagor's part to be kept, observed and performed.

(c) Except as set forth in Exhibit B, the Mortgagor has not previously sold, assigned, transferred, mortgaged or pledged the Leases or the Rents, whether now due or hereafter to become due.

(d) No Rents due for any period subsequent to the month next succeeding the date of this Mortgage have been collected, and no payment of any of the Rents has otherwise been anticipated, waived, released, discounted, set-off or otherwise discharged or compromised.

(e) The Mortgagor has not received any funds or deposits from any lessee in excess of one month's rent for which credit has not already been made on account of accrued rents.

(f) To the best of the Mortgagor's knowledge, the lessees under the Existing Leases are not in default under any of the terms thereof.

SECTION 2.03. Environmental Compliance. To the best of the Mortgagor's knowledge, (a) neither the Property nor any other real property now or previously owned by the Mortgagor is or has been in violation of, any applicable Environmental Law; (b) the Property and all real property now or previously owned by the Mortgagor are free of Hazardous Substances, and (c) there are no pending investigations, claims or threats of claims with respect to the Property or any other real property now or previously owned by the Mortgagor by any governmental authority or other person relating to any Environmental Law. As used in this Mortgage, "Hazardous Substances" shall mean and include all pollutants, contaminants, toxic or hazardous wastes, and other substances (including without limitation asbestos and urea formaldehyde foam insulation), the removal of which is required or the manufacture, use, maintenance and handling of which is regulated, restricted, prohibited or penalized by any Environmental Law, or even though not so regulated, restricted, prohibited or penalized, might pose a hazard to the health and safety of the occupants of the property on which it is located or the occupants of the property adjacent thereto. "Environmental Law" shall mean and include any federal, state or local law or ordinance relating to pollution or protection of the environment, including any relating to Hazardous Substances, and any and all regulations, codes, plans, orders, decrees, judgments, injunctions, notices and demand letters issued, entered, promulgated or approved thereunder.

SECTION 2.04. Governmental Compliance, etc. (a) The Property, the Project and the use and operation thereof contemplated by the Construction Loan Agreement comply with all applicable environmental and other laws, ordinances, regulations, rules, covenants, conditions, restrictions, licenses and permits; and (b) no lien, charge or encumbrance exists on the Property, or any part thereof, in favor of any governmental authority or other person or organization under any federal, state or local environmental law, ordinance, regulation or rule that might have priority over this Mortgage.

### III. COVENANTS AND AGREEMENTS OF MORTGAGOR

The Mortgagor covenants and agrees that, until the Debt is paid and this Mortgage is satisfied in writing by the Mortgagee:

SECTION 3.01. Payment of Taxes and Other Assessments. The Mortgagor will pay or cause to be paid all taxes, assessments and other governmental, municipal or other public dues, charges, fines or impositions imposed or levied upon the Property or on the interests created by this Mortgage or with respect to the filing of this Mortgage, and any tax or excise on rents or other tax, however described, assessed or levied by any state, federal or local taxing authority as a substitute, in whole or in part, for taxes assessed or imposed on the Property or on the lien and other interests created by this Mortgage, and at least ten days before said taxes, assessments and other governmental charges are due the Mortgagor will deliver receipts therefor to the Mortgagee, or, in the case of mortgage filing privilege taxes, pay to the Mortgagee an amount equal to such taxes. The Mortgagor may, at the Mortgagor's own expense, in good faith contest any such taxes, assessments and other governmental charges and, in the event of any such contest, may permit the taxes, assessments or other governmental charges so contested to remain unpaid during the period of such contest and any appeal therefrom, provided that during such period enforcement of such contested items shall be effectively stayed. If any tax or assessment (other than state and federal income taxes) is levied, assessed or imposed by any governmental authority on the Mortgagee as a legal holder of the Note, any interest in this Mortgage or any of the other Loan Documents (as hereinafter defined), then unless all such taxes and assessments are paid by the Mortgagor as they become due and payable, but in any case before they become delinquent (and in the opinion of counsel for the Mortgagee, such payment by the Mortgagor is lawful and does not place the Mortgagee in violation of any law), the Mortgagee may, at its option, declare an Event of Default under this Mortgage.

### SECTION 3.02. Insurance.

(a) The Mortgagor shall keep or cause to be kept the Property insured against loss or damage by flood (if the Property is located in a flood-prone area), fire, windstorm, extended coverage perils, vandalism, malicious mischief and such other hazards, casualties or other contingencies as from time to time may be required by the Mortgagee in such manner and in such companies and amounts as the Mortgagee may approve. All such policies shall name the Mortgagee as a

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named insured and provide that any losses payable thereunder shall (pursuant to loss payable clauses, in form and content acceptable to the Mortgagee, to be attached to each policy) be payable to the Mortgagee, and provide that the insurance provided thereby, as to the interest of the Mortgagee, shall not be invalidated by any act or neglect of the Mortgagor, nor by the commencement of any proceedings by or against the Mortgagor in bankruptcy, insolvency, receivership or any other proceedings for the relief of a debtor, nor by any foreclosure, repossession or other proceedings relating to the property insured, nor by any occupation of such property or the use of such property for purposes more hazardous than permitted in the policy. The Mortgagor shall cause duplicate originals of any and all such insurance policies to be deposited with the Mortgagee. At least thirty days prior to the date the premiums on each such policy or policies shall become due and payable, the Mortgagor shall furnish to the Mortgagee evidence of the payment of such premiums. The Mortgagor will cause each insurer under each of the policies to agree (either by endorsement upon such policy or by letter addressed to the Mortgagee) to give the Mortgagee at least thirty days' prior written notice of the cancellation of such policies in whole or in part or the lapse of any coverage thereunder. The Mortgagor agrees that the Mortgagor will not take any action or fail to take any action, which action or inaction would result in the invalidation of any insurance policy required hereunder.

(b) With respect to all such insurance policies, subject to the rights of the holders of any prior mortgages, the Mortgagee is hereby authorized, but not required, on behalf of the Mortgagor, to collect for, adjust or compromise any losses under any such insurance policies and to apply, at its option, the loss proceeds (less expenses of collection) on the Debt, in any order and amount, and whether or not due, or hold such proceeds as a cash collateral reserve against the Debt or apply such proceeds to the restoration of the Property, or to release the same to the Mortgagor, but no such application, holding in reserve or release shall cure or waive any default by the Mortgagor. In case of a sale pursuant to the foreclosure provisions hereof, or any conveyance of all or any part of the Property in extinguishment of the Indebtedness, complete title to all insurance policies held by the Mortgagee and the unearned premiums with respect thereto shall pass to and vest in the purchaser or grantee of the Property.

SECTION 3.03. Utilities; Waste, Demolition, Alteration or Replacement. The Mortgagor shall pay or cause to be paid all bills for utilities and other materials and services used on or in connection with the Property. The Mortgagor shall cause the Property and every part thereof to be maintained, preserved and kept in safe and good repair, working order and condition, shall not commit or permit waste thereon, except as contemplated by the Construction Loan Agreement, shall not remove, demolish or alter the design or structural character of any building now or hereafter erected on the Real Estate without the express prior written consent of the Mortgagee, and shall from time to time make all necessary and proper repairs, renewals, additions and restorations

thereto so that the value and efficient use thereof shall be fully preserved and maintained. The Mortgagor agrees not to remove any of the fixtures or Personal Property included in the Property without the express prior written consent of the Mortgagee and unless the same is immediately replaced with like property of at least equal value and utility.

SECTION 3.04. Rents and Leases. The Mortgagor covenants and agrees that the Mortgagor shall:

(a) observe, perform and discharge all obligations, covenants and warranties provided for under the terms of the Leases to be kept, observed and performed by the Mortgagor, and shall give prompt notice to the Mortgagee in the event the Mortgagor fails to observe, perform and discharge the same;

(b) enforce or secure in the name of the Mortgagee the performance of each and every obligation, term, covenant, condition and agreement to be performed by any lessee under the terms of the Leases;

(c) appear in and defend any action or proceeding arising under, occurring out of, or in any manner connected with the Leases or the obligations, duties or liabilities of the Mortgagor and any lessee thereunder, and, upon request by the Mortgagee to do so in the name and on behalf of the Mortgagee but at the expense of the Mortgagor, and to pay all costs and expenses of the Mortgagee, including reasonable attorneys' fees, in any action or proceeding in which the Mortgagee may appear;

(d) not receive or collect any Rents from any present or future lessee of the Real Estate or any of the Improvements, or any part thereof, for a period of more than one month in advance, or pledge, transfer, mortgage or otherwise encumber or assign future payments of the Rents;

(e) not waive, excuse, condone, discount, set off, compromise, or in any manner release or discharge any lessee of the Real Estate or any of the Improvements of and from any obligations, covenants, conditions and agreements by said lessee to be kept, observed and performed, including the obligation to pay rent in the manner and at the place and time specified in any Lease;

(f) not enter into any Leases except on a form approved by the Mortgagee, nor cancel, terminate or consent to any surrender of any Lease, or modify or in any way alter the terms thereof without, in each such instance, the prior written consent of the Mortgagee;

(g) not renew or otherwise extend the term of the Existing Leases; provided, however, that nothing herein contained shall prevent the Mortgagor, upon expiration of the now-current term (or other expiration or termination) of the Existing Leases, from leasing the

property covered thereby to the lessee thereunder by a lease or leases expressly subject and fully subordinate to the lien, assignment and security interest of this Mortgage;

(h) promptly upon the execution by the Mortgagor of any future Lease, (i) furnish the Mortgagee with the name and address of the lessee thereunder, the term of such Lease and a description of the premises covered thereby and, upon request of the Mortgagee, a copy of such Lease, and (ii) execute all such further assignments of such Lease and the Rents therefrom as the Mortgagee may require;

(i) not, without the prior written approval of the Mortgagee, execute any management or leasing agreements affecting any of the Property; and

(j) if required by the Mortgagee, cause each Lease to provide, in a manner approved by the Mortgagee, that the Lease is junior and subordinate to the lien of this Mortgage and that the Lessee will recognize as lessor, Mortgagee or any person succeeding to the interest of the Mortgagor, upon any foreclosure of this Mortgage.

SECTION 3.05. Sale, Lease or Transfer, etc. The Mortgagor covenants and agrees that neither the Real Estate or the Improvements, nor any part thereof, nor any interest therein, shall be (a) sold, assigned, transferred, conveyed, leased with an option to purchase, exchanged or otherwise disposed of, nor shall the Mortgagor contract with any person or entity for any of the foregoing, without the Mortgagee's prior written consent; or (b) subject to any additional lien, mortgage or other encumbrance, either voluntarily or involuntarily, without the Mortgagee's prior written consent. Upon the occurrence of any such sale, assignment, transfer, conveyance, lease with an option to purchase, exchange, other disposition, contract, lien, mortgage or encumbrance, this Mortgage shall be deemed to be in default at the option of the Mortgagee and the Mortgagee may, at its sole option: (i) declare the Debt immediately due and payable in full; or (ii) require the payment, after the date of such occurrence, of a higher\*rate of interest on the unpaid principal portion of the Debt as a condition to not exercising such option to accelerate the Debt, whether such rights be exercised by the Mortgagee to obtain a higher rate of interest on the Debt or to protect the security of this Mortgage. Mortgagor further covenants and agrees that without the prior written consent of the Mortgagee, the Mortgagor shall not be dissolved, liquidated or terminated, whether by operation of law or otherwise. Any such dissolution, liquidation or termination, without the Mortgagee's prior written consent, shall constitute a default hereunder. The Mortgagor expressly covenants and agrees, and acknowledges the Mortgagee's express reliance hereon, that any sale, pledge, encumbrance, contract to sell, assignment or other transfer of any stock of the Mortgagor, or any other transaction whereby the legal or beneficial ownership of the Mortgagor is changed, including, without limitation, the sale of additional stock, the liquidation or dissolution of the Mortgagor, or the merger or consolidation of the Mortgagor with any

other corporation, shall be treated as a transfer of the Real Estate and the Improvements for purposes of this section.

**SECTION 3.06. Zoning, Governmental Compliance, etc.** Without the prior written consent of the Mortgagee, the Mortgagor will not seek, make or consent to any change in the zoning or conditions of use of the Property that would materially impair the ability of the Mortgagor to construct the Improvements pursuant to the terms of the Construction Loan Agreement or to operate or develop the Property as contemplated thereby. The Mortgagor shall comply with and make all payments required under all environmental and other laws, ordinances, regulations, rules, covenants, conditions, restrictions, licenses and permits now or hereafter affecting the Property or any part thereof or the business or activity conducted or to be conducted thereon. The Mortgagor shall not commit, suffer, permit or allow any act to be done in or on the Property in violation of any such law, ordinance, regulation, rule, covenant, condition, restriction, license or permit, and the Mortgagor shall not permit any lien, charge or encumbrance to exist on the Property, or any part thereof, in favor of any federal, state or local governmental authority or other person or organization under any of the same that might have priority over this Mortgage. The Mortgagor shall comply with all existing and future requirements of all governmental authorities having jurisdiction over the Property.

**SECTION 3.07. Environmental Compliance.** The Mortgagor shall (a) not permit any Hazardous Substances to be brought on to the Property or any other real property now or hereafter owned by the Mortgagor; (b) if any Hazardous Substances are brought or found on the Property or any such other real property, immediately remove and properly dispose thereof and diligently undertake all cleanup procedures required under applicable Environmental Laws; (c) promptly give notice to the Mortgagee in writing if the Mortgagor should receive notice of any investigation, claim or threatened claim under any Environmental Law, or any notice of violation under any Environmental Law, involving the Mortgagor, the Property or any other real property heretofore, now or hereafter owned by the Mortgagor; and (d) permit the Mortgagee from time to time to inspect the Property and observe the Mortgagor's operations thereon and to perform tests (including soil and ground water tests) for Hazardous Substances on the Property.

**SECTION 3.08. Maintenance of Lien Priority.** The Mortgagor shall take all steps necessary to preserve and protect the validity and priority of the liens on, security interests in, and assignment of, the Property created hereby. The Mortgagor shall execute, acknowledge and deliver such additional instruments as the Mortgagee may deem necessary in order to preserve, protect, continue, extend or maintain the liens, security interests and assignments created hereby as first liens on, security interests in, and assignments of, the Property, except as otherwise permitted under the terms of this Mortgage. All costs and expenses incurred in connection with the protection, preservation, continuation, extension or maintaining of the liens, security interests and assignments hereby created shall be paid by the Mortgagor.

**SECTION 3.09. Fund for Premiums and Taxes.** At the request of the Mortgagee, the Mortgagor shall create a fund or reserve for the payment of all insurance premiums, taxes and assessments against or affecting the

Property by paying to the Mortgagee, on the first day of each calendar month prior to the maturity of the Note, a sum equal to the premiums that will next become due and payable on the hazard insurance policies covering the Property, or any part thereof, plus taxes and assessments next due on the Property, or any part thereof, as estimated by the Mortgagee, less all sums paid previously to the Mortgagee therefor, divided by the number of months to elapse before one month prior to the date when such premiums, taxes and assessments will become delinquent, such sums to be held by the Mortgagee, without interest, unless interest is required by applicable law, for the purposes of paying such premiums, taxes and assessments. Any excess reserve shall, at the discretion of the Mortgagee, be credited by the Mortgagee on subsequent reserve payments or subsequent payments to be made on the Note by the maker thereof, and any deficiency shall be paid by the Mortgagor to the Mortgagee on or before the date when such premiums, taxes and assessments shall become delinquent. Transfer of legal title to the Property shall automatically transfer title to all sums deposited with the Mortgagee under the provisions hereof or otherwise.

**SECTION 3.10. Release of Collateral.** Any part of the Property may be released by the Mortgagee without affecting the lien, security interest and assignment hereof against the remainder. The lien, security interest and other rights granted hereby shall not affect or be affected by any other security taken for the same indebtedness or any part thereof. The taking of additional security, or the extension or renewal of the indebtedness secured hereby or any part thereof, shall not release or impair the lien, security interest and other rights granted hereby, or affect the liability of any endorser, guarantor or surety, or improve the right of any permitted junior lienholder; and this Mortgage, as well as any instrument given to secure any renewal or extension of the indebtedness secured hereby, or any part thereof, shall be and remain a first and prior lien, except as otherwise provided herein, on all of the Property not expressly released until the indebtedness secured hereby is completely paid.

**SECTION 3.11. Subordinate Mortgages.** The Mortgagor will not, without the prior written consent of the Mortgagee, execute and deliver any pledge, security agreement, mortgage or deed of trust covering all or any portion of the Property (hereinafter called "Subordinate Mortgage"). In the event of consent by the Mortgagee to the foregoing or in the event the foregoing prohibition is determined by a court of competent jurisdiction to be unenforceable by the provisions of any applicable law, the Mortgagor will not execute or deliver any Subordinate Mortgage unless there shall have been delivered to the Mortgagee not less than ten (10) days prior to the date thereof a copy thereof which shall contain express covenants to the effect:

(a) That the Subordinate Mortgage is in all respects unconditionally subject and subordinate to the lien, security interest and assignment evidenced by this Mortgage and each term and provision hereof;

(b) That if any action or proceeding shall be instituted to foreclose the Subordinate Mortgage (regardless of whether the same is a judicial proceeding or pursuant to a power of sale contained

therein), no tenant of any portion of the Property will be named as a party defendant, nor will any action be taken with respect to the Property which would terminate any occupancy or tenancy of the Property without the prior written consent of the Mortgagee;

(c) That the Rents and Leases, if collected through a receiver or by the holder of the Subordinate Mortgage, shall be applied first to the obligations secured by this Mortgage, including principal and interest due and owing on or to become due and owing on the Note and the other indebtedness secured hereby and then to the payment of maintenance, operating charges, taxes, assessments and disbursements incurred in connection with the ownership, operating and maintenance of the Property; and

(d) That if any action or proceeding shall be brought to foreclose the Subordinate Mortgage, or if the holder of the Subordinate Mortgage shall take any other action to enforce its rights thereunder, written notice of the commencement thereof, or of the taking of such other action, will be given to the Mortgagee at least thirty days prior to said foreclosure (or any other enforcement of said Subordinate Mortgage) and providing that the Mortgagee shall have the right (but not the obligation) to, at its election, cure any default under the Subordinate Mortgage. If any such default is ~~assumed~~ by the Mortgagee, the Mortgagor shall immediately pay same to the Mortgagee, plus interest thereon from the date the Mortgagee has paid said amount at the past due rate of interest provided in the Note, not to exceed in any event the maximum nonusurious rate of interest allowed by applicable law.

The occurrence of any default or event of default pursuant to any Subordinate Mortgage shall constitute a default hereunder.

It is specifically understood and agreed that the Mortgagee may require, as a condition to granting its consent in any instance in which such consent is required pursuant to this Section, that:

- (i) The Mortgagor pay to the Mortgagee a reasonable fee for the granting of its consent;
- (ii) The Mortgagor agree to an increase in the interest rate on the Note (subject to the limitation that such interest rate may not exceed the maximum rate permitted by applicable law); and/or
- (iii) The Mortgagor agree to a modification of the manner in which the principal and/or accrued but unpaid interest on the Note is due and payable.

The provisions of the preceding paragraph are not intended to, and shall not be construed to, limit the Mortgagee's right, in its sole discretion, to withhold consent for any or no reason or to impose such other requirements as the Mortgagee may deem appropriate as a condition to giving its consent or to preclude the Mortgagee from, in its sole

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\*cured

discretion, withholding consent for any or no reason, or imposing such conditions as it deems appropriate to the granting of its consent pursuant to any other provision of this Mortgage.

SECTION 3.12. Partial Releases. The Mortgagor shall be entitled to one or more partial releases of the Property from the lien and security interests of this instrument, no default having occurred hereunder or under any of the other documents executed in connection with the Construction Loan Agreement, upon and subject to the following terms and conditions:

(a) accrued interest on the Note shall be paid to the date of each such partial release;

(b) no partial release shall be granted if the holder (or if more than one, fifty percent [50%] or more of the holders) of the indebtedness secured hereby believe that the granting thereof directly or indirectly result in the remaining unpaid balance secured hereby being inadequately secured;

(c) the Mortgagor shall have paid against the outstanding principal balance of the Note a sum equal to one hundred percent (100%) of the amount that the Mortgagee determines that it has loaned on the lot or parcel to be released;

(d) all costs and expenses of the partial release (including any endorsement required by the Mortgagee to its policy of title insurance) shall have been paid in full; and

(e) no partial release shall be granted if, in the determination of the Mortgagee, any unreleased portion of the Property would have inadequate access to public streets and roadways, or any unreleased portion of the Property would be of unmarketable shape or size.

#### IV. DEFEASANCE, DEFAULT AND REMEDIES

SECTION 4.01. Defeasance. This Mortgage is made upon the condition that if the Mortgagor pays the Debt, as defined in this Mortgage (which Debt includes all of the debt described in paragraphs (a) through (e) of Section 1.01 of this Mortgage, including without limitation the debt evidenced or to be evidenced by the Note, and interest thereon, and all other indebtedness, obligations and liabilities of the Mortgagor to the Mortgagee of every kind and description whatsoever, due or to become due, and now existing or hereafter incurred, contracted or arising), and reimburses the Mortgagee for any amounts the Mortgagee has paid in respect of Liens or insurance premiums, and interest thereon, and fulfills all of its other obligations under this Mortgage, and if the Mortgagee has no obligation to extend any further credit to or for the account of the Mortgagor, and if there is in existence no contingent liability of the Mortgagor that is secured by this Mortgage, this conveyance shall be null and void.

SECTION 4.02. Events of Default. The happening of any one or more of the following events, or the happening of any other event of default as specified elsewhere in this Mortgage (hereinafter collectively referred to as "Events of Default"), shall constitute a default under this Mortgage:

(a) if the Mortgagor fails to pay to the Mortgagee when due the principal or interest on the Debt evidenced by the Note, or any other sum due under any of the Loan Documents (as hereinafter defined), or any other Debt secured hereby; or

(b) if the Mortgagor fails to comply with any of the provisions of the Construction Loan Agreement, the Note, this Mortgage, the other Security Documents described in the Construction Loan Agreement, or any other document executed or delivered in connection with the Loan or any of the foregoing documents (all of the foregoing being herein collectively called the "Loan Documents"); or

(c) if any guarantor of any of the Debt fails to comply with any of the provisions of such guarantor's guaranty agreement; or

(d) if any statement, representation or warranty contained in this Mortgage or any of the other Loan Documents, or any report, certificate or other instrument delivered to Mortgagee in connection with any of the same, is untrue in any material respect; or

(e) if default is made with respect to any indebtedness (other than the Debt) of the Mortgagor or any guarantor of the Debt when due or the performance of any other obligation incurred in connection with any indebtedness for borrowed money of the Mortgagor or any such guarantor, if the effect of such default is to accelerate the maturity of such indebtedness or to permit the holder thereof to cause such indebtedness to become due prior to its stated maturity, or any such indebtedness is not paid when due; or

(f) if the Mortgagor at any time prior to completion of the Project abandons the Project, or ceases to work thereon for a period of more than ten consecutive calendar days, or fails diligently to prosecute the work on the Project; or

(g) if the Mortgagor, any guarantor of any of the Debt or any other maker, endorser, surety, or guarantor of the Note or any of the other Debt (hereinafter collectively called the "Obligors" and singularly an "Obligor") fails to pay such Obligor's debts generally as they become due, or if a receiver, trustee, liquidator or other custodian is appointed for any Obligor or for any of the property of any Obligor, or if a petition in bankruptcy (whether for liquidation, reorganization, arrangement, wage-earner's plan or otherwise) is filed by or against any Obligor, or if any Obligor applies for the benefits of, or takes advantage of, any law for the relief of debtors, or enters into an arrangement or composition with, or makes an assignment for the benefit of, creditors; or

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(h) if any Obligor dies, if an individual; or dissolves, if a corporation or a partnership; or if a partnership, any general partner becomes insolvent, dies or is replaced or withdraws; or if a corporation, any principal officer thereof becomes insolvent, dies or ceases to be employed by any such Obligor; or

(i) if final judgment for the payment of money in excess of an aggregate of \$10,000 is rendered against any Obligor, and the same remains undischarged for a period of 30 days during which execution is not effectively stayed; or

(j) if the interest of the Mortgagee, as mortgagee or secured party, in any of the Property becomes endangered by reason of the enforcement of any prior lien or encumbrance thereon; or

(k) if any of the material stipulations contained in any of the Loan Documents is declared invalid or inoperative by any court of competent jurisdiction; or

(l) if in the judgment of the Mortgagee the proceeds of the Loan or any part thereof are being or shall at any time have been diverted to a purpose other than the reimbursement for or payment of costs of construction of the Project that have been approved by the Mortgagee; or

(m) if the Mortgagor conveys or further encumbers all or part of the Property; or

(n) if any lien, statement of lien or suit to enforce a lien is filed against any of the Collateral and the Mortgagor fails to have such lien satisfied or suit dismissed or to secure the payment of the amount claimed by such lien, statement of lien or suit by a bond, letter of credit or other security satisfactory to the Mortgagee within ten days of the day such lien or statement of lien is filed in the office of the Judge of Probate of the County in which the Real Estate is located or such suit is filed in court; or

(o) if any law is passed imposing, or authorizing the imposition of, any specific tax upon this Mortgage or the Debt or permitting or authorizing the deduction of any such tax from the principal of, or interest on, the Debt, or by virtue of which any tax, lien or assessment upon the Property shall be chargeable against the owner of this Mortgage; or

(p) if any other event of default occurs under any of the Loan Documents.

#### SECTION 4.03. Rights and Remedies of Mortgagee Upon Default.

(a) Acceleration of Debt. Upon occurrence of an Event of Default or at any time thereafter, the Mortgagee may at its option and without demand or notice to the Mortgagor, declare all or any part of the Debt immediately due and payable, whereupon all such Debt shall forthwith become due and payable, without presentment, demand, protest or further

notice of any kind, all of which are hereby expressly waived by the Mortgagor, and the Mortgagee may immediately enforce payment of all such amounts and may exercise any or all of its rights and remedies under this Mortgage, the Note, any of the other Loan Documents and applicable law. The Mortgagor also waives any and all rights the Mortgagor may have to a hearing before any judicial authority prior to the exercise by the Mortgagee of any of its rights under this Mortgage, the Note, any of the other Loan Documents and applicable law.

(b) Operation of Property by Mortgagee. Upon the occurrence of an Event of Default or at any time thereafter, in addition to all other rights herein conferred on the Mortgagee, the Mortgagee (or any person, firm or corporation designated by the Mortgagee) may, but will not be obligated to, enter upon and take possession of any or all of the Property, exclude the Mortgagor therefrom, and hold, use, administer, manage and operate the same to the extent that the Mortgagor could do so, without any liability to the Mortgagor resulting therefrom; and the Mortgagee may collect, receive and receipt for all proceeds accruing from such operation and management, make repairs and purchase needed additional property, and exercise every power, right and privilege of the Mortgagor with respect to the Property.

(c) Judicial Proceedings; Right to Receiver. Upon the occurrence of an Event of Default or at any time thereafter, the Mortgagee, in lieu of or in addition to exercising the power of sale hereinafter given, may proceed by suit to foreclose its lien on, security interest in, and assignment of, the Property, to sue the Mortgagor for damages on account of or arising out of said default or breach, or for specific performance of any provision contained herein, or to enforce any other appropriate legal or equitable right or remedy. The Mortgagee shall be entitled, as a matter of right, upon bill filed or other proper legal proceedings being commenced for the foreclosure of this Mortgage, to the appointment by any competent court or tribunal, without notice to the Mortgagor or any other party, of a receiver of the rents, issues and profits of the Property, with power to lease and control the Property and with such other powers as may be deemed necessary.

(d) Foreclosure Sale. Upon the occurrence of any Event of Default, or at any time thereafter, this Mortgage shall be subject to foreclosure and may be foreclosed as now provided by law in case of past due mortgages, and the Mortgagee shall be authorized, at its option, whether or not possession of the Property is taken, after giving twenty-one days' notice by publication once a week for three consecutive weeks of the time, place and terms of each such sale by publication in some newspaper published in the county wherein the Property or any part thereof is located, to sell the Property (or such part or parts thereof as the Mortgagee may from time to time elect to sell) in front of such county's courthouse door, at public outcry, to the highest bidder for cash. The Mortgagee, its successors and assigns, may bid at any sale or sales had under the terms of this Mortgage and may purchase the Property, or any part thereof, if the highest bidder therefor. The purchaser at any such sale or sales shall be under no obligation to see to the proper application of the purchase

money. At any foreclosure sale, any part or all of the Property, real, personal or mixed, may be offered for sale in parcels or en masse for one total price, the proceeds of any such sale en masse to be accounted for in one account without distinction between the items included therein or without assigning to them any proportion of such proceeds, the Mortgagor hereby waiving the application of any doctrine of marshalling or like proceeding. In case the Mortgagee, in the exercise of the power of sale herein given, elects to sell the Property in parts or parcels, sales thereof may be held from time to time, and the power of sale granted herein shall not be fully exercised until all of the Property not previously sold shall have been sold or all the Debt secured hereby shall have been paid in full.

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(e) Personal Property and Fixtures. On the happening of any Event of Default or at any time thereafter, the Mortgagee shall have and may exercise with respect to the personal property and fixtures included in the Property (the "Collateral") all rights, remedies and powers of a secured party under the Alabama Uniform Commercial Code with reference to the Collateral or any other items in which a security interest has been granted herein, including without limitation the right and power to sell at public or private sale or sales or otherwise dispose of, lease or utilize the Collateral and any part or parts thereof in any manner to the fullest extent authorized or permitted under the Alabama Uniform Commercial Code after default hereunder, without regard to preservation of the Collateral or its value and without the necessity of a court order. The Mortgagee shall have, among other rights, the right to take possession of the Collateral and to enter upon any premises where the same may be situated for the purpose of repossessing the same without being guilty of trespass and without liability for damages occasioned thereby and to take any action deemed appropriate or desirable by the Mortgagee, at its option and its sole discretion, to repair, restore or otherwise prepare the Collateral for sale, lease or other use or disposition. At the Mortgagee's request, the Mortgagor shall assemble the Collateral and make the Collateral available to the Mortgagee at any place designated by the Mortgagee. To the extent permitted by law, the Mortgagor expressly waives any notice of sale or any other disposition of the Collateral and any rights or remedies of the Mortgagee with respect to, and the formalities prescribed by law relative to, the sale or disposition of the Collateral or to the exercise of any other right or remedy of the Mortgagee existing after default. To the extent that such notice is required and cannot be waived, the Mortgagor agrees that if such notice is given to the Mortgagor in accordance with the provisions of Section 5.14 below, at least five days before the time of the sale or other disposition, such notice shall be deemed reasonable and shall fully satisfy any requirement for giving said notice.

The Mortgagor agrees that the Mortgagee may proceed to sell or dispose of both the real and personal property comprising the Property in accordance with the rights and remedies granted under this Mortgage with respect to the real property covered hereby. The Mortgagor hereby grants the Mortgagee the right, at its option after default hereunder, to transfer at any time to itself or its nominee the Collateral or any

part thereof and to receive the monies, income, proceeds and benefits attributable to the same and to hold the same as Collateral or to apply it on the Debt in such order and amounts and manner as the Mortgagee may elect. The Mortgagor covenants and agrees that all recitals in any instrument transferring, assigning, leasing or making other disposition of the Collateral or any part thereof shall be full proof of the matters stated therein and no other proof shall be required to establish the legal propriety of the sale or other action taken by the Mortgagee and that all prerequisites of sale shall be presumed conclusively to have been performed or to have occurred.

(f) Rents and Leases. Upon the occurrence of an Event of Default or at any time thereafter:

(i) The Mortgagee, at its option, shall have the right, power and authority to exercise and enforce any or all of the following rights and remedies with respect to Rents and Leases:

(A) to terminate the license granted to the Mortgagor in Section 1.02(c)(iii) hereof to collect the Rents, and, without taking possession, in the Mortgagee's own name to demand, collect, receive, sue for, attach and levy the Rents, to give proper receipts, releases and acquittances therefor, and after deducting all necessary and reasonable costs and expenses of collection, including reasonable attorney's fees, to apply the net proceeds thereof to the Debt in such order and amounts as the Mortgagee may choose (or hold the same in a reserve as security for the Debt);

(B) without regard to the adequacy of the security, with or without any action or proceeding, through any person or by agent, or by a receiver to be appointed by court, to enter upon, take possession of, manage and operate the Property or any part thereof for the account of the Mortgagor, make, modify, enforce, cancel or accept surrender of any Lease, remove and evict any lessee or sublessee, increase or reduce rents, decorate, clean and make repairs, and otherwise do any act or incur any cost or expenses the Mortgagee shall deem proper to protect the security hereof, as fully and to the same extent as the Mortgagor could do if in possession, and in such event to apply any funds so collected to the operation and management of the Property (including payment of reasonable management, brokerage and attorney's fees) and payment of the Debt in such order and amounts as the Mortgagee may choose (or hold the same in reserve as security for the Debt);

(C) to take whatever legal proceedings may appear necessary or desirable to enforce any obligation or covenant or agreement of the Mortgagor under this Mortgage.

(ii) The collection of the Rents and application thereof (or holding thereof in reserve) as aforesaid or the entry upon and taking possession of the Property or both shall not cure or waive any default or waive, modify or affect any notice of default under this Mortgage, or invalidate any act done pursuant to such notice, and the enforcement



of such right or remedy by the Mortgagee, once exercised, shall continue for so long as the Mortgagee shall elect, notwithstanding that the collection and application aforesaid of the Rents may have cured the original default. If the Mortgagee shall thereafter elect to discontinue the exercise of any such right or remedy, the same or any other right or remedy hereunder may be reasserted at any time and from time to time following any subsequent default.

(g) Foreclosure Deeds. The Mortgagor hereby authorizes and empowers the Mortgagee or the auctioneer at any foreclosure sale had hereunder, for and in the name of the Mortgagor, to execute and deliver to the purchaser or purchasers of any of the Property sold at foreclosure good and sufficient deeds of conveyance or bills of sale thereto.

(h) Order of Application of Proceeds. All payments received by the Mortgagee as proceeds of the Property, or any part thereof, as well as any and all amounts realized by the Mortgagee in connection with the enforcement of any right or remedy under or with respect to this Mortgage, shall be applied by the Mortgagee as follows: (i) to the payment of all necessary expenses incident to the execution of any foreclosure sale or sales or other remedies under this Mortgage, including reasonable attorneys' fees as provided herein and in the other Loan Documents, appraisal fees, title search fees and foreclosure notice costs, (ii) to the payment in full of any of the Debt that is then due and payable (including without limitation principal, accrued interest and all other sums secured hereby) and to the payment of attorneys' fees as provided herein and in the other Loan Documents, all in such order as the Mortgagee may elect in its sole discretion, (iii) to a cash collateral reserve fund to be held by the Mortgagee in an amount equal to, and as security for, any of the Debt that is not then due and payable, and (iv) the remainder, if any, shall be paid to the Mortgagor or such other person or persons as may be entitled thereto by law, after deducting therefrom the cost of ascertaining their identity.

(i) Multiple Sales. Upon the occurrence of any Event of Default or at any time thereafter, the Mortgagee shall have the option to proceed with foreclosure, either through the courts or by proceeding with foreclosure as provided for in this Mortgage, but without declaring the whole Debt due. Any such sale may be made subject to the unmatured part of the Debt secured by this Mortgage, and such sale, if so made, shall not in any manner affect the unmatured part of the Debt secured by this Mortgage, but as to such unmatured part of the Debt this Mortgage shall remain in full force and effect as though no sale had been made under the provisions of this paragraph. Several sales may be made under the provisions of this paragraph without exhausting the right of sale for any remaining part of the Debt whether then matured or unmatured, the purpose hereof being to provide for a foreclosure and sale of the Property for any matured part of the Debt without exhausting any power of foreclosure and the power to sell the Property for any other part of the Debt, whether matured at the time or subsequently maturing.

(j) Waiver of Appraisal Laws. The Mortgagor waives, to the fullest extent permitted by law, the benefit of all laws now existing or hereafter enacted providing for (i) any appraisal before sale of any portion of the Property (commonly known as appraisal laws), or (ii) any extension of time for the enforcement of the collection of the Debt or any creation or extension of a period of redemption from any sale made in collecting the Debt (commonly known as stay laws and redemption laws).

(k) Prerequisites of Sales. In case of any sale of the Property as authorized by this Section 4.03, all prerequisites to the sale shall be presumed to have been performed, and in any conveyance given hereunder all statements of facts, or other recitals therein made, as to the nonpayment of any of the Debt or as to the advertisement of sale, or the time, place and manner of sale, or as to any other fact or thing, shall be taken in all courts of law or equity as rebuttably presumptive evidence that the facts so stated or recited are true.

## V. MISCELLANEOUS

SECTION 5.01. Collection Costs. The Mortgagor agrees to pay all costs, including reasonable attorneys' fees, incurred by the Mortgagee in collecting or securing, or attempting to collect or secure, the Debt, or any part thereof, or in defending or attempting to defend the priority of this Mortgage against any Lien on the Property, unless this Mortgage is herein expressly made subject to any such Lien; and/or all costs incurred in the foreclosure of this Mortgage, either under the power of sale contained herein, or by virtue of the decree of any court of competent jurisdiction. The full amount of such costs incurred by the Mortgagee shall be a part of the Debt and shall be secured by this Mortgage.

SECTION 5.02. No Obligations of Mortgagee; Indemnification. The Mortgagee shall not by virtue of this Mortgage or otherwise assume any duties, responsibilities, liabilities or obligations with respect to Leases, the Improvements, the Personal Property, the Real Estate or any of the other Property (unless expressly assumed by the Mortgagee under a separate agreement in writing), and this Mortgage shall not be deemed to confer on the Mortgagee any duties or obligations that would make the Mortgagee directly or derivatively liable for any person's negligent, reckless or wilful conduct. The Mortgagor agrees to defend, indemnify and save harmless the Mortgagee from and against any and all claims, causes of action, judgments and other loss, cost and expense (collectively called "claims and losses") relating to or arising out of any default in the Mortgagor's performance of its representations, warranties, covenants, agreements, duties, responsibilities and obligations under this Mortgage or under the Leases and with respect to the Real Estate, the Improvements, the Personal Property, or any of the other Property. The provisions of this Section 5.02 shall survive the payment of the Debt in full and the termination, satisfaction, release (in whole or in part) and foreclosure of this Mortgage with respect to claims and losses asserted against or suffered by the Mortgagee. Without limiting the generality of the foregoing, the Mortgagor agrees that the Mortgagor's obligation to defend,

indemnify and save harmless the Mortgagee set forth in this Section shall specifically include all claims and losses asserted against or suffered by the Mortgagee that are related to or arise out of (i) any representations or warranty set forth in Section 2.03 hereof that shall prove to be false or untrue in any material respect, (ii) any default in the performance of nonperformance of the Mortgagor's covenants and agreements set forth in Section 3.07 hereof, and (iii) any clean up or removal of, or other remedial action with respect to, any Hazardous Substances now or hereafter located on or included in the Property, or any part thereof, that may be required by any Environmental Law or governmental authority.

SECTION 5.03. Construction of Mortgage. This Mortgage is and may be construed as a mortgage, deed of trust, chattel mortgage, conveyance, assignment, security agreement, pledge, financing statement, hypothecation or contract, or any one or more of them, in order fully to effectuate the lien hereof and the assignment and security interest created hereby and the purposes and agreements herein set forth.

SECTION 5.04. Successors and Assigns. All covenants and agreements herein made by the undersigned shall bind the undersigned and the heirs, personal representatives, successors and assigns of the undersigned; and every option, right and privilege herein reserved or secured to the Mortgagee shall inure to the benefit of the Mortgagee's successors and assigns.

SECTION 5.05. Waiver and Election. The exercise by the Mortgagee of any option given under the terms of this Mortgage shall not be considered as a waiver of the right to exercise any other option given herein, and the filing of a suit to foreclose the lien, security interest and assignment granted by this Mortgage, either on any matured portion of the Debt or for the whole of the Debt, shall not be considered an election so as to preclude foreclosure under power of sale after a dismissal of the suit; nor shall the publication of notices for foreclosure preclude the prosecution of a later suit thereon. No failure or delay on the part of the Mortgagee in exercising any right, power or remedy under this Mortgage shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy hereunder or thereunder. The remedies provided in this Mortgage and in the other Loan Documents are cumulative and not exclusive of any remedies provided by law. No amendment, modification, termination or waiver of any provisions of this Mortgage or any of the Security Documents, nor consent to any departure by the Mortgagor therefrom, shall be effective unless the same shall be in writing and signed by an executive officer of the Mortgagee, and then such waiver or consent shall be effective only in this specific instance and for the specific purpose for which given. No notice to or demand on the Mortgagor in any case shall entitle the Mortgagor to any other or further notice or demand in similar or other circumstances. Mortgagor hereby waives the right to trial by jury in any action arising out of or related to the Debt, this Mortgage, any of the other Loan Documents, or any of the transactions contemplated thereby.

SECTION 5.06. Landlord-Tenant Relationship. Any sale of the Property under this Mortgage shall, without further notice, create the relationship of landlord and tenant at sufferance between the purchaser and the Mortgagor.

SECTION 5.07. Enforceability. If any provision of this Mortgage is now or at any time hereafter becomes invalid or unenforceable, the other provisions hereof shall remain in full force and effect, and the remaining provisions hereof shall be construed in favor of the Mortgagee to effectuate the provisions hereof.

SECTION 5.08. Application of Payments. If the lien, assignment or security interest created by this Mortgage is invalid or unenforceable as to any part of the Debt or is invalid or unenforceable as to any part of the Property, the unsecured or partially secured portion of the Debt shall be completely paid prior to the payment of the remaining and secured or partially secured portion of the Debt, and all payments made on the Debt, whether voluntary or under foreclosure or other enforcement action or procedures, shall be considered to have been first paid on and applied to the full payment of that portion of the Debt which is not secured or not fully secured by said lien, assignment or security interest created hereby.

SECTION 5.09. Meaning of Particular Terms. Whenever used, the singular number shall include the plural and the plural the singular, and pronouns of one gender shall include all genders; and the words "Mortgagor" and "Mortgagee" shall include their respective successors and assigns. The term "Mortgagor" as used in this Mortgage refers to each of the undersigned, jointly and severally, whether one or more natural persons, corporations, associations, trusts, partnerships or other entities or organizations.

SECTION 5.10. Advances by the Mortgagee. If the Mortgagor shall fail to comply with the provisions hereof with respect to the securing of insurance, the payment of Liens, the keeping of the Property in repair, the performance of the Mortgagor's obligations under any Lease, the payment or performance of any prior mortgages, or the performance of any other term or covenant herein contained, the Mortgagee may (but shall not be required to) make advances to perform the same, and where necessary enter the Property for the purpose of performing any such term or covenant. The Mortgagor agrees to repay all such sums advanced upon demand, with interest from the date such advances are made, at the rate provided for in the Note, or the highest rate permitted by law, whichever shall be less, and all sums so advanced with interest shall be a part of the Debt and shall be secured hereby. The making of any such advances shall not be construed as a waiver by the Mortgagee of any Event of Default resulting from the Mortgagor's failure to pay the amounts paid.

SECTION 5.11. Release or Extension by the Mortgagee. The Mortgagee, without notice to the Mortgagor and without in any way affecting the rights of the Mortgagee hereunder as to any part of the Property not expressly released, may release any part of the Property or any person liable for any of the Debt and may agree with any party with an interest in

the Property to extend the time for payment of all or any part of the Debt or to waive the prompt and full performance of any term, condition or covenant of the Note or any of the other Loan Documents.

SECTION 5.12. Partial Payments. Acceptance by the Mortgagee of any payment of less than the full amount due on the Debt shall be deemed acceptance on account only, and the failure of the Mortgagor to pay the entire amount then due shall be and continue to constitute an Event of Default, and at any time thereafter and until the entire amount due on the Debt has been paid, the Mortgagee shall be entitled to exercise all rights conferred on it by the terms of this Mortgage in case of the occurrence of an Event of Default.

SECTION 5.13. Addresses for Notices. When any notice is required or permitted to be given in connection with this Mortgage, such notice shall be given by delivering it to the other party at the address set forth below or by depositing it in the United States mail (either certified mail or registered mail), postage prepaid and addressed to such party at the address shown on the first page of this instrument, or to such other address of which either party may give the other notice as provided herein.

SECTION 5.14. Correction of Errors. Upon request of the Mortgagee, the Mortgagor will promptly correct any error which may be discovered in any of the documents executed in connection with the Loan.

SECTION 5.15. Titles. All section, paragraph, subparagraph or other titles contained in this Mortgage are for reference purposes only, and this Mortgage shall be construed without reference to said titles.

IN WITNESS WHEREOF, the undersigned Mortgagor has caused this instrument to be executed by its duly authorized officer on the date first written above.

KEN LOKEY HOMES, INC.

By

Its

ATTEST:

By

Its

STATE OF TEXAS )  
HARRIS COUNTY )

I, Kathleen Geier, a Notary Public in and for said County in said State, hereby certify that Kurt Watzek, whose name as President of Lokey Homes, Inc., a corporation, 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 said instrument, she, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this the 14 day of December, 1988.

Kathleen Geier  
Notary Public

AFFIX SEAL

My commission expires: March 18, 1989

This instrument prepared by:

HORAN & ASSOCIATES  
6363 Woodway, Suite 900  
Houston, Texas 77057  
Attn: Mr. Jim F. Avant

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EXHIBIT "A"

Lot Three (3), according to the survey of Cedar Cove Royal Addition as recorded in Map Book 12, Page 66 in the Probate Office of Shelby County, Alabama, being situated in Shelby County, XXXXXXXX Alabama.

STATE OF ALA. SHELBY  
I CERTIFY THIS  
INSTRUMENT WAS FILED

88 DEC 21 AM 11:08

1. Deed Tax \$ 144.00  
2. Mtg Tax 65.00  
3. Recording Fee 1.00  
4. Indexing Fee 210.00  
TOTAL

*Thomas W. Cunningham, Jr.*  
JUDGE OF PROBATE

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