

This instrument prepared by and return to:
Julian E. Whitehurst, Esquire
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
Post Office Box 2809
Orlando, Alabama 32802-2809

January 14, 1998

Borrower Name: Birmingham Realty Company
Project Name: Columbiana Square Shopping Center

ASSIGNMENT OF LEASES, RENTS AND PROFITS

THIS ASSIGNMENT OF LEASES, RENTS AND PROFITS (hereinafter referred to as "Assignment") is made, executed and delivered as of the day and year first above written by **BIRMINGHAM REALTY COMPANY**, an Alabama corporation, whose address is 2118 First Avenue, North, Birmingham, Alabama, 35203 (hereinafter referred to as "Assignor"), to and in favor of **NATIONWIDE LIFE INSURANCE COMPANY**, an Ohio corporation, having its principal office at One Nationwide Plaza, Columbus, Ohio 43215-2220, Attention: Real Estate Investment Department, 34T and its successors and assigns (hereinafter referred to as the "Assignee");

WITNESSETH:

WHEREAS, Assignor is the present owner in fee simple of certain real property located in Shelby County, Alabama more particularly described on Exhibit A attached hereto and by this reference made a part hereof (hereinafter referred to as the "Real Property"); and

WHEREAS, Assignee is the owner and holder of a certain Mortgage and Security Agreement of even date herewith (hereinafter referred to as the "Mortgage") encumbering the Real Property and other property more specifically described in the Mortgage (all of which property is referred to herein and in the Mortgage as the "Property"), which Mortgage secures the payment of that certain Mortgage Note of even date herewith in the amount of THREE MILLION EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS (\$3,800,000.00) payable to Nationwide Life Insurance Company (said Mortgage Note being hereinafter referred to as the "Note"); and

WHEREAS, Assignee, as a condition to making the aforesaid loan and to obtain additional security therefor, has required the execution of this Assignment by Assignor; and

Inst # 1998-01782

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SHELBY COUNTY JUDGE OF PROBATE
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Columbiana Square

NOW THEREFORE, in order to further secure the payment of the indebtedness of Assignor to Assignee evidenced by the Note, and secured by the Mortgage, and in further consideration of the sum of TEN AND 00/100 DOLLARS (\$10.00) in hand paid by Assignee to Assignor, the receipt and sufficiency of which are hereby acknowledged, Assignor (jointly and severally, if more than one) does hereby sell, assign, transfer and set over unto Assignee all of the leases, rents, issues, profits and income of, from or pertaining to the Property, including without limitation, any and all fees (hereinafter referred to as "termination fees") that permit any tenant of any portion of the Property to terminate its lease. This Assignment shall include any and all leases or rental agreements that may now be in effect, as well as any future or additional leases or rental agreements, and any renewals or extensions of the same, that may be entered into by Assignor, together with all security deposits paid or payable by any tenants under all present or future leases or rental agreements and any fees that permit tenants to terminate their leases, which are payable to Assignor under the terms and conditions of any of said leases. Assignor hereby agrees to execute and deliver such further assignments of said leases or rental agreements as Assignee may from time to time require.

This Assignment is absolute and effective immediately and without possession. Notwithstanding the foregoing, Assignor shall have a license to receive, collect and enjoy the rents, issues, profits and income accruing from the Property (but excluding any termination fees, which shall be paid directly to Assignee) until a default has occurred under the Note, the Mortgage or any other instrument evidencing or securing the Note. Upon the occurrence of a default, the license shall cease automatically, without need of notice, possession, foreclosure or any other act or procedure, and all leases, rents, issues, profits and income assigned hereby shall thereafter be payable to Assignee.

PROVIDED ALWAYS, however, that if Assignor shall pay unto Assignee the indebtedness evidenced by the Note, and if Assignor shall duly, promptly and fully perform, discharge, execute, effect, complete, comply with and abide by each of the agreements, conditions and covenants of the Note, the Mortgage, this Assignment and all other instruments executed by Assignor to and in favor of Assignee as further evidence of or as additional security for the indebtedness (hereinafter together referred to as the "Loan Documents"), then this Assignment and the estates and interests hereby granted and created shall terminate.

1. Representations and Warranties of Assignor. In furtherance of the foregoing assignment, Assignor:

A. Represents and warrants that it is the owner in fee simple of the Property and has good title to the leases, rents, income, issues, profits and security deposits hereby assigned and good right to assign the same, and that no other person, entity, firm or corporation has any right, title or interest therein; that Assignor has not previously sold, assigned, transferred, mortgaged or pledged said rents, issues, profits, income and leases of

the Property; and that payment of any of the same has not otherwise been anticipated, waived, released, discounted, set off or otherwise discharged or compromised.

B. Except as provided in the Mortgage, agrees and warrants that, without the prior written consent of Assignee, the terms of any and all leases will not be amended, altered, modified or changed in any manner whatsoever, nor will they be surrendered or canceled, nor will any proceedings for dispossession or eviction of any lessee under said leases be instituted by Assignor.

C. Agrees and warrants that no request will be made of any lessee to pay any rent, and no rent will be accepted by Assignor, for more than one month in advance of the date such rent becomes due and payable under the terms of any and all leases, it being agreed between Assignor and Assignee that rent shall be paid as provided in said leases and not otherwise. The foregoing shall not prevent Assignor from charging and collecting security deposits from each tenant leasing space in the Real Property.

D. Authorizes Assignee, by and through its employees or agents or duly appointed receiver, at its option, after the occurrence of a default under this Assignment, the Note, the Mortgage or any of the other Loan Documents, to enter upon the Property and to collect, in the name of Assignor, as its lawful attorney, or in its own name as Assignee, any rents, income or profits accrued but unpaid and/or in arrears at the date of such default, as well as the rents, income or profits thereafter accruing and becoming payable during the period of the continuance of the said default or any other default. To this end, Assignor further agrees that it will cooperate with and facilitate, in all reasonable ways, Assignee's collection of said rents, income or profits and will, upon request by Assignee, execute a written notice to each tenant, occupant or licensee directing said tenant, occupant or licensee to pay directly to Assignee all income, rents and profits due and payable under said leases; provided, however, that Assignee may notify said tenant, occupant or licensee of the effectiveness of this Assignment without giving notice to Assignor or requesting Assignor to give such notice or join in such notice.

E. Authorizes Assignee, upon such entry, at its option, to take over and assume the management, operation and maintenance of the Property and to perform all acts necessary and proper and to expend such sums out of the income of the Property as in Assignee's sole discretion may be reasonable or necessary in connection therewith, in the same manner and to the same extent as Assignor theretofore might do. Assignor hereby releases all claims against Assignee arising out of such management, operation and maintenance.

F. Agrees to execute, upon the request of Assignee, any and all other instruments requested by Assignee to effectuate this Assignment or to accomplish any other purpose deemed by Assignee to be necessary or appropriate in connection with this Assignment.

G. Agrees and acknowledges that nothing in this Assignment shall be construed to limit or restrict in any way the rights and powers granted to Assignee in the Note, the Mortgage or any of the other Loan Documents. The collection and application of the rents, issues and profits as described herein shall not constitute a waiver of any default which might at the time of application or thereafter exist under the Note, the Mortgage or any of the other Loan Documents, and the exercise by Assignee of the rights herein provided shall not prevent Assignee's exercise of any rights provided under the Note, the Mortgage or any of the other Loan Documents.

2. Assignee's Rights Following Default by Assignor. Assignee may, after the occurrence of a default as hereinabove provided, from time to time, appoint and dismiss such agents or employees as shall be necessary or reasonable for the collection of the rents, issues and profits derived from the Property and for the proper care and operation of the Property, and Assignor hereby grants to Assignee the authority to give such agents or employees so appointed full and irrevocable authority on Assignor's behalf to manage the Property and to do all acts relating to such management, including, without limitation, the entry into and execution of new leases in the name of Assignor or otherwise, the alteration or amendment of existing leases, the authorization to repair or replace any items necessary in order to maintain the building or buildings and chattels incidental thereto in good and tenantable condition, and the effectuation of such alterations or improvements as in the judgment of Assignee may be reasonable or necessary to maintain or increase the income from the Property. Assignee shall have the sole control of such agents or employees, whose remuneration shall be paid out of the rents, issues and profits as hereinabove provided, at the rate of compensation accepted in the community wherein the Property is situated.

3. Application by Assignee of Net Income From the Property. Assignee shall, after payment of all proper charges and expenses enumerated under Paragraph 2 above, and after retaining sufficient sums to meet taxes, assessments, utilities and insurance coverages in requisite amounts (including liability, fire and extended coverage), credit the net income received by it from the Property, by virtue of this Assignment, to any amounts due and owing to Assignee by Assignor under and pursuant to the terms of the Note and the Mortgage, but the manner of the application of such net income shall be determined in the sole discretion of Assignee. Assignee shall make a reasonable effort to collect rents, income and profits, reserving, however, within its sole discretion, the right to determine the method of collection and the extent to which enforcement of the collection of delinquent rents, income and profits shall be prosecuted. Notwithstanding the foregoing, no such credit shall be given by Assignee for any sum or sums received from the rents, issues and profits of the Property until the money collected is actually received by Assignee at its principal office as stated above (or at such other place as Assignee shall designate in writing), and no credit shall be given for any uncollected rents or other uncollected amounts or bills, nor shall credit be given for any rents, issues and profits derived from the Property under any order of court or by operation of law until such amounts are actually received by Assignee at its principal office as stated above. The net amount of income received by Assignee hereunder and applied by Assignee to the amounts due and owing by Assignor shall not serve to cure any default under the Note, the Mortgage or any of

the other Loan Documents, nor shall any amounts received by Assignee hereunder be in full satisfaction of the indebtedness evidenced by the Note unless such amounts are sufficient to pay such indebtedness in full (including any prepayment premiums, late payment charges and advancements) in accordance with the terms of the Note, Mortgage and other Loan Documents.

4. Limitation of Assignee's Liability. Assignee shall not be obligated to perform or discharge any obligation under the leases hereby assigned or under or by reason of this Assignment, and Assignor hereby agrees to indemnify and hold Assignee harmless against any and all liability, loss or damage which Assignee might incur under the leases or under or by reason of this Assignment and of and from any and all claims and demands whatsoever which may be asserted against Assignee by reason of any alleged obligation or undertaking on Assignee's part to perform or discharge any of the terms of such leases, except for claims and demands arising by reason of Assignee's gross negligence or willful misconduct.

5. Reinstatement After Default. In the event that Assignor shall, with the consent of Assignee, reinstate the indebtedness evidenced by the Note completely in good standing, having complied with all the terms, covenants and conditions of the Note, the Mortgage and any of the other Loan Documents, then, in such event, Assignee shall return possession of the Property to Assignor, and Assignor shall remain in possession of the Property unless and until another default occurs under the Note, the Mortgage, this Assignment or any of the other Loan Documents, at which time Assignee may, at its option, again take possession of the Property under authority of and pursuant to the terms and provisions of this Assignment.

6. Tenants' Notification of Assignment. Upon request by Assignee, at any time, Assignor will deliver a written notice to each of the tenants and lessees of the Property, which notice shall inform such tenants and lessees of this Assignment and instruct them that upon receipt of notice by them from Assignee of the existence of a default by Assignor under the Note or under any of the other Loan Documents, all rent due thereafter shall be paid directly to Assignee.

7. Satisfaction of Mortgage; Satisfaction of Assignment. This Assignment shall remain in full force and effect as long as the indebtedness evidenced by the Note remains unpaid in whole or in part. It is understood and agreed that a complete release or satisfaction of the aforesaid Mortgage shall operate as a complete release or satisfaction of all of Assignee's rights and interest hereunder, and that satisfaction of said Mortgage shall operate to satisfy this Assignment.

8. Exculpation. The liability of Assignor with respect to the payment of principal and/or interest payable under the Note shall be "non-recourse," and, accordingly, Assignee's source of satisfaction of said indebtedness and Assignor's other obligations hereunder and under the Note and under any of the other Loan Documents shall be limited to the Property and Assignee's receipt of the rents, issues and profits from the Property, and Assignee shall not seek to procure payment out of any other assets of Assignor or any person or entity comprising Assignor, or to seek any judgment for any sums which are or may be payable under the Note or under any other Loan Documents, as

well as any claim or judgment (except as hereafter provided) for any deficiency remaining after foreclosure of the Mortgage. Notwithstanding the above, nothing herein contained shall be deemed to be a release or impairment of the indebtedness evidenced by the Note or the security therefor intended by any of the other Loan Documents, or be deemed to preclude Assignee from exercising its rights to foreclose the Mortgage or to enforce any of its other rights or remedies under the Loan Documents.

Notwithstanding the foregoing, it is expressly understood and agreed that the aforesaid limitation on liability shall in no way affect or apply to Assignor's continued personal liability for:

- A. fraud or misrepresentation made in or in connection with the Note or any of the Loan Documents governing, securing or pertaining to the payment thereof;
- B. failure to pay taxes or assessments prior to delinquency, or to pay charges for labor, materials or other charges which can create liens on any portion of the Property;
- C. the misapplication of (i) proceeds of insurance covering any portion of the Property; or (ii) proceeds of the sale or condemnation of any portion of the Property; or (iii) rentals held or received by or on behalf of Assignor subsequent to the date on which Assignee makes written demand therefor pursuant to any of the Loan Documents;
- D. causing or permitting waste to occur on, in or about the Property and failure to maintain the Property, excepting ordinary wear and tear;
- E. the return to Assignee of any and all fees paid to Assignor by tenants of the Property which fees permit tenants to terminate their leases;
- F. loss by fire or casualty to the extent not compensated by insurance proceeds collected by Assignee;
- G. the return to Assignee of all unearned advance rentals and security deposits paid by tenants of the Property and not refunded to or forfeited by such tenants;
- H. the return of, or reimbursement for, all Fixtures and Personal Property (as defined in the Mortgage) owned by Assignor taken from the Property by or on behalf of Assignor, out of the ordinary course of business, and not replaced by items of equal or greater value than the original value of the Fixtures and Personal Property so removed;
- I. all court costs and Reasonable Attorneys' Fees actually incurred which are provided for in the Note or in any other Loan Document;

- J. (i) the removal of any chemical, material or substance exposure to which is prohibited, limited or regulated by any Federal, State, County, Regional or Local authority which may or could pose a hazard to the health and safety of the occupants of the Property, regardless of the source of origination; (ii) the restoration of the Property to comply with all governmental regulations pertaining to Hazardous Materials found in, on or under the Property, regardless of the source of origination; and (iii) any indemnity or other agreement to hold the Assignee harmless from and against any and all losses, liabilities, damages, injuries, costs and expenses of any and every kind arising under Paragraph 3 of the Mortgage or under the Hazardous Materials Indemnity Agreement as described in the Mortgage. However, Assignor shall not be liable for removal of any Hazardous Materials if such Hazardous Materials were placed on the Property subsequent to Assignee's acquisition of title to the Property by foreclosure of the Mortgage or acceptance of a deed in lieu thereof or subsequent to any transfer by Assignee of ownership of the Property by means of a transfer approved by Assignee pursuant to the Mortgage (provided that such transferee assumes in writing all obligations of Assignor pertaining to Hazardous Materials pursuant to the Mortgage and the Hazardous Materials Indemnity Agreement). Liability under this Subparagraph shall survive the repayment and satisfaction of the Note, Mortgage and other Loan Documents unless contemporaneously with such repayment and satisfaction Assignor furnishes Assignee with an environmental assessment report acceptable to Assignee reflecting that the Property is free from Hazardous Materials and not in violation of any Hazardous Materials Laws (as defined in the Hazardous Materials Indemnity Agreement). The burden of proof under this Subparagraph with regard to establishing the date upon which such Hazardous Materials were placed or appeared in, on or under the Property shall be upon Assignor;
- K. (i) any and all costs incurred in order to cause the Improvements (as defined in the Mortgage) to comply with any Accessibility Laws (as defined in the Mortgage); and (ii) any indemnity or other agreement to hold Assignee harmless from and against any and all losses, damages, injuries, costs or expenses of any and every kind arising under Paragraph 3 of the Mortgage regarding accessibility for the disabled or handicapped or under the Accessibility Indemnity Agreement or described in the Mortgage; provided, however, Assignor shall not be liable for compliance with Accessibility Laws that first become effective, or for any violation of any Accessibility Laws resulting from alterations or improvements to the Property that are performed, subsequent to Assignee's actually taking possession of the Property pursuant to foreclosure of the Property, or acceptance of a deed in lieu thereof or subsequent to any transfer of ownership of the Property that has the prior written approval of Assignee, provided that such transferee assumes in writing all obligations of Assignor with respect to compliance with the Accessibility Laws under the Mortgage and the Accessibility Indemnity Agreement;

- L. any and all state documentary stamp taxes and intangible personal property taxes, if any, which may be levied or assessed against the Note, the Mortgage or the other Loan Documents together with all interest thereon and penalties or charges in connection therewith; and
- M. obligations under any letter(s) of credit held by Assignee as described in the Commitment defined in the Mortgage.

Except as provided in Subparagraphs (J) and (K) above, the obligations of Assignor in Subparagraphs (A) through (M) above shall survive the repayment and satisfaction of the indebtedness secured by the Mortgage and the other Loan Documents.

Notwithstanding the foregoing limitation on liability, the Assignor shall remain personally liable, without exculpation or limitation of liability whatsoever, for the entire amount of the Loan evidenced by the Note (including all principal, interest, and other charges thereunder and under the Loan Documents) in the event that Assignor (a) violates any provision of the Mortgage governing the placing of subordinate financing on the Property, or (b) violates any provision of the Mortgage restricting transfers of interests in the Property or transfers of ownership interests in Assignor.

9. Benefits and Burdens. The provisions of this Assignment shall inure to the benefit of the Assignee, its successors and assigns, and shall be binding upon Assignor, its personal representatives, heirs, successors and assigns. The creation of rights and powers under this Assignment in favor of, or available to, Assignee shall, in no way whatsoever, be construed to impose concomitant duties or obligations on Assignee in favor of Assignor except as expressly set forth herein.

10. Terminology. As used herein, the phrase "Reasonable Attorneys' Fees" shall mean fees charged by attorneys selected by Assignee based upon such attorneys' then prevailing hourly rates as opposed to any statutory presumption specified by any statute then in effect in the State of Alabama.

11. Governing Law. This Assignment is executed and delivered as additional security for a loan transaction negotiated and consummated in the State of Alabama and is to be construed according to the laws of the State of Alabama, and the laws of the United States.

IN WITNESS WHEREOF, the undersigned has executed this Assignment under seal as of the day and year first above written.

BIRMINGHAM REALTY COMPANY, an
Alabama corporation

By: *Russell M. Cunningham III*

Name: *Russell M. Cunningham III*

Its: President

STATE OF ALABAMA
COUNTY OF *Jefferson*

I, a Notary Public in and for said state, hereby certify that *Russell M. Cunningham III*, whose name as (Office of Signature) *President* of BIRMINGHAM REALTY COMPANY, an Alabama corporation, is signed to the foregoing instrument, and who is acknowledged before me on this *14th* day of *January*, 1997 that, being informed of the contents of the instrument, he/she, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this *14th* day of January, 1998.

Don E. Hagler

Notary Public

Name: _____

My Commission Expires: *9-19-98*

(SEAL)

Exhibit "A"

Legal Description

SHOPPING CENTER SITE

A PARCEL OF LAND LOCATED IN THE NE 1/4 OF THE NW 1/4 AND THE NW 1/4 OF THE NE 1/4 OF SECTION 26, TOWNSHIP 21 SOUTH, RANGE 1 WEST, MORE PARTICULARLY DESCRIBED AS FOLLOWS: COMMENCE AT THE NE CORNER OF THE NW 1/4 OF SAID SECTION 26; THENCE IN A NORTHERLY DIRECTION ALONG THE PROJECTION OF THE EASTERLY LINE OF SAID SECTION 26, A DISTANCE OF 2.82 FEET TO A POINT ON THE WESTERLY RIGHT OF WAY LINE OF JOINER TOWN ROAD SAID POINT ALSO BEING AN OLD REBAR CORNER WHICH IS ALSO THE SE CORNER OF THE ELLIOT LOT DESCRIBED IN DEED BOOK 12, PAGE 496; THENCE 137 DEGREES 14 MINUTES 28 SECONDS RIGHT IN A SOUTHEASTERLY DIRECTION ALONG SAID RIGHT OF WAY LINE, A DISTANCE OF 30.06 FEET TO THE POINT OF BEGINNING; THENCE CONTINUE ALONG LAST DESCRIBED COURSE AND SAID RIGHT OF WAY LINE, A DISTANCE OF 40.09 FEET; THENCE 93 DEGREES 46 MINUTES 21 SECONDS RIGHT IN A SOUTHWESTERLY DIRECTION A DISTANCE OF 200.73 FEET; THENCE 93 DEGREES 46 MINUTES 21 SECONDS LEFT IN A SOUTHEASTERLY DIRECTION A DISTANCE OF 77.68 FEET; THENCE 21 DEGREES 21 MINUTES 23 SECONDS LEFT IN A SOUTHEASTERLY DIRECTION, A DISTANCE OF 171.49 FEET TO A POINT ON THE WESTERLY RIGHT OF WAY LINE OF ALABAMA HIGHWAY NO. 25; THENCE 90 DEGREES RIGHT IN A SOUTHWESTERLY DIRECTION AND ALONG SAID RIGHT OF WAY LINE, A DISTANCE OF 497.95 FEET; THENCE 90 DEGREES RIGHT IN A NORTHWESTERLY DIRECTION, A DISTANCE OF 328.00 FEET; THENCE 90 DEGREES LEFT IN A SOUTHWESTERLY DIRECTION, A DISTANCE OF 20.00 FEET; THENCE 90 DEGREES RIGHT IN A NORTHWESTERLY DIRECTION, A DISTANCE OF 325.09 FEET; THENCE 90 DEGREES RIGHT IN A NORTHEASTERLY DIRECTION, A DISTANCE OF 467.05 FEET TO A POINT ON THE SOUTHEASTERLY RIGHT OF WAY LINE OF SOUTHERN RAILWAY; THENCE 30 DEGREES 06 MINUTES 20 SECONDS RIGHT IN A NORTHEASTERLY DIRECTION, A DISTANCE OF 235.48 FEET TO A POINT ON THE WEST LINE OF SAID ELLIOT LOT; THENCE 81 DEGREES 15 MINUTES 03 SECONDS RIGHT IN A SOUTHEASTERLY DIRECTION ALONG SAID WEST LINE OF THE ELLIOT LOT, AND PARALLEL WITH THE WESTERLY RIGHT OF WAY LINE OF JOINERTOWN ROAD, A DISTANCE OF 146.98 FEET; THENCE 93 DEGREES 46 MINUTES 21 SECONDS RIGHT IN A SOUTHWESTERLY DIRECTION, A DISTANCE OF 10.02 FEET; THENCE 93 DEGREES 46 MINUTES 21 SECONDS LEFT, IN A SOUTHEASTERLY DIRECTION, A DISTANCE OF 130.06 FEET; THENCE 86 DEGREES 13 MINUTES 39 SECONDS LEFT IN A NORTHEASTERLY DIRECTION, A DISTANCE OF 200.73 FEET TO THE POINT OF BEGINNING, CONTAINING 8.56 ACRES, MORE OR LESS.

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