

Send Tax Notices To:

STATE OF ALABAMA)
SHELBY COUNTY)

C/O George Taylor, Esquire
Burr & Forman
420 North 20th Street, Suite 3000
Birmingham, Alabama 35203

STATUTORY WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS: That in consideration of Four Hundred Fifty Thousand and No/100 Dollars (\$450,000.00) in hand paid by **Aussie Realty Partners, L.L.C.** (the "Grantee"), to the undersigned grantor, **Brook Highland Limited Partnership**, a Georgia limited partnership (the "Grantor"), the receipt of which is hereby acknowledged, the said Grantor does by these presents, grant, bargain, sell and convey unto the said Grantee the following described real estate, situated in Birmingham, Shelby County, Alabama, to-wit:

LOT 1C of that certain map entitled **BROOK HIGHLAND PLAZA RESURVEY**, as said map appears of record in the Office of the Judge of Probate of Shelby County, Alabama in Map Book 18, Page 99 (the "Property");

TOGETHER WITH a non-exclusive easement for purposes of vehicular and pedestrian ingress and egress to the Property from Highway 280 on, over and across that certain roadway constructed or to be constructed on that property shown as being cross-hatched on Exhibit A attached hereto and incorporated herein by reference;

The Property is conveyed subject to the title encumbrances described in Exhibit B attached hereto and incorporated herein by reference and that certain Covenant, Condition and Restriction Agreement attached hereto as Exhibit C and incorporated herein by reference.

And Grantor covenants with Grantee that Grantor has done nothing to impair such title as Grantor received and that Grantor will warrant and defend such title to the Property against the lawful claims of all persons claiming by, through or under Grantor, except for the exceptions set forth on Exhibit B attached hereto.

TO HAVE AND TO HOLD to said Grantee, its successors and assigns forever.

Land Title

07/15/1994-22323
04:21 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
013 MCD 39.50

Inst # 1994-22323

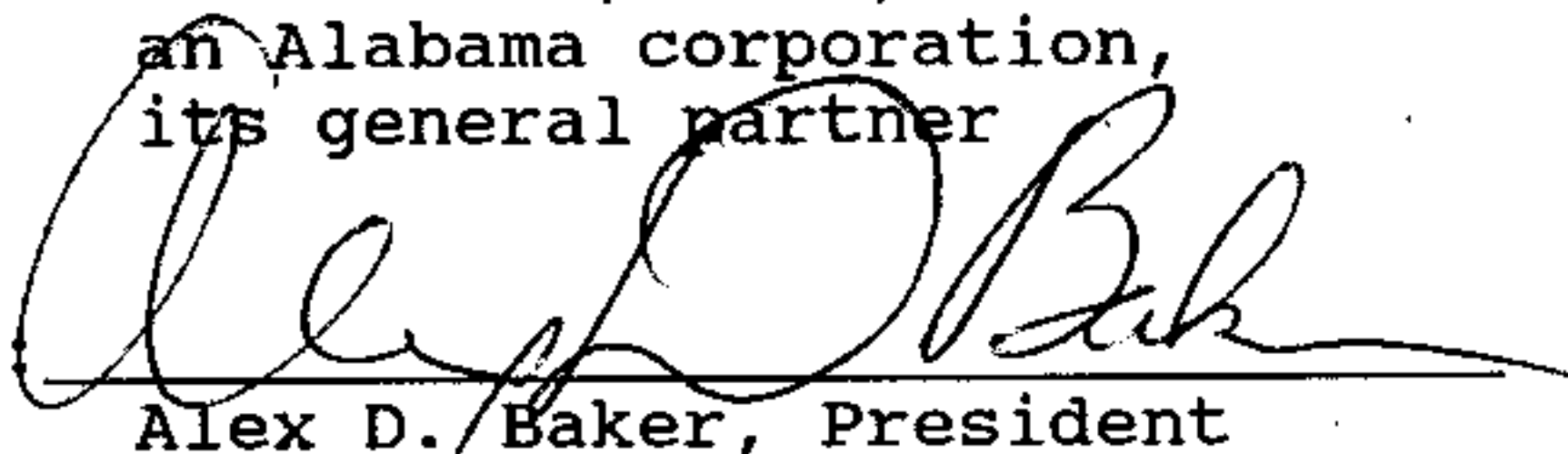
By its acceptance of this Statutory Warranty Deed, Grantee hereby covenants and agrees for itself and its successors, assigns, licensees, lessees, employees and agents that Grantor shall not be liable for, and no action shall be asserted against Grantor for, loss or damage on account of injuries to the Property or any buildings, improvements, or structures now or hereafter located upon the Property, which are caused by, or arise as a result of, past or future soil and/or subsurface conditions, known or unknown (including, without limitation, sinkholes, underground mines and limestone formations) under or on the Property or any other property now or hereafter owned by Grantor, whether contiguous or non-contiguous to the Property. For purposes of this paragraph, the term Grantor shall mean and refer to (i) the partners, agents, and employees of Grantor; (ii) the officers, directors, employees and agents of Grantor; any successors or assigns of Grantor; and (iv) any successors and assigns of Grantor's interest in the Property. This covenant and agreement shall run with the land conveyed hereby as against Grantee, and all persons, firms, trusts, partnerships, limited partnerships, and other entities holding under or through Grantee.

IN WITNESS WHEREOF, the said Grantor, who is authorized to execute this conveyance, hereto sets its signature and seal this the 11th day of July, 1994.

BROOK HIGHLAND LIMITED PARTNERSHIP,
an Alabama limited partnership

BY: BW280 LIMITED PARTNERSHIP, a
Georgia limited partnership,
its general partner

BY: ALEX BAKER, INC.,
an Alabama corporation,
its general partner

BY: 
Alex D. Baker, President

STATE OF ALABAMA)
)
COUNTY OF JEFFERSON)

I, the undersigned, a Notary Public in and for said State and County, hereby certify that Alex D. Baker, whose name as President of Alex Baker, Inc., an Alabama corporation as a general partner in BW280 Limited Partnership., a Georgia limited partnership, as a general partner in Brook Highland Limited Partnership, an Alabama limited partnership is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation, acting in its capacity as general partner of said limited partnership acting in its capacity as the general partner of Brook Highland Limited Partnership on the day the same bears date.

Given under my hand and official seal of office this 11th day of July, 1994.

(Notary Seal)

Melissa Whillia
Notary Public
My Commission Expires: 6-8-96

This instrument prepared by:

W. Ernest Moss, Esq.
1900 International Park Drive, Suite 303
Birmingham, Alabama 35243
(205) 969-1000

JOINDER

SOUTHTRUST BANK OF ALABAMA, NATIONAL ASSOCIATION, a national banking association, the holder of a MORTGAGE AND SECURITY AGREEMENT recorded in the Office of the Judge of Probate of Shelby County, Alabama in Inst # 1993-32521, which MORTGAGE AND SECURITY AGREEMENT is a lien on the real property included in the easement hereinabove granted by Grantor to Grantee and described on Exhibit A attached hereto, does hereby consent to the granting of said easement and does by these presents subordinate the lien of the MORTGAGE AND SECURITY AGREEMENT to the easement hereinabove granted.

IN WITNESS WHEREOF, SOUTHTRUST BANK OF ALABAMA, NATIONAL ASSOCIATION has caused this Joinder to be executed by a duly authorized officer this 15th day of July, 1994.

SOUTHTRUST BANK OF ALABAMA,
NATIONAL ASSOCIATION,
a national banking association

By: Andy Morris

Its: SVP

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned, a Notary Public in and for said State and County, hereby certify that Andy Morris, whose name as Senior Vice President of SouthTrust Bank of Alabama, National Association, a national banking association, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said SouthTrust Bank of Alabama, National Association on the day the same bears date.

Given under my hand and official seal of office this 15th day of July, 1994.

(Notary Seal)

Pamela A. West

Notary Public

My Commission Expires: 8-10-95

EXHIBIT "A"
to
Statutory Warranty Deed
Non-Exclusive Easement

XXXXXX = Easement Area

Brook Highland Limited Partnership
BROOK HIGHLAND PLAZA
CITY OF DENVER/DENVER COUNTY, COLORADO

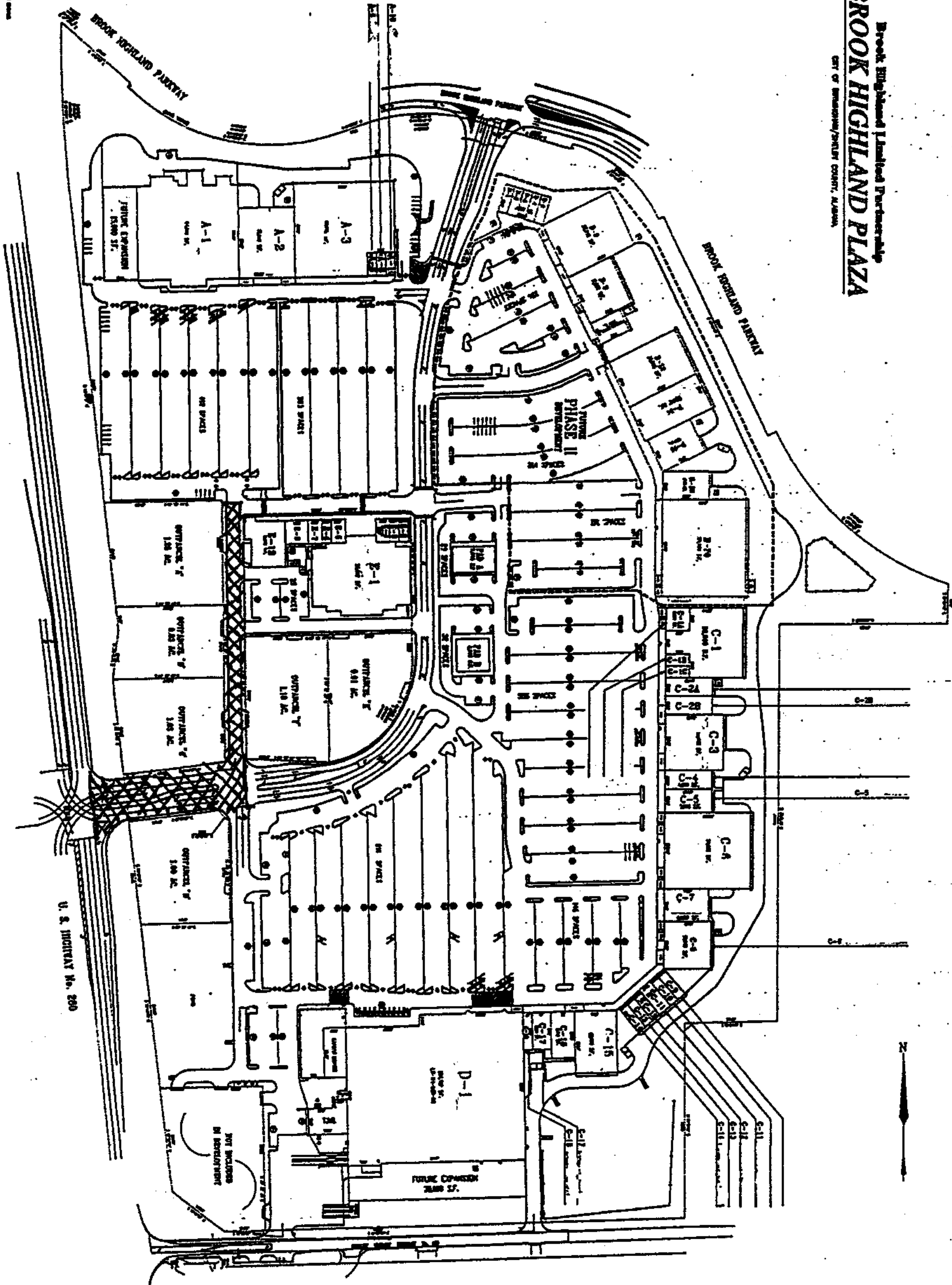


EXHIBIT "B"

PERMITTED EXCEPTIONS

1. General and special taxes or assessments for 1994 and subsequent years not yet due and payable.
2. Declaration of Protective Covenants which relate to the Watershed Property and maintenance thereof, as set out by instrument recorded in real 194 page 54 in Probate Office.
3. Brook Highland Common Property Declaration of Covenants, Conditions and Restrictions, as set out in instrument dated August 29, 1990 recorded in real 307 page 954 in Probate Office.
4. Title to all mineral rights, if any, within and underlying the premises, together with all mining rights and other rights, privileges and immunities, if any, relating thereto now owned by Grantor, including rights set out in deed book 28 page 581 in Probate Office.
5. The Covenant of Restrictions as set out on Subdivision plat of Brook Highland Plaza recorded in Map Book 18, Page 99.
6. Restrictions, covenants and conditions as set out in Agreement between AmSouth Bank, N.A., as Ancillary Trustee for NCNB National Bank of North Carolina, as Trustee for the Public Employees Retirement System of Ohio and Women's Missionary Union Auxiliary to Southern Baptist Convention dated August 31, 1990, and recorded in real 309 page 317 in the Probate Office of Shelby County, Alabama, as amended by Amendment dated April 26, 1993, recorded or to be recorded in Probate Office.
7. Restrictive Agreement attached as Exhibit C to Statutory Warranty Deed recorded in the Office of the Judge of Probate; Shelby County, Alabama, Instrument # 1993-32511.

EXHIBIT "C"
to
Statutory Warranty Deed

COVENANT, CONDITION AND RESTRICTION AGREEMENT

(IMPOSITION OF PROTECTIVE REAL COVENANTS
ON A SINGLE PROPERTY)

RECITALS

WHEREAS, Brook Highland Limited Partnership (hereinafter referred to as "Grantor") as the conveyor of the real property described in Exhibit A attached to the Statutory Warranty Deed to which this Exhibit C is attached, secured the agreement of Aussie Realty Partners, L.L.C., its successors and assigns (hereinafter referred to as "Grantee"), to the imposition of the protective real covenants herein contained on such property (hereinafter referred to as the "Property") as part of the instant conveyance, which protective covenants shall bind the aforesaid Grantee, its successors and assigns, through the term hereof; and

WHEREAS, It is understood and agreed that the protective real covenants hereinbelow set forth are intended to subject the Property to certain conditions, covenants and restrictions upon and subject to which the Property itself shall be held, improved and conveyed, without regard to the present existence or future imposition of similar conditions, covenants and restrictions by Grantor on any other property.

1. Except as provided in Paragraph 18 hereof, the Property conveyed hereby and any improvements constructed thereon will for a period of at least fifty (50) years from the date hereof be used only for retail uses permitted on the date hereof under the existing zoning laws of the City of Birmingham, Shelby County, Alabama, affecting the Property except that in no event shall the Property be used (a) as a furniture store or market (b) as a motion picture or amusement theater, (c) as a drugstore, health and beauty aids store and/or a store selling prescription drugs and health and beauty aids, (d) as a food supermarket or for the sale of (i) packaged or fresh seafood, meat, or poultry for off-premises consumption; (ii) packaged or fresh produce or vegetables for off-premises consumption; (iii) dairy products (excluding cone ice cream) for off-premises consumption; (iv) packaged or fresh bakery products for off-premises consumption; or (v) grocery items, (e) a music store, (f) a bookstore, or (g) any of the following uses: (i) a bowling alley, (ii) a skating rink, (iii) a car wash, (iv) an automobile lubrication and oil change operation, (v) an amusement arcade, (vi) a billiard parlor, (vii) a night club or any bar or similar establishment which sells alcoholic beverages for on-

premises consumption (it is not intended to prohibit the sale of alcoholic beverages for on premises consumption by an ordinary restaurant establishment) and (viii) as a book store.

2. The Property shall be restricted to a one story building which shall not contain more than Sixty-Five Hundred (6,500) square feet so long as it is used as any type of restaurant or Ten Thousand (10,000) square feet if the same is used for any permitted use other than a restaurant (herein called the "building"), which building and all other improvements on the Property shall conform to the plans submitted to, and which have received the prior written approval of, the Grantor; provided, however, in no event shall (i) the canopy of the building or other improvements extend higher than twenty-four feet (24') above the ground; (ii) the parapet of any building or other improvements extend higher than twenty-four feet (24') above the ground; (iii) any sign be erected or maintained on the exterior of the building or other improvements except directional signs and a sign upon the canopy or against the parapet of the building, the characters of which sign shall not exceed four feet (4') in height thereof and the top of which sign shall not be higher than twenty-four feet (24') above the ground; (iv) any sign that is visible from the exterior of any building on the Property have any bulbs or other forms of lighting that go on and off intermittently; (v) any building on the Property have a second story or basement; and (vi) any sign be a so-called "portable" or similar type sign. The Property shall be entitled to one separate pylon sign which shall not exceed thirty (30) feet in height (or such other greater height as Grantor may, but is not obligated to, agree upon), measured from the ground to the top of the sign and the sign panel itself shall not exceed fifteen (15) feet in length, four (4) feet in height and two (2) feet in thickness.

3. Grantee shall keep and maintain the entire area outside the building constructed on the Property only as and for landscaping, access drives, parking areas and sidewalks used only in connection with the use permitted under Paragraph 1 above. Grantee shall provide adequate parking on the Property, but in no event shall there be less than fifteen (15) parking spaces per each one thousand (1,000) square feet of gross building area of all buildings, in the aggregate, located on the Property, so long as the Property is used for any type of restaurant and five (5) parking spaces per each one thousand (1,000) square feet of gross building area of all buildings, in the aggregate, located on the Property, if the same is used for any permitted use other than a restaurant, for the convenient parking of full size automobiles on the Property and reasonable access drives for the convenient use thereof. The parking area and all access drives on and to the Property shall be paved in a good first-class manner and of high qualify materials and properly maintained, repaired, and, if reasonably necessary, replaced, at all times.

4. The building and improvements shall be permanent and shall be in accordance with plans and specifications approved in advance by Grantor, which approval shall not be unreasonably delayed or withheld if the same complies with the requirements set forth herein and provides for first-class materials and equipment, of the same quality and of compatible and harmonious design with the commercial buildings constituting the Brook Highland Plaza Shopping Center, Birmingham, Alabama, which is located on portions of Lot 1 and Lot 2 of the said Brook Highland Plaza Resurvey appearing of record in the Office of the Judge of Probate of Shelby County, Alabama in Map Book 18, Page 99 (the "Adjacent Property") and uses exterior material which is aesthetically compatible with the type used in said Brook Highland Plaza Shopping Center. In the event of disagreement between Grantor and Grantee that any disapproval by Grantor is improper, then the opinion of an architect which is experienced in shopping center development but not employed directly by Grantor or Grantee shall be binding upon parties. In the event the Grantor and Grantee cannot agree on the architect then the Grantor shall select an architect and the Grantee shall select an architect and the decision of the two of them shall be binding upon the parties. If the two architects selected by the Grantor and Grantee respectively cannot agree then they shall appoint a third architect and the decision of the third architect shall be binding upon the parties.

5. The site lighting and exterior building lighting shall be as approved by the Grantor or its assigns, which approval shall not be unreasonably withheld or delayed.

6. There shall be no curb cuts between the Property and any adjoining public right-of-way. The curbs cuts or access points between the Property and the adjoining property of Grantor shall be of such size and in such location as approved by Grantor and shall be such as not to create any traffic congestion or traffic hazard on or going to and from any adjoining public right-of-way.

7. The building or any other structure (except for the drive-through lanes, if any, shown on the approved plans) constructed on the Property shall not be closer than: Twenty-five feet (25') from any property line; and all such set-back lines shall also comply with any more stringent set back requirements of the City of Birmingham, Alabama or the map of Brook Highland Plaza Resurvey; and

8. Grantee shall keep or cause to be kept the building and other improvements at any time located on the Property in good order, condition and repair at all times. In addition, Grantee covenants to maintain and keep in a first-class, clean and orderly condition, consistent with standards of maintenance of Brook Highland Plaza Shopping Center, the building, improvements, grass, landscaping, parking areas and driveways located on the Property. In the event of damage or destruction of the building or other im-

provements on the Property, Grantee covenants that if it does not promptly repair and restore the same to the same condition as the same were in immediately prior to such damage or destruction, it shall promptly clear the Property of all debris and hazardous conditions and shall leave, keep and maintain the same in a grassed, landscaped, clean, safe, sightly and attractive condition. Grantee shall cause all of the unimproved portion of the Property to be properly grassed and landscaped to meet Grantor's reasonable requirements at all times, until such time as same shall be improved in the manner required hereby.

9. Grantee covenants that it will do nothing to prohibit, impede or discourage the free and uninterrupted flow of proper and safe pedestrian and vehicular traffic to or from the adjoining land of Grantor or to or from any adjoining public right-of-way as approved by appropriate governmental authority, or to create a traffic hazard or congestion of, or on any adjoining or nearby public right-of-way, or access thereto or therefrom.

10. That Grantee shall prevent:

A. The installation in or on the Property or building or other improvements thereon of any amplifiers or similar devices, or other use in or about the Property or any building thereon of any matter which may be heard or experienced outside such building, including, but not limited to, flashing lights, spotlights, loudspeakers, phonographs or radio broadcasts, or anything similar which are audible or visible outside of any such building but specifically permitting a paging and music system for customers immediately outside the building;

B. The burning of any paper, trash or garbage of any kind on the Property or in the building or other improvement thereon;

C. The use of any portion or portions of the Property for the purpose of loading or unloading any trucks or other delivery vehicle, except to the rear of the building constructed thereon; and

D. The distribution or use of any printed or handwritten papers or materials of any kind or character outside the building except routine, professionally lettered printed materials outside the building and around the drive-through lanes and islands.

11. It is understood that it is most important for Grantee and any tenant or other occupant of the Property, or any part thereof, to comply with each and every one of the foregoing obligations. In the event that any of the foregoing obligations be not promptly complied with as and when required hereby and within fifteen (15) days after Grantor notifies Grantee of any such

failure to perform such obligation, then without limiting any other legal or equitable right or remedy which Grantor may have for such violation, Grantor shall be entitled to one, more or all of the following remedies:

A. Injunction;

B. Specific performance;

C. Damages;

D. The right to perform any obligation of Grantee without being obligated to do so whether or not Grantor shall have previously performed any such obligation of Grantee. In the event that Grantor performs such obligation, then Grantee covenants to pay to Grantor immediately upon demand and without any set-off the moneys expended by Grantor therefor together with Grantor's reasonable administrative expenses in connection therewith, and attorney's fees, all together with interest thereon at the highest rate then permitted by Alabama Law, and if at such time there is no maximum rate of interest for the amount involved, then at the rate equal to 12% per annum. The performance by Grantor of any obligation of Grantee on any one or more occasions shall not be construed to be an assumption by Grantor of any duty to perform any such obligation in the future; and

E. Reasonable attorneys' fees in attempting to enforce said obligation or obligations.

It is understood, however, that in the event Grantee fails to comply with any obligation hereunder, which failure results solely from an Unavoidable Delay (as hereinafter defined), then Grantee's obligation to perform such duty shall be extended for a time equal to that during which it is prevented from complying with such obligation solely as a result of such Unavoidable Delay, provided and upon the further condition that Grantee gives to Grantor notice of the event relating to said Unavoidable Delay within ten (10) days after the commencement thereof.

12. Any provision of this Agreement or any section, sentence, clause, phrase or wording appearing herein which shall prove to be invalid, void or illegal for any reason shall in no way affect, impair or invalidate any other provision hereof, and the remaining provisions, paragraphs, sentences, clauses, phrases and words hereof shall nevertheless remain in full force and effect. If in this Agreement there is any restriction, covenant or agreement which is effective beyond the period permitted by law, it shall be effective only for such period or time as shall be lawful and shall then expire, all without affecting, impairing or invalidating any such as may be lawfully effective thereafter.

13. Time is of the essence with respect to the Grantee's obligation to perform each of the covenants and agreements herein set forth.

14. It is agreed that, in the construction and interpretation of the provisions hereof, that the rule of construction that a document is to be construed most strictly against the party who prepared the same shall not applied; it being agreed that both parties hereto have participated in the preparation of the final form of this instrument.

All notices or communications herein required or which either party desires to give to the other shall be in writing and sent by United States Registered or Certified Mail, postage prepaid, return-receipt requested, and shall be mailed as follows, or to such other address as may be designed by similar notice from time to time in writing:

If to Grantor:

Brook Highland Limited Partnership
1900 International Park Drive
Suite 303
Birmingham, Alabama 35243
Attention: Mr. Alex D. Baker

If to Grantee:

Aussie Realty Partners, L.L.C.
C/O George Taylor, Esquire
420 North 20th Street, Suite 3000
Birmingham, AL 35203

Such notice shall be deemed to have been received within three (3) business days after such mailing. The address for giving of such notice may be changed by similar notice.

15. As written herein, one gender shall be construed to mean or include any and all other applicable genders, the singular number shall be construed to mean the plural, and the plural number shall be construed to mean the singular number, in all instances where the context of this Agreement so admits or requires.

16. The Grantor owns other property adjoining and in the vicinity of the Property. By imposition of the covenants, restrictions, and agreements herein, there is no express or implied obligation on Grantor to, in any manner, restrict the use of such property owned by Grantor.

17. For purposes of this agreement, "Unavoidable Delay" shall mean delays caused by the following reasons:

- A. Governmental statutes, ordinances or edicts;
- B. Governmental rationing or allocation of materials;
- C. Unusually severe weather conditions;
- D. Strikes, blackouts, unavoidable casualty and disasters, delays in transportation, shortage of labor or materials, or any other cause beyond the reasonable control of the Grantee.

18. Except as hereinafter provided with regard to the restriction on certain uses of the Property, this Agreement, every provision hereof and every covenant, condition and restriction contained herein shall continue in full force and effect for a period of fifty (50) years from July 7, 1994. Notwithstanding the preceding sentence to the contrary, the restriction against the use of the Property as a music store or book store shall be only for period of twenty (20) years and not fifty (50) years. Provided, however, and notwithstanding the foregoing to the contrary, if applicable law restricts the time period during which the provisions and covenants, conditions and restrictions in the Agreement may be enforced to a period shorter in duration than the time periods set forth in the immediately preceding two sentences, then the provisions of this Agreement shall continue in full force for the maximum period of time permitted by such applicable law.

19. The provisions hereof shall inure to the benefit of, and shall be binding on, the Grantor and its successors and assigns in interest in the Adjacent Property and shall inure to the benefit of, and be binding upon Grantee, its successors and assigns in and to the Property.

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Inst # 1994-22323

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SHELBY COUNTY JUDGE OF PROBATE
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