

NOTE TO PROBATE JUDGE:

\$2,250,000 of the proceeds of the loan secured by this Mortgage has been used to finance the purchase price of the Land described herein, which has been conveyed to the Borrower simultaneously herewith, as evidenced by a deed recorded concurrently with the recording of this mortgage.

STATE OF ALABAMA)
SHELBY COUNTY)

Inst # 1993-40414

FUTURE ADVANCE MORTGAGE

THIS FUTURE ADVANCE MORTGAGE (this "Agreement") dated December 15, 1993 is between **WEATHERLY INVESTMENT GROUP, L.L.C.**, an Alabama limited liability company (herein jointly and severally called the "Borrower," whether one or more), as mortgagor, and **AMSOUTH BANK N.A.**, a national banking association (the "Lender"), as mortgagee.

Recitals

Capitalized terms used in these Recitals have the meanings defined for them above or in Section 1.2. The Borrower has requested that the Lender extend Credit to the Borrower under the Credit Documents. To secure the Obligations, and to induce the Lender to extend such Credit, the Borrower has agreed to execute this Agreement. This is a **FUTURE ADVANCE MORTGAGE** and the proceeds of the Credit may be advanced by the Lender to the Borrower from time to time under the Credit Documents.

A portion of the Credit to be extended by the Lender to the Borrower under the Credit Documents is to be used by the Borrower to purchase the Land simultaneously with the delivery of this Agreement.

The Borrower intends to convey the Land to Weatherly Joint Venture, L.L.C. (the "Joint Venture"), which will develop the Project on the Land.

Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals, and to induce the Lender to extend Credit to the Borrower under the Credit Documents, the Borrower agrees with the Lender as follows:

1993-40414

141002.03/ARENDD/2-1301 12/13/93 1:16pm

Return To:
Alabama Title Co., Inc.

12/16/1993-40414
12:02 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
033 MCD 3463.50

ARTICLE 1

Rules of Construction and Definitions

SECTION 1.1 Rules of Construction. For the purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

(a) Words of masculine, feminine or neuter gender include the correlative words of other genders. Singular terms include the plural as well as the singular, and vice versa.

(b) All references herein to designated "Articles," "Sections" and other subdivisions or to lettered Exhibits are to the designated Articles, Sections and subdivisions hereof and the Exhibits annexed hereto unless expressly otherwise designated in context. All Article, Section, other subdivision and Exhibit captions herein are used for reference only and do not limit or describe the scope or intent of, or in any way affect, this Agreement.

(c) The terms "include," "including," and similar terms shall be construed as if followed by the phrase "without being limited to."

(d) The terms "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, other subdivision or Exhibit.

(e) All Recitals set forth in, and all Exhibits to, this Agreement are hereby incorporated in this Agreement by reference.

(f) No inference in favor of or against any party shall be drawn from the fact that such party or such party's counsel has drafted any portion hereof.

(g) All references in this Agreement to a separate instrument are to such separate instrument as the same may be amended or supplemented from time to time pursuant to the applicable provisions thereof.

SECTION 1.2 Definitions. As used in this Agreement, the following terms are defined as follows:

(a) **Business Day** means any day other than a Saturday, a Sunday or a day on which banking institutions are required or authorized to close in Birmingham, Alabama.

(b) **CERCLA** means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 *et seq.*

(c) **Construction Documents** is defined in Section 2.1(h).

(d) **Credit** means, individually and collectively, all loans, forbearances, advances, disbursements and other extensions of credit now or hereafter made by the Lender to or for the account of the Borrower under the Credit Documents.

(e) **Credit Documents** means this Agreement and the documents described in **Exhibit B** and all other documents now or hereafter executed or delivered in connection with the transactions contemplated thereby.

(f) **Default Rate** means a rate of interest equal to four percentage points (400 basis points) in excess of the highest interest rate that would otherwise be payable on the principal amount of the Credit under the Credit Documents from time to time in the absence of the existence of a default, or the maximum rate permitted by law, whichever is less.

(g) **Development Escrow Fund** means the fund to be established and maintained pursuant to Section 4.14 of this Agreement.

(h) **Environmental Law** means any Governmental Requirement (including CERCLA) relating to pollution or protection of human health or the environment, including any Governmental Requirement relating to Hazardous Substances.

(i) **Event of Default** is defined in Section 5.2. An Event of Default "exists" if the same has occurred and is continuing.

(j) **Governmental Authority** means any national, state, county, municipal or other government, domestic or foreign, and any agency, authority, department, commission, bureau, board, court or other instrumentality thereof.

(k) **Governmental Requirements** means all laws, rules, regulations, ordinances, judgments, decrees, codes, orders, injunctions, notices and demand letters of any Governmental Authority.

(l) **Guarantors** shall mean Thomas J. Thornton, Patrick A. Thornton, Thomas J. Curtin, T. Phillip Webb, William J. Long, David W. Wood, James A. Watson, Dr. James A. Flanagan and Dr. Robert P. Eichelberger.

(m) **Hazardous Substances** means all pollutants, contaminants, toxic or hazardous wastes and other substances (including asbestos, urea formaldehyde foam insulation and materials containing either petroleum or any of the substances referenced in Section 101(14) of CERCLA), 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 if not so regulated, restricted, prohibited or penalized, might pose a hazard to the health and safety of the public or the occupants of the property on which it is located or the occupants of the property adjacent thereto.

(n) **Impositions** means all taxes, assessments, dues, fines, rents, levies, fees, permits and other governmental and quasi-governmental charges imposed or levied upon the Property (or any part thereof), the operations thereon, the use or occupancy thereof, the Liens or other interests created by this Agreement, the filing or recording of this Agreement or the Obligations.

(o) **Improvements** is defined in Section 2.1(b).

(p) **Joint Venture** is defined in the recitals to this Agreement.

(q) **Land** is defined in Section 2.1(a).

(r) **Lien** means any mortgage, pledge, assignment, charge, encumbrance, lien, security title, security interest or other preferential arrangement.

(s) **Lot** means any lot in the Project as shown on any subdivision plat for the Project approved by the Lender, or any other portion of the Real Property approved by the Lender, which is to be sold or offered for sale to any other person.

(t) **Lot Contracts** means all sale contracts heretofore or hereafter entered into with any person for the sale of any Lot (or the grant of any option to purchase right of first refusal, right to select a Lot, or any other right or interest whatsoever with respect to any Lot).

(u) **Obligations** means (1) the payment of all amounts now or hereafter becoming due and payable under the Credit Documents, including the principal amount of the Credit, all interest thereon (including interest that, but for the filing of a petition in bankruptcy, would accrue on any such principal) and all other fees, charges and costs (including attorneys' fees and disbursements) payable in connection therewith; (2) the observance and performance by the Borrower of all of the provisions of the Credit Documents; (3) the payment of all sums advanced or paid by the Lender in exercising any of its rights, powers or remedies under the Credit Documents, and all interest (including post-bankruptcy petition interest, as aforesaid) on such sums provided for herein or therein; and (4) all renewals, extensions, modifications and amendments of any of the foregoing, whether or not any renewal, extension, modification or amendment agreement is executed in connection therewith.

(v) **Obligors** means the Borrower, the Guarantors, and any other maker, endorser, surety, guarantor or other person now or hereafter liable for the payment or performance, in whole or in part, of any of the Obligations.

(w) **Permitted Encumbrances** means any Liens and other matters affecting title to the Property that are described in Exhibit C.

(x) **Person** (whether or not capitalized) includes natural persons, sole proprietorships, corporations, trusts, unincorporated organizations, associations, companies, institutions, entities, joint ventures, partnerships and Governmental Authorities.

(y) **Personal Property** is defined in Section 2.1(c).

(z) **Property** is defined in Section 2.1.

(aa) **Project** means a certain residential subdivision to be known as "Weatherly," which is proposed to be developed on the Land in accordance with a development plan and subdivision plat to be approved by the Lender, the First Sector of which Project is to consist of approximately 37 single-family estate sized lots of approximately two acres each.

(ab) **Purchasers** means the parties named as the purchasers of the Lots in the Lot Contracts, and their respective heirs, successors and assigns.

(ac) **Real Property** is defined in Section 2.1(b).

(ad) **UCC Property** means the Personal Property and all other personal property and fixtures included in the Property.

ARTICLE 2

Granting Clauses

SECTION 2.1 Granting Clauses. As security for the Obligations, the Borrower hereby grants, bargains, sells, assigns and conveys unto the Lender, and hereby grants to the Lender a security interest in, all of the Borrower's right, title and interest in, to and under the following property and interests in property (collectively, the "Property"):

(a) **Land**. The land located in Shelby County, Alabama more particularly described in Exhibit A, and all reversions and remainders in and to said land and all tenements, hereditaments, easements, rights-of-way, rights (including mineral and mining rights, and all water, oil and gas rights), privileges, royalties and appurtenances to said land, now or hereafter belonging or in anywise appertaining thereto, including any right, title and interest in, to or under any agreement or right granting, conveying or creating, for the benefit of said land, any easement, right or license in any other property, and in, to or under any streets, ways, alleys, vaults, gores or strips of land adjoining said land or any parcel thereof, or in or to the air space over said land; and all claims or demands of the Borrower, at law or in equity, in possession or expectancy of, in or to any of the same (all of the foregoing hereinafter collectively called the "Land").

(b) **Improvements**. All buildings, structures, facilities and other improvements (including the clearing and grubbing, rough grading, sewer (sanitary and storm water), drainage, water, electricity and natural gas distribution systems, curbs and gutters, street paving, sidewalks and street lights constituting improvements for the Project) now or hereafter located on the Land, and all building materials, building equipment and fixtures of every kind and nature now or hereafter located on the Land or attached to, contained in, or used in connection with, any such

buildings, structures, facilities or other improvements, and all appurtenances and additions thereto and betterments, renewals, substitutions and replacements thereof, now owned or hereafter acquired by the Borrower (all of the foregoing hereinafter collectively called the "Improvements," and together with the Land called the "Real Property").

(c) **Personal Property.** All goods, equipment, inventory, supplies and other items or types of tangible personal property (including additions and accessions thereto and replacements and substitutions therefor) now owned or hereafter created or acquired by the Borrower and attached to the Real Property (other than fixtures); or placed on the Real Property and used or useful in connection with, or in any way pertaining or relating to, the Real Property or the use and occupancy thereof, though not attached to the Real Property; or for which the proceeds of the Credit have been or may be advanced, wherever the same may be located (all of the foregoing hereinafter collectively called the "Personal Property").

(d) **Rents and Leases.** All leases, subleases, lettings and licenses, and other use and occupancy agreements, now or hereafter pertaining to any of the Real Property or Personal Property, and all rents, profits, issues and revenues of the Real Property and Personal Property now or hereafter accruing; provided, however, that if no Event of Default exists, the Borrower shall have a license (but limited as set forth in Section 5.3(f)) to collect and receive all of such rents, profits, issues and revenues.

(e) **Insurance Policies.** All policies of hazard insurance now or hereafter in effect that insure the Real Property, the Personal Property or any other property conveyed or encumbered hereby, together with all right, title and interest of the Borrower in and to each and every such policy, and all proceeds thereof, including any premiums paid and rights to returned premiums.

(f) **Litigation Awards.** All judgments, damages, settlements, awards, payments and compensation, including all interest thereon, that may be made or due to the Borrower or any subsequent owner of any of the Real Property, the Personal Property or any other property conveyed or encumbered hereby, as a result of the exercise of the right of eminent domain or condemnation, the alteration of the grade of any street or any other injury to or diminution or decrease in value of the Real Property, the Personal Property, or any other such property.

(i) **Lot Contracts.** (i) All Lot Contracts, (ii) all guarantees of payment or performance of any of the obligations of the Purchasers under the Lot Contracts, (iii) all sales proceeds and other sums payable under the Lot Contracts, including all earnest money and other deposits paid or to be paid thereunder, and (iv) all awards, dividends and other payments heretofore or hereafter made to the Borrower in any court proceedings involving any of the Purchasers under the Lot Contracts in any bankruptcy, insolvency or reorganization proceedings in any state or federal court (the Borrower hereby appointing the Lender as the Borrower's irrevocable attorney in fact to appear in any such proceeding and to collect any such award, dividend or other payment).

(g) **General Intangibles and Agreements.** (1) All general intangibles relating to the development or use of the Real Property, the Personal Property or any other property conveyed or encumbered hereby, or the management and operation of any business of the Borrower thereon, including all patents, patent applications, trade names, trademarks, trademark applications, knowledge and process, licensing arrangements, blueprints, technical specifications, manuals and other trade secrets, including the right to use the name "Weatherly," or any variation thereof, and any logo, copyright or trademark associated therewith in the naming of or advertising for the Project and the Real Property; (2) the good will of any business conducted or operated on the Real Property, all governmental licenses and permits relating to the construction, renovation or operation thereof, all names under or by which the same may at any time be operated or known and all rights to carry on business under any such names or any variant thereof; and (3) all contracts and agreements (including construction, renovation, maintenance, engineering, architectural, leasing, management, operating and concession agreements) affecting the Real Property, the Personal Property or any other property conveyed or encumbered by this Agreement, or used or useful in connection therewith, whether now or hereafter entered into.

(h) **Construction Documents.** (1) All plans and specifications for the Project or any portion thereof; (2) all contracts with architects and engineers responsible for the design of any of the Project, the preparation or evaluation of any such plans and specifications or the supervision of construction of any of the Project; (3) all contracts to which the Borrower is a party providing for the construction of any of the Project or the furnishing of any labor or material in connection therewith; (4) all contracts to which the Borrower is a party providing for the management of the construction of any of the Project; (5) all rights of the Borrower as a third party beneficiary under all contracts and subcontracts pertaining to the design, construction and development of any of the Project as to which the Borrower is not a party; (6) all payment and performance bonds relating to any portion of the Project; and (7) all other contracts and agreements related to the design, construction and development of any of the Project (all of the foregoing hereinafter collectively called the "Construction Documents").

(i) **Supplemental Documents.** All changes, additions, supplements, modifications, amendments, extensions, renewals, revisions and guaranties to, of or for any agreement or instrument included in the foregoing.

(j) **Proceeds.** All proceeds of any of the foregoing.

SUBJECT, HOWEVER, to Permitted Encumbrances.

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

ARTICLE 3

Representations and Warranties

The Borrower represents and warrants to the Lender that:

SECTION 3.1 Valid Title, Debt, etc. (a) The Borrower is lawfully seized in fee simple of the Real Property and is the lawful owner of, and has good title to, the remainder of the Property, and the Borrower has good right to mortgage, assign and grant a security interest in the Property as aforesaid; (b) the Property is free of all Liens other than Permitted Encumbrances; (c) the Borrower has full power to encumber, assign and convey the Property as provided herein; (d) this Agreement is and will remain a valid and enforceable first priority mortgage lien on, and security interest in, the Property, subject only to Permitted Encumbrances; and (e) the Borrower shall forever warrant and defend the title to the Property unto the Lender against the lawful claims of all persons whomsoever, except those claiming under Permitted Encumbrances.

SECTION 3.2 Environmental Compliance. To the best knowledge of the Borrower, (a) the Property has not been used to generate, manufacture, refine, transport, treat, store, handle or dispose of any Hazardous Substance; (b) the Property is not now, and has never been, in violation of any applicable Environmental Law; (c) there are no pending or threatened investigations or claims with respect to the Property by any Governmental Authority or other person under any Environmental Law; (d) there are no Hazardous Substances present on property adjacent to the Property that could migrate to, through or under the Property; (e) the past, current and intended uses of the Property comply and will comply with all Environmental Laws; and (f) the Borrower has obtained all certificates, licenses, authorizations, registrations, permits and other approvals of Governmental Authorities required by Environmental Laws.

ARTICLE 4

Covenants and Agreements of Borrower

SECTION 4.1 Payment of Impositions. Unless the Borrower is making monthly deposits pursuant to Section 4.6, the Borrower shall pay or cause to be paid all Impositions and at the Lender's request shall furnish evidence of the payment thereof at least 10 business days before the Impositions are due. The Borrower may, at the Borrower's own expense, in good faith contest any such Impositions and, in the event of any such contest, may permit the Impositions so contested to remain unpaid during the period of such contest and any appeal therefrom, provided that during such period enforcement of the contested items shall be effectively stayed.

SECTION 4.2 Insurance. The Borrower 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 and other contingencies as from time to time may be required by the Lender, all in such manner and with such companies and in such amounts as the Lender may approve. All such policies shall be subject to the Lender's approval and shall name the Lender as a named insured and provide that any losses payable thereunder shall (pursuant to loss payable clauses, in form and content acceptable to the Lender, to be attached to each policy) be payable to the Lender, subject to the rights of the holders of any prior mortgages. The Borrower shall cause duplicate originals of such insurance policies (or, at the Lender's option, certificates satisfactory to the Lender) to be deposited with the Lender. If requested by the Lender, the Borrower shall furnish to the Lender evidence of the payment of the premiums for such policies. The Borrower shall cause each insurer under each of the policies to agree (either by endorsement upon such policy or by letter addressed to the Lender) to give the Lender at least 10 business days' prior written notice of the cancellation of such policies in whole or in part or the lapse of any coverage thereunder. The Borrower shall not take any action or fail to take any action that would result in the invalidation of any insurance policy required hereunder. 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 Obligations, complete title to all insurance policies held by the Lender and the unearned premiums with respect thereto shall pass to and vest in the purchaser or grantee of the Property.

SECTION 4.3 Damage and Destruction.

(a) **Borrower's Responsibilities.** In the event of any damage to or loss or destruction of the Property, the Borrower shall (1) promptly notify the Lender of such event and take such steps as shall be necessary to preserve any undamaged portion of the Property, and (2) unless otherwise instructed by the Lender, promptly, regardless whether any insurance proceeds are sufficient for the purpose or (unless such insurance proceeds are otherwise applied by the Lender as provided herein), commence and diligently pursue to completion the restoration, replacement or rebuilding of the Property as nearly as possible to the value, condition and character thereof immediately prior to such damage, loss or destruction and in accordance with plans and specifications approved, and with other provisions for the preservation of the security hereunder established, by the Lender.

(b) **Lender's Rights; Application of Proceeds.** If any portion of the Property is so damaged, destroyed or lost, and such damage, destruction or loss is covered, in whole or in part, by insurance described in Section 4.2, then (1) the Lender may, but shall not be obligated to, make proof of loss, and may settle, adjust or compromise any claims thereunder, (2) each insurance company concerned is hereby authorized and directed to make payment therefor directly to the Lender, and (3) the Lender shall have the right to apply the insurance proceeds, first, to reimburse the Lender for all reasonable costs and expenses, including all attorneys' fees and disbursements, incurred in connection with the collection of such proceeds, and second, the remainder of such proceeds shall be applied, at the Lender's option, (A) in payment of all or any part of the Obligations in the order and manner determined by the Lender in its sole discretion (provided that the remainder of the Obligations shall continue in full force and effect and the Obligors who are obligated therefor shall not be excused from the payment thereof), (B) to the cure of any then-existing Event of Default, or (C) to the repair, restoration, or

replacement, in whole or in part, of the Property. The Borrower expressly assumes all risk of loss, including a decrease in the use, enjoyment or value, of the Property from any casualty whatsoever, whether or not insurable or insured against. The Lender shall not be liable for any failure to collect, or exercise any due diligence in the collection of, any insurance proceeds.

SECTION 4.4 Condemnation.

(a) **Borrower's Responsibilities; Proceedings.** The Borrower, immediately upon obtaining knowledge thereof, shall notify the Lender of any pending or threatened proceedings for the condemnation of any of the Property or of the exercise of any right of eminent domain with respect thereto, or of any other pending or threatened proceedings arising out of injury or damage to any of the Property. The Lender may participate in any such proceedings, and the Borrower from time to time shall execute and deliver to the Lender all instruments requested by the Lender to permit such participation. The Borrower shall, at the Borrower's expense, diligently prosecute any such proceedings, deliver to the Lender copies of all papers served in connection therewith and consult and cooperate with the Lender, its attorneys and agents, in carrying on and defending any such proceedings. No settlement of any such proceedings shall be made by the Borrower without the Lender's consent, not to be unreasonably withheld.

(b) **Lender's Rights to Proceeds.** All proceeds of condemnation awards or proceeds of sale in lieu of condemnation, and all judgments, decrees and awards for injury or damage to the Property shall be paid to the Lender. The Borrower authorizes the Lender to collect and receive the same, to give receipts and acquittances therefor, and to appeal from any such judgment, decree or award. The Lender shall not be liable for any failure to collect, or exercise diligence in the collection of, any of the same.

(c) **Application of Proceeds.** The Lender shall have the right to apply any proceeds, judgments, decrees or awards referred to in Section 4.4(b), first, to reimburse the Lender for all reasonable costs and expenses, including attorneys' fees and disbursements, incurred in connection with the proceeding in question or the collection of such amounts, and second, the remainder thereof in the same manner as provided in Section 4.3(b) with respect to insurance proceeds.

SECTION 4.5 Liens and Liabilities.

(a) **Discharge of Liens.** The Borrower shall pay, bond or otherwise discharge, from time to time when the same shall become due, all lawful claims and demands of mechanics, materialmen, laborers and others that, if unpaid, might result in, or permit the creation of, a Lien on any of the Property, and in general, the Borrower shall do, or cause to be done, at the Borrower's sole cost and expense, everything necessary to fully preserve the Lien and priority of this Agreement.

(b) **Creation of Liens.** The Borrower shall not, without the Lender's consent, create, place or permit to be created or placed, or allow to remain, any voluntary or involuntary Lien on any of the Property, whether prior to, on a parity with or subordinate to the Lien of this

Agreement, other than Permitted Encumbrances. If any such Lien is created or placed on the Property without the Lender's consent, the Borrower shall cause the same to be discharged, released or bonded off to the Lender's satisfaction within 10 days after the filing thereof.

(c) **No Consent.** Nothing in the Credit Documents shall be deemed or construed as constituting the consent or request by the Lender, express or implied, to any contractor, subcontractor, laborer, mechanic or materialman for the performance of any labor or the furnishing of any material for any improvement, construction, renovation, alteration or repair of the Property. The Borrower agrees that the Lender does not stand in any fiduciary relationship to the Borrower by reason of the transactions contemplated by the Credit Documents.

SECTION 4.6 Tax and Insurance Deposits. At any time during the term of this Agreement if an Event of Default exists, upon demand by the Lender, the Borrower shall deposit with the Lender a sum that bears the same relation to the annual insurance premiums for all insurance required by the terms hereof and Impositions assessed against the Property for the insurance period or tax year then in effect, as the case may be, as the number of months elapsed as of the date of such demand since the last preceding installment of said premiums or Impositions shall have become due and payable bears to twelve (12). For the purpose of this computation, the month in which the last preceding installment of premiums or Impositions became due and payable and the month in which such demand is given shall be included and deemed to have elapsed. On the first day of the month next succeeding the month in which such demand is given, and thereafter on the first day of each and every month during the term of this Agreement, the Borrower shall deposit with the Lender a sum equal to one-twelfth of such insurance premiums and such Impositions for the then-current annual insurance period and tax year, so that as each installment of such premiums and Impositions shall become due and payable, the Borrower shall have deposited with the Lender a sum sufficient to pay the same. All such deposits shall be received and held by the Lender, and shall be applied to the payment of each installment of such premiums and Impositions as they shall become due and payable. The Lender shall, upon demand, furnish evidence to the Borrower of the making of each such payment. If the amount of such premiums and Impositions has not been definitely ascertained at the time when any such monthly deposits are required to be made, the Borrower shall make such deposits based upon the amount of such premiums and Impositions for the preceding year, subject to adjustment as and when the amount of such premiums and Impositions are ascertained. If at the time when any installment of such premiums and such Impositions becomes due and payable the Borrower shall not have deposited a sum sufficient to pay the same, the Borrower shall, within 10 days after demand, deposit any deficiency with the Lender. Upon the termination of this Agreement in accordance with Section 6.18, any remaining amount on deposit with the Lender shall be repaid to the Borrower without interest. The Borrower shall deliver to the Lender all insurance and tax bills promptly following receipt during any period when such monthly deposits are to be made with the Lender. If the Obligations are accelerated as provided in Section 5.3(a), all funds so deposited may, at the Lender's option, be applied to the Obligations in any order determined by the Lender or to cure any existing Event of Default or to the payment of insurance premiums and Impositions as provided in this Section 4.6.

SECTION 4.7 Operations; Utilities; Waste, Demolition, Alteration or Replacement.

The Borrower shall (a) continuously operate the Borrower's business on the Improvements in accordance with sound business practices; (b) not engage in any activity that would diminish the value of the Property or decrease the income from the Property; (c) pay or cause to be paid all bills for utilities and other materials and services used on or in connection with the Property; (d) cause the Property and every part thereof to be maintained and kept in good and safe repair, working order and condition; (e) not commit or permit waste thereon; (f) not remove, demolish or alter the design or structural character of any Improvements hereafter erected on the Land without the Lender's prior written consent; and (g) 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 Borrower shall not remove from the Real Property any of the fixtures or Personal Property included in the Property without the express prior written consent of the Lender and unless the same are immediately replaced with like property of at least equal value and utility.

SECTION 4.8 Sale, Lease or Transfer, etc.

(a) **Real Property.** The Borrower shall not (1) sell, assign, transfer, convey, lease with an option to purchase, exchange or otherwise dispose of (collectively, a "transfer"), any of the Real Property or any interest therein; (2) contract with any person for any of the foregoing; or (3) subject any of the Real Property or any interest therein to any additional Lien, either voluntarily or involuntarily; provided, however, that notwithstanding the foregoing, the Borrower may (A) transfer the Real Property to the Joint Venture for the purpose of developing the Project, provided that the Property shall remain subject to the Lien of this Agreement, and (B) the Joint Venture may transfer Lots in connection with their sale in the ordinary course of business and in conformity with the release provisions contained in Section 6.20 of this Agreement. Nothing contained herein shall be construed to permit any other transfer of any of the Property by the Borrower or the Joint Venture.

(b) **Equity Interests.** The Borrower and the Joint Venture shall not be dissolved, liquidated or terminated, whether by operation of law or otherwise, and there shall be no change in their Managing Members. Any sale, pledge, encumbrance, contract to sell, assignment or other transfer of any equity interest in the Borrower or the Joint Venture, or any other transaction whereby the legal or beneficial ownership of the Borrower or the Joint Venture is changed, including the sale of additional memberships or other equity interests, the liquidation or dissolution of the Borrower or the Joint Venture, the merger or consolidation of the Borrower or the Joint Venture with any other person, or the participation by the Borrower or the Joint Venture in a statutory share exchange with any other person, shall be treated as a transfer of the Real Property for purposes of this Section 4.8; provided, however, that nothing contained herein shall prohibit the following transfers of equity interests in the Borrower or the Joint Venture so long as there is no change in the Managing Members: (1) the members of each of the Borrower and the Joint Venture may transfer their equity interests in the limited liability company in whole or in part to other members thereof in accordance with the terms of its Operating Agreement, and (2) any member thereof may transfer his equity interest in whole or in part to any other members of his family. As used in this paragraph, the term "family" shall mean the member's

spouse, siblings, children, grandchildren, nieces and nephews, and any trust for any of them. No further transfers shall be permitted by any such family members.

(c) **Lender's Rights.** The occurrence of any of the events described in Section 4.8(a) or 4.8(b) will constitute an Event of Default under this Agreement, and the Lender may, in its sole discretion, exercise any of its rights and remedies on default under Section 5.3 or require the payment after the date of such occurrence of a higher rate of interest on the unpaid principal portion of the Obligations as a condition to not exercising such rights and remedies, whether such rights and remedies be exercised by the Lender to obtain a higher rate of interest on the Obligations or to protect the security afforded by this Agreement.

(d) **Lender's Reliance.** The Borrower acknowledges the Lender's express reliance on this Section 4.8 in extending Credit under the Credit Documents based on the security of this Agreement.

SECTION 4.9 Use, Governmental Compliance, etc. The Borrower shall (a) use the Property solely for the development of a single-family residential subdivision consisting of Lots of approximately two acres in accordance with a development plan approved by the Lender in writing; (b) maintain all material certificates, licenses, authorizations, registrations, permits and other approvals of Governmental Authorities necessary for the use of the Property and the conduct of any business or activity on the Real Property, including all required zoning, subdivision lot sale, building, land use, environmental, occupancy, fire and utility approvals; (c) comply with all Governmental Requirements now or hereafter affecting the Property or any business or activity conducted or to be conducted on the Real Property; and (d) not permit any act to be done on the Property in violation of any Governmental Requirements or that constitutes a public or private nuisance, or that makes void or cancelable, or increases the premium of, any insurance then in force with respect thereto.

SECTION 4.10 Zoning; Title Matters. The Borrower shall not: (a) initiate or support any zoning reclassification of the Property or seek any variance under existing zoning laws or use or permit the use of the Property in a manner that would result in such use becoming a non-conforming use under, or otherwise violate, applicable zoning laws; (b) modify, amend or supplement any Permitted Encumbrances in any manner that would materially increase the obligations or decrease the rights of the Borrower or adversely affect the rights of the Lender under the Credit Documents; (c) subject the Property to any restrictive covenants or encumbrances (other than the Permitted Encumbrances), execute or file any subdivision plat affecting the Property except as approved in writing by the Lender or consent to the annexation of the Property to any municipality; or (d) permit the Property to be used by the public or any person in any manner that might make possible a claim of adverse possession or of any implied dedication easement or easement by prescription.

SECTION 4.11 Environmental Compliance. The Borrower shall (a) not, and shall not permit any other person to, bring any Hazardous Substances on to the Property; (b) if any Hazardous Substances are brought or found on the Property, immediately and properly remove and dispose of them in accordance with applicable Environmental Laws; (c) cause the Property

and all operations conducted thereon (including all operations conducted thereon by other persons) to comply with all Environmental Laws; (d) permit the Lender from time to time to inspect the Property and observe the Borrower's operations thereon and to perform tests (including soil and ground water tests) for Hazardous Substances on the Property; (e) undertake all preventive, investigatory and remedial action (including emergency response, removal, clean up, containment and other remedial action) that is (1) required by any applicable Environmental Law or (2) necessary to prevent or minimize any property damage (including damage to any of the Property), personal injury or harm to the environment, or the threat of any such damage or injury, by releases of or exposure to Hazardous Substances in connection with the Property or the operations of the Borrower on the Property; (f) promptly give notice to the Lender in writing if the Borrower should become aware of (1) any spill, release or disposal of any Hazardous Substances, or imminent threat thereof, at the Property, in connection with the operations on the Property, or at any adjacent property that could migrate to, through or under the Property, (2) any violation of Environmental Laws regarding the Property or operations on the Property, and (3) any investigation, claim or threatened claim under any Environmental Law, or any notice of violation under any Environmental Law, involving the Borrower or the Property; and (g) deliver to the Lender, at the Lender's request, copies of any and all documents in the Borrower's possession or to which the Borrower has access relating to Hazardous Substances or Environmental Laws and the Property, and the operations on the Property, including laboratory analyses, site assessments or studies, environmental audit reports and other environmental studies and reports. If the Lender at any time reasonably believes that the Borrower is not complying with all applicable Environmental Laws or the requirements of this Agreement regarding the same, or that a material spill, release or disposal of Hazardous Substances has occurred on or under the Property, or if any other Event of Default exists, the Lender may require the Borrower to furnish to the Lender an environmental audit or site assessment reasonably satisfactory to the Lender with respect to the matters of concern to the Lender. Such audit or assessment shall be performed at the Borrower's expense by a qualified consultant approved by the Lender.

SECTION 4.12 Maintenance of Lien Priority. The Borrower shall take all steps necessary to preserve and protect the perfection, validity and priority of the Liens on the Property purported to be created by this Agreement. The Borrower shall execute, acknowledge, deliver, file and record such additional instruments as the Lender may deem necessary in order to perfect, preserve, protect, continue, extend or maintain the Liens created hereby as first priority Liens on the Property, subject to Permitted Encumbrances, or to subject after-acquired property or proceeds to such Liens. If the Liens, validity or priority of this Agreement, or if title to any of the rights of the Borrower or the Lender in or to the Property shall be endangered or questioned, or shall be attacked directly or indirectly, or if any action or proceeding is instituted against the Borrower or the Lender with respect thereto, the Borrower shall promptly notify the Lender thereof and shall diligently endeavor to cure any defect that may be claimed, and shall take all necessary and proper steps for the defense of such action or proceeding, including the employment of counsel, the prosecution or defense of the litigation, and subject to the Lender's approval, the compromise, release or discharge of any and all adverse claims other than Permitted Encumbrances. The Lender (whether or not named as a party to such actions or proceedings) is authorized and empowered (but shall not be obligated) to take such

additional steps as it may reasonably deem necessary or proper for the defense of any such action or proceeding or the protection of the Liens, validity or priority of this Agreement, including the employment of counsel, the prosecution or defense of litigation, the compromise, release or discharge of adverse claims, and the removal of prior Liens. The Borrower shall, on demand, reimburse the Lender for all expenses (including attorneys' fees and disbursements) reasonably incurred by the Lender in connection with any of the foregoing matters.

SECTION 4.13 Permitted Encumbrances. The Borrower shall not permit any default or violation to occur with respect to any agreement, covenant or restriction included in Permitted Encumbrances.

SECTION 4.14 Development Escrow Fund.

(a) Concurrently with the execution and delivery of this Agreement, the Borrower shall (1) cause to be established a depository account with the Lender in the name of the Joint Venture, which shall constitute the Development Escrow Fund referred to herein, and (2) cause to be deposited in the Development Escrow Fund immediately available funds in an amount not less than \$250,000. The moneys deposited in the Development Escrow Fund may be withdrawn only upon the signatures of both Thomas J. Thornton and Jack H. Harrison (or upon the death, disability or similar unavailability or unacceptability of either of them, such other persons as may be acceptable to the Lender).

(b) The Borrower covenants and agrees as follows with respect to the Development Escrow Fund: (1) the Borrower shall permit the moneys deposited from time to time in the Development Escrow Fund to be used by the Joint Venture solely for the payment of the costs of the development of the Project on the Land; and (2) the Borrower shall cause the Joint Venture to pay over to the Lender as each Lot is sold for deposit to the Development Escrow Fund the Lot's "pro rata share of the development costs," as defined in Section 6.20.

(c) The Borrower acknowledges and agrees that the intention of the parties in establishing the Development Escrow Fund is to provide a fund which will make available to the Joint Venture the approximate cost of developing a sector of the Project (i.e. \$250,000) and to replenish such fund from time to time from the sale of Lots so that sufficient funds will be available from the sale of all Lots in a given sector to develop the next sector.

SECTION 4.15 Other Covenants. The Borrower shall (a) commence (or cause to be commenced) the construction of the Project within 30 days from the date of this Agreement, (b) not declare or pay any dividend or distribution to its members or redeem, retire, purchase or acquire the equity interests of any of its members until the Obligations are paid in full, and (c) cause all depository accounts (including the operating account) relating to the Project to be maintained with the Lender until the Obligations are paid in full.

ARTICLE 5

Defeasance, Default and Remedies

SECTION 5.1 Defeasance. This Agreement is made upon the condition that if (a) all of the Obligations (as defined in Section 1.2(u), including all future advances and other future indebtednesses, obligations and liabilities included therein) are paid in full, and (b) the Borrower reimburses the Lender for any amounts the Lender has paid in respect of Liens, Impositions, prior mortgages, insurance premiums, repairing or maintaining the Property, performing the Borrower's obligations under any lease related to the Real Property, performing the Borrower's obligations under Section 4.11 with respect to environmental matters, and any other advancements hereunder, and interest thereon, and (c) the Borrower fulfills all of the Borrower's other obligations under this Agreement, and (d) the Lender has no obligation to extend any further Credit to or for the account of the Borrower and there is in existence no contingent liability of the Borrower that is secured by this Agreement, and (e) any other conditions set forth in Section 6.18 are fulfilled, this conveyance shall be null and void upon the filing by the Lender of the written instrument of termination described in Section 6.18.

SECTION 5.2 Events of Default. The occurrence of any of the following events shall constitute an event of default (an "Event of Default") under this Agreement (whatever the reason for such event and whether or not it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree, order, rule or regulation of any Governmental Authority):

(a) any representation or warranty made in this Agreement or in any of the other Credit Documents shall prove to be false or misleading in any material respect as of the time made; or

(b) any report, certificate, financial statement or other instrument furnished in connection with the Credit, this Agreement or any of the other Credit Documents, shall prove to be false or misleading in any material respect as of the time furnished; or

(c) default shall be made in the payment when due of any of the Obligations, and such default shall continue unremedied for five days; or

(d) default shall be made in the due observance or performance of any covenant, condition or agreement on the part of the Borrower to be observed or performed pursuant to the terms of this Agreement (other than any covenant, condition or agreement, default in the observance or performance of which is elsewhere in this Section 5.2 specifically dealt with) and such default shall continue unremedied until the first to occur of (1) the date that is 30 days after written notice by the Lender to the Borrower; or (2) the date that is 30 days after any member of the Borrower first obtains knowledge thereof; or

(e) any event of default, as therein defined, shall occur under any of the other Credit Documents (after giving effect to any applicable notice, grace or cure period specified therein); or

(f) (1) default shall be made with respect to any indebtedness (other than the Obligations) of the Borrower, 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 (2) any such indebtedness shall not be paid when due (after giving effect to any applicable notice, grace or cure periods); or

(g) the Borrower shall (1) apply for or consent to the appointment of a receiver, trustee, liquidator or other custodian of it or any of its properties or assets (including the Property), (2) fail or admit in writing its inability to pay its debts generally as they become due, (3) make a general assignment for the benefit of creditors, (4) suffer or permit an order for relief to be entered against it in any proceeding under the federal Bankruptcy Code, or (5) file a voluntary petition in bankruptcy, or a petition or an answer seeking an arrangement with creditors or to take advantage of any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation law or statute, or an answer admitting the material allegations of a petition filed against the Borrower in any proceeding under any such law or statute, or if action shall be taken by the managers or members of the Borrower for the purpose of effecting any of the foregoing; or

(h) a petition shall be filed, without the application, approval or consent of the Borrower in any court of competent jurisdiction, seeking bankruptcy, reorganization, rearrangement, dissolution or liquidation of the Borrower or of all or a substantial part of its properties or assets, or seeking any other relief under any law or statute of the type referred to in Section 5.2(g)(5) against it, or the appointment of a receiver, trustee, liquidator or other custodian of the Borrower or of all or a substantial part of the properties or assets, and such petition shall not have been stayed or dismissed within 30 days after the filing thereof; or

(i) the Borrower shall become insolvent, suspend its business or be dissolved or liquidated or any writ of execution, attachment or garnishment shall be issued against the assets of the Borrower and such writ of execution, attachment or garnishment shall not be dismissed, discharged or quashed within 30 days of issuance; or

(j) any final judgment for the payment of money shall be rendered against the Borrower and the same shall remain undischarged for a period of 30 days during which execution shall not be effectively stayed; or

(k) if an order of a court of competent jurisdiction is entered permanently enjoining the development of the Project (or any material portion thereof) or the operation of the Property, and all rights of appeal therefrom are exhausted; or

(l) if the Borrower at any time prior to completion of the Project abandons the Project, or ceases to work thereon for a period of more than 10 consecutive calendar days, or fails diligently to prosecute the work on the Project; or

(m) if in the judgment of the Lender the proceeds of the Credit or the Development Escrow Fund or any part thereof are being or at any time have been diverted to a purpose other than the payment of costs of the acquisition of the Land and the development of the Project; or

(n) except for Permitted Encumbrances, if any Lien, statement of Lien or suit to enforce a Lien is filed against any of the Property and the Borrower 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 Lender within 10 days of the day such Lien, statement of Lien or suit is filed.

SECTION 5.3 Rights and Remedies of Lender Upon Default.

(a) **Acceleration of Obligations.** If an Event of Default exists under Section 5.2(g) or 5.2(h), all of the Obligations shall automatically become immediately due and payable. If any other Event of Default exists, the Lender shall have the right without further notice to the Borrower (except any such notice as may be specifically required under the other Credit Documents) to declare all of the Obligations immediately due and payable.

(b) **Possession and Operation of Property.** If an Event of Default exists, in addition to all other rights herein conferred on the Lender, the Lender (or any person designated by the Lender) may, but will not be obligated to, (1) enter upon the Real Property and take possession of any or all of the Property without being guilty of trespass or conversion, exclude the Borrower therefrom, and hold, use, administer, manage and operate the same to the extent that the Borrower could do so, without any liability to the Borrower resulting therefrom; (2) perform any and all obligations of the Borrower under the Construction Documents and exercise any and all rights of the Borrower thereunder as fully as the Borrower could; (3) collect, receive and receipt for all proceeds accruing from the operation and management of the Property; (4) make repairs and purchase needed additional property; (5) insure or reinsure the Property; (6) maintain and restore the Property; (7) prepare the Property for resale, lease or other disposition; (8) have furnished to the Property utilities and other materials and services used on or in connection with the Property; and (9) exercise every power, right and privilege of the Borrower with respect to the Property.

(c) **Judicial Proceedings; Right to Receiver.** If an Event of Default exists, the Lender, in lieu of or in addition to exercising the power of sale hereinafter given, may proceed by suit to foreclose its Lien on the Property, to sue the Borrower for damages on account of said default, for specific performance of any provision contained herein, or to enforce any other appropriate legal or equitable right or remedy. The Lender shall be entitled, as a matter of right, upon bill filed or other proper legal proceedings being commenced for the foreclosure of this Agreement, to the appointment by any competent court or tribunal, without notice to the Borrower or any other party, of a receiver of the rents, issues, profits and revenues of the

Property, with power to lease and control the Property and with such other powers as may be deemed necessary.

(d) **Power of Sale.** If an Event of Default exists, this Agreement shall be subject to foreclosure and may be foreclosed as now provided by law in case of past-due mortgages, and the Lender shall be authorized, at its option, whether or not possession of the Property is taken, to sell the Property (or such part or parts thereof as the Lender may from time to time elect to sell) under the power of sale which is hereby given to the Lender, at public outcry, to the highest bidder for cash, at the front or main door of the courthouse of the county in which the Land to be sold, or a substantial and material part thereof, is located, after first giving notice by publication once a week for three successive weeks of the time, place and terms of such sale, together with a description of the Property to be sold, by publication in some newspaper published in the county or counties in which the Land to be sold is located. If there is Land to be sold in more than one county, publication shall be made in all counties where the Land to be sold is located, but if no newspaper is published in any such county, the notice shall be published in a newspaper published in an adjoining county for three successive weeks. The sale shall be held between the hours of 11:00 a.m. and 4:00 p.m. on the day designated for the exercise of the power of sale hereunder. The Lender may bid at any sale held under this Agreement and may purchase the Property, or any part thereof, if the highest bidder therefor. The purchaser at any such sale shall be under no obligation to see to the proper application of the purchase money. At any sale all or any part of the Property, real, personal or mixed, may be offered for sale in parcels or en masse for one total price, and the proceeds of any such sale en masse shall be accounted for in one account without distinction between the items included therein and without assigning to them any proportion of such proceeds, the Borrower hereby waiving the application of any doctrine of marshalling or like proceeding. In case the Lender, 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 Obligations shall have been paid in full and this Agreement shall have been terminated as provided herein.

(e) **Personal Property and Fixtures.** If an Event of Default exists, the Lender shall have with respect to the UCC Property all rights and remedies of a secured party under the Alabama Uniform Commercial Code, including the right to sell it at public or private sale or otherwise dispose of, lease or use it, without regard to preservation of the UCC Property or its value and without the necessity of a court order. At the Lender's request, the Borrower shall assemble the UCC Property and make it available to the Lender at any place designated by the Lender. To the extent permitted by law, the Borrower expressly waives notice and any other formalities prescribed by law with respect to any sale or other disposition of the UCC Property or exercise of any other right or remedy upon default. The Borrower agrees that the Lender may sell or dispose of both the Real Property and the UCC Property in accordance with the rights and remedies granted under this Agreement with respect to Real Property.

(f) **Rents and Leases.** If an Event of Default exists, the Lender, at its option, shall have the right, power and authority to terminate the license granted to the Borrower in

Section 2.1(d) to collect the rents, profits, issues and revenues of the Real Property, and, without taking possession, in the Lender's own name to demand, collect, receive, sue for, attach and levy such rents, profits, issues and revenues, to give proper receipts, releases and acquittances therefor, and to apply the proceeds thereof as set forth in Section 5.3(h).

(g) **Foreclosure Deeds.** To the extent permitted by applicable law, the Borrower hereby authorizes and empowers the Lender or the auctioneer at any foreclosure sale had hereunder, for and in the name of the Borrower, 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 Lender as proceeds of any of the Property, as well as any and all amounts realized by the Lender in connection with the enforcement of any right or remedy under this Agreement, shall be applied by the Lender as follows: (1) to the payment of all expenses incident to the exercise of any remedies under this Agreement, including attorneys' fees and disbursements as provided in the Credit Documents, appraisal fees, environmental site assessment fees, title search fees and foreclosure notice costs, (2) to the payment in full of any of the Obligations that are then due and payable (including principal, accrued interest and all other sums secured hereby) in such order as the Lender may elect in its sole discretion, (3) to a cash collateral reserve fund to be held by the Lender in an amount equal to, and as security for, any of the Obligations that are not then due and payable, and (4) the remainder, if any, shall be paid to the Borrower or such other persons as may be entitled thereto by law, after deducting therefrom the cost of ascertaining their identity.

(i) **Multiple Sales.** If an Event of Default exists, the Lender shall have the option to proceed with foreclosure, either through the courts or by power of sale as provided for in this Agreement, but without declaring the whole Obligations due. Any such sale may be made subject to the unmatured part of the Obligations, and such sale, if so made, shall not affect the unmatured part of the Obligations, but as to such unmatured part of the Obligations this Agreement shall remain in full force and effect as though no sale had been made under this Section 5.3(i). Several sales may be made hereunder without exhausting the right of sale for any remaining part of the Obligations, 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 Obligations without exhausting the power of foreclosure and the power to sell the Property for any other part of the Obligations, whether matured at the time or subsequently maturing.

(j) **Waiver of Certain Laws.** The Borrower waives, to the fullest extent permitted by law, the benefit of all laws now existing or hereafter enacted providing for (1) any appraisalment before sale of any portion of the Property (commonly known as appraisalment laws), or (2) any extension of time for the enforcement of the collection of the Obligations or any creation or extension of a period of redemption from any sale made in collecting the Obligations (commonly known as stay laws and redemption laws). The Borrower also waives any and all rights the Borrower may have to a hearing before any Governmental Authority prior

to the exercise by the Lender of any of its rights or remedies under the Credit Documents and applicable law.

(k) **Prerequisites of Sales.** In case of any sale of the Property as authorized by this Section 5.3, 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 Obligations 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.

SECTION 5.4 Construction Documents. Upon the occurrence of an Event of Default or at any time thereafter, the Lender may exercise any or all of the rights and remedies of the Borrower under the Construction Documents, to the same extent as the Borrower could in the absence of such Event of Default, including the completion of the construction of the Project pursuant to the Construction Documents and in the course of such construction the making of such changes in the Plans and other Construction Documents as the Lender in its sole discretion may deem advisable. The Lender may, but without obligation so to do and without notice to or demand on the Borrower or releasing the Borrower from its obligations so to do, perform any covenant or condition of the Borrower under the Construction Documents and, to the extent that the Lender shall incur any costs or pay any monies in connection therewith, including any costs or expenses of litigation, then such costs, expense or payment shall be included in the Obligations and shall bear interest from the incurring or payment thereof at the Default Interest Rate. The Lender shall have the right to call on any architects, contractors, engineers and other parties to the Construction Documents to advise and consult with the Lender concerning construction of the Project and other matters relating thereto, and to furnish to the Lender information concerning the Project. If the Lender calls on any person for such services, the Borrower agrees to pay all charges thereof for performing such services.

SECTION 5.5 Lot Contracts. Upon the occurrence of any Event of Default or at any time thereafter, the following provisions shall apply with respect to the Lot Contracts in addition to any other rights and remedies provided elsewhere in this Agreement:

(a) The Lender at its option may collect all or any part of the sums due under the Lot Contracts, bring or defend any lawsuits in connection with the Lot Contracts in the Lender's name or in the Borrower's name, and perform such other acts in connection with the Lot Contracts, including the consummation thereof in the name of the Borrower or of the Lender, as the Lender in its judgment may deem necessary or proper.

(b) The Lender, at its option, shall be entitled, upon notice to the Purchasers, to all amounts related to the Lot Contracts and included in the Property, and this Agreement shall constitute a direction and full authority to the Purchasers to pay all such amounts to the Lender without proof of the Event of Default relied upon by the Lender. The Borrower hereby releases any claims against any Purchasers for any sums paid to the Lender in accordance with this Agreement. The Borrower hereby irrevocably authorizes the Purchasers to rely upon and comply with (and the Purchasers shall be fully protected in so doing) any notice or demand by

the Lender for the payment to the Lender of any such amounts, and the Purchasers shall have no right or duty to inquire as to whether any Event of Default has actually occurred or is then existing.

(c) The Borrower empowers the Lender, and its agents or attorneys, at the Lender's option, to demand, collect, receive, sue for, attach and levy all sums included in the Property, to settle, compromise and give acquittances, receipts and releases for all such sums, to make, modify, enforce, cancel or accept the release of any Lot Contract, and to exercise all remedies for the enforcement of the Lot Contracts and all rights in and under the Lot Contracts that the Borrower might have pursued but for this Agreement. At the request of the Lender, the Borrower agrees that the Borrower will take such action as may be necessary to enforce the Lot Contracts.

(d) The Borrower hereby irrevocably appoints the Lender, its successors and assigns, and each officer of the Lender and such successors and assigns, as the Borrower's agent and attorney in fact to exercise, at the Lender's option at any time after the occurrence of an Event of Default, all or any of the following powers: (1) to take control, in any manner, of any item of payment on, or proceeds of the Lot Contracts; (2) to use the information recorded on or contained in any data processing equipment and computer hardware and software relating to the Lot Contracts to which the Borrower has access; (3) to execute any and all deeds and other documents and to do all other acts and things necessary to consummate the Contracts; and (4) to do all acts and things necessary, in the Lender's sole discretion, to fulfill the Borrower's obligations under this Agreement and to carry out the purposes of this Agreement.

SECTION 5.6 Default Rate. If an Event of Default exists, the Obligations shall bear interest at the Default Rate, until the earlier of (a) such time as all of the Obligations are paid in full or (b) no such Event of Default exists.

SECTION 5.7 Remedies Cumulative. The rights, powers and remedies of the Lender under this Agreement are cumulative and not exclusive of any other rights, powers or remedies now or hereafter existing at law or in equity.

ARTICLE 6

Miscellaneous

SECTION 6.1 Notices.

(a) **Methods.** Any request, demand, authorization, direction, notice, consent, waiver or other document provided or permitted by this Agreement to be made upon, given or furnished to, or filed with, the Borrower or the Lender must (except as otherwise expressly provided in this Agreement) be in writing and be delivered by one of the following methods: (1) by personal delivery at the hand delivery address specified below, (2) by first-class, registered or certified mail, postage prepaid, addressed as specified below, or (3) if facsimile transmission facilities

for such party are identified below or pursuant to a separate written notice from such party, sent by facsimile transmission to the number specified below or in such notice.

(b) **Addresses.** The hand delivery address, mailing address and (if applicable) facsimile transmission number for receipt of notice or other documents by such parties are as follows:

(1) **Borrower:**

By hand: 1119 WILLOW RUN ROAD
BIRMINGHAM AL 35209

By mail: SAME

By facsimile: (205) 870-1367

(2) **Lender:**

By hand: AmSouth Bank N.A.
Commercial Real Estate Loan Department
1900 Fifth Avenue North
Fifth Floor, AmSouth-Sonat Tower
Birmingham, Alabama 35203

By mail: AmSouth Bank N.A.
Commercial Real Estate Loan Department
P. O. Box 11007
Birmingham, Alabama 35288

By facsimile: (205) 326-4075
Attention: Commercial Real Estate Loan Department

Any of such parties may change the address or number for receiving any such notice or other document by giving notice of the change to the other parties named in this Section 6.1.

(c) Any such notice or other document shall be deemed delivered when actually received by the party to whom directed (or, if such party is not an individual, to an officer, director, partner or other legal representative of the party) at the address or number specified pursuant to Section 6.1(b), or, if sent by mail, three Business Days after such notice or document is deposited in the United States mail, addressed as provided above.

(d) Five Business Days' written notice to the Borrower as provided above shall constitute reasonable notification to the Borrower when notification is required by law; provided, however, that nothing contained in the foregoing shall be construed as requiring five Business Days' notice if, under applicable law and the circumstances then existing, a shorter period of time would constitute reasonable notice.

SECTION 6.2 Expenses. The Borrower shall promptly on demand pay all costs and expenses, including the fees and disbursements of counsel to the Lender, incurred by the Lender in connection with (a) the negotiation, preparation and review of this Agreement (whether or not the transactions contemplated by this Agreement shall be consummated), (b) the enforcement of this Agreement, (c) the custody and preservation of the Property, (d) the protection or perfection of the Lender's rights and interests under this Agreement in the Property, (e) the exercise by or on behalf of the Lender of any of its rights, powers or remedies under this Agreement, and (f) the prosecution or defense of any action or proceeding by or against the Lender, the Borrower, any other Obligor, or any one or more of them, concerning any matter related to this Agreement, any of the Property, or any of the Obligations. All such amounts shall bear interest from the date demand is made at the Default Rate and shall be included in the Obligations secured hereby. The Borrower's obligations under this Section 6.2 shall survive the payment in full of the Obligations and the termination of this Agreement.

SECTION 6.3 Heirs, Successors and Assigns. Whenever in this Agreement any party hereto is referred to, such reference shall be deemed to include the heirs, successors and assigns of such party, except that the Borrower may not assign or transfer this Agreement without the prior written consent of the Lender; and all covenants and agreements of the Borrower contained in this Agreement shall bind the Borrower's heirs, successors and assigns and shall inure to the benefit of the successors and assigns of the Lender.

SECTION 6.4 Independent Obligations. The Borrower agrees that each of the obligations of the Borrower to the Lender under this Agreement may be enforced against the Borrower without the necessity of joining any other Obligor, any other holders of Liens in any Property or any other person, as a party.

SECTION 6.5 Governing Law. This Agreement shall be construed in accordance with and governed by the internal laws of the State of Alabama (without regard to conflict of law principles) except as required by mandatory provisions of law and except to the extent that the validity and perfection of the Liens on the Property are governed by the laws of any jurisdiction other than the State of Alabama.

SECTION 6.6 Date of Agreement. The date of this Agreement is intended as a date for the convenient identification of this Agreement and is not intended to indicate that this Agreement was executed and delivered on that date.

SECTION 6.7 Separability Clause. If any provision of the Credit Documents shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

SECTION 6.8 Counterparts. This Agreement may be executed in any number of counterparts, each of which so executed shall be deemed an original, but all such counterparts shall together constitute but one and the same agreement.

SECTION 6.9 No Oral Agreements. This Agreement is the final expression of the agreement between the parties hereto, and this Agreement may not be contradicted by evidence of any prior oral agreement between such parties. All previous oral agreements between the parties hereto have been incorporated into this Agreement and the other Credit Documents, and there is no unwritten oral agreement between the parties hereto in existence.

SECTION 6.10 Waiver and Election. The exercise by the Lender of any option given under this Agreement shall not constitute a waiver of the right to exercise any other option. The filing of a suit to foreclose the Liens granted by this Agreement, either on any matured portion of the Obligations or for the whole of the Obligations, shall not be considered an election so as to preclude foreclosure under power of sale; nor shall the publication of notices for foreclosure under power of sale preclude the prosecution of a later or simultaneous suit to collect the Obligations or foreclose by judicial foreclosure the Liens granted by this Agreement. No failure or delay on the part of the Lender in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any further exercise thereof or the exercise of any other right, power or remedy. No modification, termination or waiver of any provisions of the Credit Documents, nor consent to any departure by the Borrower therefrom, shall be effective unless in writing and signed by an authorized officer of the Lender, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. No notice to or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in similar or other circumstances.

SECTION 6.11 No Obligations of Lender; Indemnification. The Lender does not by virtue of this Agreement or any of the transactions contemplated by the Credit Documents assume any duties, liabilities or obligations with respect to any of the Property unless expressly assumed by the Lender under a separate agreement in writing, and this Agreement shall not be deemed to confer on the Lender any duties or obligations that would make the Lender directly or derivatively liable for any person's negligent, reckless or wilful conduct. The Borrower agrees to indemnify and hold the Lender harmless against and with respect to any damage, claim, action, loss, cost, expense, liability, penalty or interest (including attorney's fees) and all costs and expenses of all actions, suits, proceedings, demands, assessments, claims and judgments (collectively, "claims and losses") directly or indirectly resulting from, occurring in connection with, or arising out of: (a) any inaccurate representation made by the Borrower or any Obligor in this Agreement or any other Credit Document; (b) any breach of any of the warranties or obligations of the Borrower or any Obligor under this Agreement or any other Credit Document; and (c) the Property, or the Liens of the Lender thereon. Without limiting the generality of the foregoing, the Borrower agrees that the Borrower's obligation to defend, indemnify and save harmless the Lender set forth in this Section 6.11 shall specifically include all claims and losses asserted against or suffered by the Lender that are related to or arise out of (1) any representations or warranties in Section 3.2 that prove to be false or untrue in any

material respect, (2) any default in the performance or nonperformance of the Borrower's covenants and agreements in Section 4.11, and (3) 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, that may be required by any Environmental Law or Governmental Authority. The provisions of this Section 6.11 shall survive the payment of the Obligations in full and the termination, satisfaction, release (in whole or in part) and foreclosure of this Agreement.

SECTION 6.12 Advances by the Lender. If the Borrower shall fail to comply with any of the provisions of this Agreement, the Lender may (but shall not be required to) make advances to perform the same, and where necessary enter the Property for the purpose of performing the Borrower's obligations under any such provision. The Borrower agrees to repay all such sums advanced upon demand, with interest from the date such advances are made at the Default Rate, and all sums so advanced with interest shall be a part of the Obligations. The making of any such advances shall not be construed as a waiver by the Lender of any Event of Default resulting from the Borrower's failure to pay such amounts.

SECTION 6.13 Rights, Liens and Obligations Absolute. All rights of the Lender hereunder, all Liens granted to the Lender hereunder, and all obligations of the Borrower hereunder, shall be absolute and unconditional and shall not be affected by (a) any lack of validity or enforceability as to any other person of any of the Credit Documents, (b) any change in the time, manner or place of payment of, or any other term of the Obligations, (c) any amendment or waiver of any of the provisions of the Credit Documents as to any other person, and (d) any exchange, release or non-perfection of any other collateral or any release, termination or waiver of any guaranty, for any of the Obligations.

SECTION 6.14 Construction of Agreement. This Agreement is and may be construed as a mortgage, deed of trust, chattel mortgage, conveyance, assignment, security agreement, pledge, financing statement, fixture filing, hypothecation or contract, or any one or more of them, in order fully to effectuate the Liens created hereby and the purposes and agreements herein set forth.

SECTION 6.15 Fixture Filing. This Agreement shall be effective as a financing statement filed as a fixture filing for purposes of Article 9 of the Uniform Commercial Code. The fixture filing covers all goods that are or are to become affixed to the Real Property. The goods are described by item or type in Section 2.1. The Borrower is the debtor, and the Lender is the secured party. The names of the debtor (Borrower) and the secured party (Lender) are given in the first paragraph of this Agreement. This Agreement is signed by the debtor (Borrower) as a fixture filing. The mailing address of the Lender set out in Section 6.1(b)(2) is an address of the secured party from which information concerning the security interest may be obtained. The mailing address of the Borrower set out in Section 6.1(b)(1) is a mailing address for the debtor. A statement indicating the types, or describing the items, of collateral is set forth in this Section 6.15 and in Section 2.1. The real estate to which the goods are or are to be affixed is described in Exhibit A. The Borrower is a record owner of the real estate.

SECTION 6.16 Landlord-Tenant Relationship. Any sale of the Property under this Agreement shall, without further notice, create the relationship of landlord and tenant at sufferance between the purchaser and the Borrower.

SECTION 6.17 Other Mortgages Encumbering the Real Property.

(a) **Authorization to Disclose.** The Borrower hereby authorizes the holder of any other mortgage encumbering any of the Real Property to disclose to the Lender at any time the following information: (1) the amount of debt secured by such mortgage; (2) the amount of such debt that is unpaid; (3) whether such debt is or has been in arrears; (4) whether there is or has been any default with respect to such mortgage or the debt secured thereby; and (5) any other information regarding such mortgage or the debt secured thereby that the Lender may request from time to time.

(b) **No Amendments; Default, etc.** The Borrower agrees to comply with the terms of any other mortgage encumbering any of the Real Property and agrees not to consent to or permit any amendment or modification thereof without the prior written consent of the Lender. The Borrower further agrees not to permit any default to occur under any other mortgage encumbering any of the Real Property, but that if any default should be made in the payment of principal, interest or any other sum secured by any such mortgage, the Lender may (but shall not be required to) pay all or any part of such amount in default, without notice to the Borrower. Any such action by the Lender shall not cure any Event of Default created under this Agreement by virtue of the default in the other mortgage.

SECTION 6.18 Termination. This Agreement and the Lender's Liens under this Agreement in the Property will not be terminated until a written mortgage satisfaction instrument executed by one of the Lender's officers is filed for record in the county in which the Land is located. Except as otherwise expressly provided in this Agreement, no satisfaction of this Agreement shall in any way affect or impair the representations, warranties, agreements or other obligations of the Borrower or the powers, rights and remedies of the Lender under this Agreement with respect to any transaction or event occurring prior to such satisfaction, all of which shall survive such satisfaction. Even if all of the Obligations owing to the Lender at any one time should be paid in full, this Agreement will continue to secure any Obligations that might later be owed to the Lender until such mortgage satisfaction instrument has been executed and recorded. In no event shall the Lender be obligated to satisfy its Liens under this Agreement or return or release any of the Property to the Borrower (a) until the payment in full of all Obligations then outstanding, (b) if the Lender is obligated to extend Credit to the Borrower, (c) if any contingent obligation of the Borrower to the Lender remains outstanding or (d) until the expiration of any period for avoiding or setting aside any payment to Lender under bankruptcy or insolvency laws.

SECTION 6.19 Reinstatement. This Agreement, the obligations of the Borrower hereunder, and the Liens, rights, powers and remedies of the Lender hereunder, shall continue to be effective, or be automatically reinstated, as the case may be, if at any time any amount applied to the payment of any of the Obligations is rescinded or must otherwise be restored or

returned to the Borrower, any Obligor, or any other person (or paid to the creditors of any of them, or to any custodian, receiver, trustee or other officer with similar powers with respect to any of them, or with respect to any part of their property) upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of the Borrower, any Obligor or any such person, or upon or as a result of the appointment of a custodian, receiver, trustee or other officer with respect to any of them, or with respect to any part of their property, or otherwise, all as though such payment had not been made.

SECTION 6.20 Release of Lots. So long as no Event of Default exists, any Lot in the Project consisting of approximately two acres, which is subject to a duly recorded subdivision plat approved by the Lender, may be released from the Lien of this Agreement upon the Borrower's request in connection with a bona fide sale of such Lot to a Purchaser accompanied by payment to the Lender of the following: (a) the "Net Sale Proceeds" resulting from the sale of such Lot; provided, however, that in the case of any "valley lot" as identified on the development plan for the Project approved by the Lender, such proceeds paid to the Lender shall not be less than \$30,000, and in the case of any "mountaintop lot" as identified on such development plan, such proceeds paid to the Lender shall not be less than \$40,000; and (b) the pro rata share of the development costs attributable to that Lot (but not more than an amount equal to the number obtained by dividing \$250,000 by the number of Lots in the sector). As used in this section, the term "Net Sale Proceeds" means the gross sales price for the Lot, minus the Lot's pro rata share of the development costs and minus all reasonable and usual closing costs (which may include a maximum of \$2,500 marketing and management expenses). The Lot's "pro rata share of the development costs" for purposes of this section shall mean the total development costs for the sector of the Project in which the Lot is situated, divided by the number of Lots in the sector, it being anticipated that the cost of the development of each sector will be approximately \$250,000, which is to be provided for by the establishment of the Development Escrow Fund. The amounts received by the Lender under Section 6.20(b) shall be deposited by the Lender to the Development Escrow Fund. The amounts received by the Lender under Section 6.20(a) shall be applied by the Lender, so long as no Event of Default exists, to principal or interest as directed by the Borrower, although no more than an average of \$5,000 of Net Sales Proceeds per Lot may be applied to interest. During the existence of an Event of Default, the Lender may apply any amounts received from the sale of any Lot to the Obligations in such order as the Lender, in its sole discretion, may elect.

IN WITNESS WHEREOF, the undersigned Weatherly Investment Group, L.L.C. has caused this Agreement to be executed by its duly authorized managing members on the date of the acknowledgment of the Borrower's signature below.

WEATHERLY INVESTMENT GROUP, L.L.C.

By Thomas J. Thornton
Its Managing Member

And

By Patrick A. Hunter
Its Managing Member

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned authority, a Notary Public in and for said county in said State, hereby certify that Thomas J. Thornton, whose name as managing member of Weatherly Investment Group, L.L.C., an Alabama limited liability company, 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, he, as such managing member and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Given under my hand and official seal this the 15th day of December, 1993.

Patricia S. Henning
Notary Public

AFFIX SEAL

My commission expires: MY COMMISSION EXPIRES OCTOBER 21, 1996

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned authority, a Notary Public in and for said county in said State, hereby certify that Patrick A. Thornton, whose name as managing member of Weatherly Investment Group, L.L.C., an Alabama limited liability company, 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, he, as such managing member and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Given under my hand and official seal this the 15th day of December, 1993.

Patricia L. Herring
Notary Public

AFFIX SEAL

My commission expires: MY COMMISSION EXPIRES OCTOBER 21, 1996

This instrument prepared by:
Douglas T. Arendall
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203-2602
(205) 254-1000

Exhibit A

LEGAL DESCRIPTION

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PARCEL I

All of Section 28, Township 20 South, Range 2 West, situated in Shelby County, Alabama. Less and except the Northwest Quarter of the Northwest Quarter.

PARCEL II

The North one-fourth of Section 33, Township 20 South, Range 2 West, situated in Shelby County, Alabama.

PARCEL III

The North one-half of the Northwest Quarter and the Northeast Quarter of the Northeast Quarter of Section 32, Township 20 South, Range 2 West, situated in Shelby County, Alabama.

PARCEL IV

The South half and the East one-half of the Northeast Quarter of Section 31, Township 20 South, Range 2 West, situated in Shelby County, Alabama.

Together with non-exclusive perpetual easement for ingress and egress and utilities as set forth in Instrument #1993-37546 and Instrument #1993-39001 and corrected in Instrument #1993-39916, dated 12-10-93.

EXHIBIT B

(Credit Documents)

The "Credit Documents" referred to in this Agreement include the following:

(a) Promissory Note dated December 15, 1993 in the principal amount of Two Million Three Hundred Thousand and No/100 Dollars (\$2,300,000.00) executed by the Borrower in favor of the Lender.

(b) Limited Guaranty Agreements dated December 15, 1993 executed by each of the Guarantors in favor of the Lender.

(c) Environmental Indemnity Agreement dated December 15, 1993 executed by the Borrower in favor of the Lender.

EXHIBIT C

(Permitted Encumbrances)

1. The Lien for ad valorem taxes on the Property so long as such taxes are not delinquent.
2. The exceptions set forth in Schedule B-2 of the mortgagee's title insurance policy issued or to be issued pursuant to that certain Commitment to Issue Title Insurance No. 93-26517 prepared by Alabama Title Company, Inc. for Commonwealth Land Title Insurance Company, having an effective date of November 19, 1993 at 8:00 a.m. (as marked down by the title agent through the date of the recording of this mortgage at closing), to the extent only that such exceptions refer expressly to instruments recorded against, or otherwise specifically affect, the Property and not to any general, standard or similar exceptions that may appear in said policy.
3. Wraparound mortgage or mortgages to be given by the Joint Venture to the Borrower upon the conveyance of the Property to the Joint Venture.

Inst # 1993-40414

141002.03/ARENDD/2-1301 12/13/93 1:16pm

C-1 12/16/1993-40414
12:02 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
033 MCB 3463.50