

DECLARATION OF RESTRICTIONS

THIS DECLARATION OF RESTRICTIONS ("Declaration") made this 30th day of December, 1994, by **BROOK HIGHLAND LIMITED PARTNERSHIP** ("Declarant"), a Georgia limited partnership, with its principal place of business at Suite 303, 1900 International Park Dr., Birmingham, Alabama 35243.

WITNESSETH:

WHEREAS, Declarant is the fee owner of the property described in attached Exhibit A in the City of Birmingham, County of Shelby, State of Alabama, commonly known as Brook Highland Plaza Shopping Center ("Shopping Center") and shown on attached Exhibit A-1 as the "Shopping Center Parcel."

WHEREAS, Declarant is also the fee owner of certain outparcels of land located in the City of Birmingham, County of Shelby, and State of Alabama, which outparcels are shown on Exhibit A-1 and more fully described in Exhibit B (hereinafter collectively referred to as the "Outparcels" or individually as "Outparcel"). Exhibits A, A-1 and B are attached hereto and incorporated herein by this reference. The Outparcels and the Shopping Center are collectively referred to herein as the "Entire Premises."

WHEREAS, Declarant intends to lease and/or sell each of the Outparcels to tenants and/or purchasers in connection with the future development of said Outparcel. Declarant (as the owner of the Outparcels) and any successor owner and/or tenants of any Outparcel are hereinafter collectively referred to as "Occupants" or individually as "Occupant."

WHEREAS, Declarant desires to establish and create certain rights, restrictions, duties and responsibilities relating to the use of the Outparcels.

NOW THEREFORE, Declarant (which under this Declaration shall also mean the successor fee owner of fifty percent (50%) or more of the total area of the Shopping Center), as the owner of the fee simple interest in the Outparcels, for itself, its successors, and assigns, declares as follows:

ARTICLE 1
TERM

1.1 Term. The rights, restrictions, duties and responsibilities relating to the Outparcels and set forth herein shall remain applicable to the Outparcels for a period of fifty (50) years from the date of this Declaration, unless earlier terminated by mutual agreement between the Occupant of each Outparcel and Declarant. Notwithstanding the foregoing to the contrary, if applicable law restricts the time period during which the provisions and covenants, conditions and restrictions in this Declaration may be enforced to a period shorter in duration than the time periods set forth above, then the provisions of this Declaration shall continue in full force for the maximum period of time permitted by such applicable law.

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ARTICLE 2
ZONING AND USE RESTRICTIONS

2.1 Zoning and Use. The Outparcels shall be used only for retail uses permitted under applicable zoning laws of the City of Birmingham, Shelby County, Alabama, affecting the Outparcels except that in no event shall all or any portion of any Outparcel be used or operated for the following purposes:

- (a) as a furniture and/or bedding store;
- (b) as a motion picture, "legitimate" 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 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, including without limitation fruits, vegetables, dairy products, frozen foods and staple or fancy groceries;
- (e) as a delicatessen;
- (f) as an establishment, other than a package store, which sells beer or wine for off-premises consumption;
- (g) as a spa, recreational activity, or health club;
- (h) as an auditorium (other than a meeting room in connection with a permitted use hereunder);
- (i) as a warehouse;
- (j) for non-retail or non-service type activities;
- (k) as a business or professional office (except for finance company offices, legal, medical, optical, dental, chiropractic, tax preparation offices, real estate sales offices (but not schools) or insurance offices, dealing with the public and with no more than seven (7) employees;
- (l) as a massage, parlor, topless or bottomless club, adult book store, peep show store, head shop store, or any store selling pornographic inventory, including nude photos, magazines, videos, tapes or objects;
- (m) as a ballroom, dance hall or discotheque;
- (n) as a manufacturing or wholesale operation;
- (o) for the sale or repair of:
 - (i) automobiles;
 - (ii) boats;
 - (iii) trailers; or
 - (iv) mobile homes;
- (p) as a music store; or
- (q) as a bowling alley;
- (r) as a skating rink;
- (s) as a car wash;
- (t) as an automobile lubrication and/or oil change operation;

- (u) as an amusement arcade (including, without limitation, bingo, electronic, or other types of games);
- (v) as a billiard parlor or pool hall;
- (w) as a night club, lounge, tavern, pub or any bar or similar establishment (including any so-called "social encounter" restaurant) which sells alcoholic beverages for on-premises consumption;
- (x) as a book store or greeting card store;
- (y) as a scuba diving supply store;
- (aa) as a women's clothing store, including discount or budget stores, featuring large or half-size, popular to moderate priced junior or missey, women's clothing containing 2001 square feet or more;
- (bb) as a picture framing shop;
- (cc) as an art gallery;
- (dd) as a one price point variety store (i.e. a "dollar store");
- (ee) as a beauty supply store (such that beauty supply products exceed ten percent (10%) of gross sales);
- (ff) as a store devoting more than twenty percent (20%) of its gross leasable area to the sale of shoes, or a family shoe store in excess of 3000 square feet;
- (gg) as a junior department store, or other use as operated by a majority of stores in the "Goody's" chain;
- (hh) as a "teen lounge";
- (ii) as a pawn shop;
- (jj) as a flea market;
- (kk) as an off-track betting facility;
- (ll) as a carnival; or
- (mm) as a cafeteria, restaurant or any business serving or selling alcoholic beverages as an incidental part thereof.

ARTICLE 3 **BUILDING AND CONSTRUCTION**

3.1 **Size and Signage.** The Outparcels shall be restricted to a one story building which shall not contain more than six-thousand 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 Outparcels shall conform to the requirements set forth herein; 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 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 Outparcels have any bulbs or other forms of lighting that intermittently switch on and off; (v) any building on the Outparcels have a second story or basement; and (vi) any sign be a so-called "portable" or similar type sign. Each Outparcel shall be entitled to one separate pylon

sign which shall not exceed thirty feet (30') in height (or such other height as Declarant 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 feet (15') in length, four feet (4') in height, and two feet (2) in thickness.

3.2 Set Back. The building or any other structure (except for the drive-through lanes, if any, shown on the approved plans) constructed on any Outparcel 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, side yard, or front setback requirements of the City of Birmingham, Alabama on the Map of Book Highland Plaza Resurvey, appearing of record in the Office of the Judge of Probate of Shelby County, Alabama, Map Book 18, Page 99; and

3.3 Plans and Specifications. The building and improvements shall be constructed with first-class materials and equipment, of the same quality and of compatible and harmonious design with the commercial buildings constituting the Shopping Center and uses exterior material which is aesthetically compatible with the type used in said Shopping Center.

3.4 Compliance with Covenants and Resolution of Record. Notwithstanding any provision in this Declaration to the contrary, each Occupant covenants and agrees that in addition to the restrictions and covenants set forth in this Declaration, the use, operation and construction of any Outparcel and any building or other improvements on any Outparcel shall be in full compliance with any and all applicable laws, regulations, codes, ordinances and easements, declarations, covenants, restrictions and conditions of record, including without limitation, those instruments listed on attached Exhibit C.

ARTICLE 4 **PARKING AND ACCESS**

4.1 Parking and Access. The Occupant of each Outparcel shall keep and maintain the entire area outside the building construction on the Outparcel only as and for landscaping, access drives, parking areas and sidewalks used only in connection with the use permitted under Section 2.1 above. The Occupant of each Outparcel shall provide adequate parking on the Outparcel, 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 Outparcel, so long as the Outparcel 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 Outparcel, if the same is used for any permitted use other than a restaurant, for the convenient parking of full size automobiles on the Outparcel and reasonable access drives for the convenient use thereof. The parking area and all access drives on and to each Outparcel shall be paved in a good first-class manner and of high quality materials and properly maintained, repaired, and, if reasonably necessary, replaced, at all times.

4.2 Curb Cuts. There shall be no curb cuts between any Outparcel and any adjoining public right-of-way. The curb cuts or access points between each Outparcel and the adjoining Outparcel shall be of such size and in such location such as not to create any traffic congestion or traffic hazard on or going to and from any adjoining public right-of-way.

4.3 Obstructions. Neither Declarant nor the Occupant shall permit any fence, barricade, barrier, chain, structure, or other obstruction of any kind whatsoever to be placed, kept, permitted or maintained between each Outparcel and the adjoining land of the Shopping Center except to the extent any temporary obstruction shall be reasonably required:

- A. In connection with the construction, expansion, repair or replacement of any of the improvements from time to time located on the Outparcel; or
- B. Once in each calendar year for the purpose of blocking off access to the Outparcel in order to avoid the possibility of dedicating the same for public use or creating prescriptive rights therein, such barriers to be temporarily erected for such purpose.

Except as the contrary is hereinabove provided, the Occupant 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 the Shopping Center 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.

ARTICLE 5

MAINTENANCE, REPAIR AND INSURANCE

5.1 Maintenance and Repair. The Occupant of each Outparcel shall keep or cause to be kept the building and other improvements at any time located on the Outparcel in good order, condition and repair at all times. In addition, the Occupant covenants to maintain and keep in a first-class, clean and orderly condition, consistent with standards of maintenance of the Shopping Center, the building, improvements, grass, landscaping, parking areas and driveways located on the Outparcel. In the event of damage or destruction of the building or other improvements on the Outparcel, the Occupant covenants that if it does not promptly repair and restore the building(s) and improvements to the same condition as the same were in immediately prior to such damages or destruction, it shall promptly clear the Outparcel of all debris and hazardous conditions and shall leave, keep and maintain the same in a grassed, landscaped, clean, safe, sightly and attractive condition. The Occupant shall cause all of the unimproved portion of the Outparcel to be properly grassed and landscaped to meet Declarant's reasonable requirements at all times, until such time as same shall be improved in the manner required hereby.

5.2 Insurance. The Occupant of each Outparcel shall at all times, at its sole cost and expense, continuously maintain comprehensive general liability insurance, endorsed to cover personal injury and contractual liability, covering the buildings, parking and other areas of the Outparcel. The limits of which insurance shall never be less than:

- A. \$1,000,000 for death of, or bodily injury to, or personal injury to one or more persons resulting from one occurrence; and

- B. Property Damage to the limit of not less than \$500,000 for each occurrence.

The Occupant shall at all times provide and deliver to Declarant copies of such policies or certificates of such insurance in full force and provision shall be contained therein that none of the same may be modified or canceled by the insurer without at least twenty (20) days prior written notice to the Declarant.

ARTICLE 6

DEFAULT AND REMEDIES

6.1 Default and Remedies. It is understood that it is most important for the owner, lessee, or other occupant of the Outparcel, or any part thereof, to comply with each and every one of the obligations contained herein. In the event that any of the obligations be not promptly complied with as and when required hereby and within fifteen (15) days after Declarant, its successor, assign, or agent notifies the Occupant of any such failure to perform such obligation, then without limiting any other legal or equitable right or remedy which Declarant may have for such violation, Declarant 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 Occupant without being obligated to do so whether or not Declarant shall have previously performed any such obligation of Occupant. In the event that Declarant performs such obligation, then Occupant covenants to pay Declarant immediately upon demand and without any set-off the moneys expenses by Declarant therefor together with Declarant'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 15% per annum. The performance by Declarant of any obligation of Occupant on any one or more occasions shall not be construed to be an assumption by Declarant 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 Occupant fails to comply with any obligation hereunder, which failure results solely from an Unavoidable Delay (as hereinafter defined), then Occupant'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 Occupant gives to Declarant notice of the event relating to said Unavoidable Delay within ten (10) days after the commencement thereof. The foregoing remedies shall be in addition to any other available remedies as provided by

applicable laws, regulations, codes, ordinances, and easements, declarations, covenants, resolutions and conditions of record.

ARTICLE 7

COVENANTS RUNNING WITH THE LAND

7.1 Covenants Running with the Land. The rights, duties, responsibilities and covenants herein contained shall be covenants running with the land, and shall inure to the benefit of, and be binding upon Declarant and its successors and assigns and any future owner of the Shopping Center and all future Occupants of all or any portion of the Outparcels, and their respective heirs, successors and assigns, and all persons claiming under them. In the event that all or any portion of the Shopping Center is sold, transferred or conveyed, the "Declarant" under this Declaration shall be deemed to be the successor fee owner of fifty percent (50%) or more of the total land area of the Shopping Center.

ARTICLE 8

MODIFICATIONS

8.1 Modifications. The provisions of this Declaration may be abrogated, modified, rescinded, terminated or amended in whole or in part only with the unanimous consent of the Declarant and the fee owners and the Occupants of each and every Outparcel or part thereof by agreement in writing, executed and delivered with the necessary formalities of a deed by all of said parties, and duly recorded in the appropriate public records. This Declaration may not otherwise be abrogated, modified, rescinded, terminated or amended in whole or in part. Notwithstanding the foregoing, Declarant reserves the right, in its sole discretion to waive or modify the whole or any part of Articles 2 and 3 hereof, so as to remove, or reduce the severity of, any restrictions contained herein, without requiring the consent or approval of any person.

ARTICLE 9

MISCELLANEOUS PROVISIONS

9.1 Severability. Any provision of this Declaration 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 Declaration 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.

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

9.3 Construction. It is agreed in the construction and interpretation of the provisions hereof 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.

9.4 Headings. The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.

9.5 Notice. 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 Declarant:

Brook Highland Limited Partnership
Suite 303
1900 International Park Drive
Birmingham, Alabama 35243

If to Occupant: Addressed to the Outparcel owned or leased.

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.

9.6 Gender and Number. 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 Declaration so admits or requires.

9.7 Limitation. By imposition of the covenants, restrictions, and agreements herein, there is no express or implied obligation on Declarant to, in any manner, restrict the use of the Shopping Center.


9.8 Delay. For purposes of this Declaration, "Unavoidable Delay" shall mean delays caused by the following reasons: (i) governmental statutes, ordinances or edicts; (ii) governmental rationing or allocation of materials; (iii) unusually severe weather conditions; strikes, blackouts, unavoidable casualty and disasters, delays in transportation, shortage of labor or materials, or any other cause beyond the reasonable control of the Occupant.

9.9 Parties Bound. The provisions hereof shall inure to the benefit of, and shall be binding on, Declarant and its successors and assigns in the interest in the Shopping Center and shall inure to the benefit of, and be binding upon each Occupant and their successors and assigns in and to each Outparcel.


IN WITNESS WHEREOF, the undersigned has caused this Declaration of Restrictions to be signed as of the day and year first above written.

BROOK HIGHLAND LIMITED
PARTNERSHIP, a Georgia limited
partnership

By: BW 280 Limited Partnership,
a Georgia limited partnership, its
sole general partner


Witness

By: Alex Baker, Inc., an Alabama
corporation, its sole general
partner


By: Alex D. Baker, President

STATE OF _____)
COUNTY OF _____) S.S.

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 and the sole general partner in BW 280 Limited Partnership, a Georgia limited partnership, and the sole general partner in Brook Highland Limited Partnership, a Georgia 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 ____ day of December, 1994.

Notary Public

My Commission Expires: _____

EXHIBIT " A "

Land lying and being in Shelby County, Alabama, and being more particularly described as that certain tract of land containing 65.88 acres, more or less, and being designated as Lots 1, 1A, 2 and 2A on that certain map entitled "Brook Highland Plaza Resurvey" recorded in Map Book 18, Page 99, in the Probate Office for Shelby County, Alabama.

EXHIBIT "A-1"

Reduced Site Plan to be Attached

Outparcels

EXHIBIT " B "

Land lying and being in Shelby County, Alabama, and being designated as Lots 1B, 1D, 1E, 1F, and 2B, on that certain map entitled Brook Highland Plaza Resurvey, recorded in Map Book 18, at Page 99, in the Probate Office for Shelby County, Alabama.

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