

**RECORDER NOTE: THIS MORTGAGE AMENDS AND RESTATES IN ITS ENTIRETY THAT CERTAIN MORTGAGE AND SECURITY AGREEMENT DATED SEPTEMBER 7, 1999, RECORDED AS INSTRUMENT #1999-38043 WITH THE OFFICE OF THE JUDGE OF PROBATE OF SHELBY COUNTY, ALABAMA; MORTGAGE TAX HAS PREVIOUSLY BEEN PAID ON \$9,770,000 OF THE INDEBTEDNESS SECURED HEREBY PURSUANT TO SAID PRIOR MORTGAGE AND SECURITY AGREEMENT; ACCORDINGLY, MORTGAGE TAX IS DUE AND PAYABLE ON \$10,932,500 OF NEW INDEBTEDNESS OWED BY BORROWERS TO LENDER AS HEREAFTER DESCRIBED.**

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***This Instrument Prepared By, And After  
Recording Should Be Returned To:***

**Gail Livingston Mills, Esq.  
Burr & Forman LLP  
3100 SouthTrust Tower  
420 North 20th Street  
Birmingham, Alabama 35203  
Telephone: (205) 251-3000**

**Inst # 2001-07390**

**03/05/2001-07390  
09:03 AM CERTIFIED  
SHELBY COUNTY JUDGE OF PROBATE  
027 CJ1 16487.75**

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**STATE OF ALABAMA     )  
                                     :  
COUNTY OF SHELBY    )**

**AMENDED AND RESTATED MORTGAGE AND SECURITY AGREEMENT**

**THIS AMENDED AND RESTATED MORTGAGE AND SECURITY AGREEMENT, made this 1st day of March, 2001, is from RIVER RIDGE DEVELOPMENT COMPANY, L.L.C., a Delaware limited liability company ("RRDC"), and RIVER RIDGE RETAIL COMPANY, L.L.C., a Delaware limited liability company ("RRRC," and collectively with RRDC, the "Borrowers"), as mortgagors and debtors, whose address is 2222 Arlington Avenue South, Birmingham, Alabama 35205, Attention: David L. Silverstein,, in favor of SOUTHTRUST BANK, an Alabama banking corporation (hereinafter called the "Lender"), as mortgagee and secured party, whose address is P.O. Box 2554, Birmingham, Alabama 35290, Attention: Commercial Real Estate Department, and 201 South Orange Avenue, Suite 1500, Orlando, Florida, 32801, Attn: Scott M. Abbott.**

**W I T N E S S E T H:**

**WHEREAS, Borrowers are justly indebted to the Lender for a loan in the principal amount of up to TWENTY MILLION SEVEN HUNDRED TWO THOUSAND FIVE HUNDRED DOLLARS (\$20,702,500) (the "Loan"), which such Loan is evidenced by that certain Amended and Restated Promissory Note of even date herewith payable by the Borrowers to the order of Lender (said Amended and Restated Promissory Note, as the same may hereafter be renewed, extended or**

modified, being herein called the "Note"), and that certain Amended and Restated Construction Loan Agreement, dated of even date herewith, among Borrowers and Lender (as the same may hereafter be modified or amended, the "Loan Agreement"); and

**WHEREAS**, as a condition precedent to making the Loan to Borrowers, the Lender has required that the Borrowers execute this Mortgage as security for the Loan and the Loan Obligations (as hereinafter defined).

**NOW, THEREFORE**, in consideration of the Recitals, the sum of Ten Dollars, and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, and in order to secure the payment and performance of the Loan Obligations, the Borrowers have bargained and sold and do hereby grant, bargain, sell, alien, and convey unto the Lender, its successors and assigns, the following described land, real estate, buildings, improvements, fixtures, furniture, and other personal property (which together with any additional such property hereafter acquired by the Borrowers and subject to the lien of this Mortgage, or intended to be so, as the same may be from time to time constituted is hereinafter sometimes referred to as the "Collateral"), to-wit:

(a) All of the Borrowers' respective right, title, and interest in and to the tracts or parcels of land located in Shelby County, Alabama as are more particularly described in Exhibit A attached hereto and by this reference made a part hereof (the "**Land**"); and

(b) All of Borrowers' respective right, title and interest in and to all buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, and all gas and electric fixtures, radiators, heaters, engines and machinery, boilers, ranges, elevators and motors, plumbing and heating fixtures, carpeting and other floor coverings, water heaters, awnings and storm sashes, and cleaning apparatus which are or shall be attached to said buildings, structures or improvements, and all other furnishings, furniture, fixtures, machinery, equipment, appliances, vehicles and personal property of every kind and nature whatsoever now or hereafter owned by Mortgagors (or either of them) and located in, on or about, or used or intended to be used with or in connection with the construction, use, operation or enjoyment of the Mortgaged Property, including all extensions, additions, improvements, betterments, renewals and replacements, substitutions, or proceeds from a permitted sale of any of the foregoing, and all building materials and supplies of every kind now or hereafter placed or located on the Land (collectively the "**Improvements**"), all of which are hereby declared and shall be deemed to be fixtures and accessions to the Land and a part of the Collateral as between the parties hereto and all persons claiming by, through or under them, and which shall be deemed to be a portion of the security for the Loan Obligations; and

(c) All of Borrowers' respective right, title and interest in and to all easements, rights-of-way, strips and gores of land, vaults, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, minerals, flowers, shrubs, crops,



trees, timber and other emblements now or hereafter located on the Land or under or above the same or any part or parcel thereof, and all ground leases, estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances, reversions, and remainders whatsoever, in any way belonging, relating or appertaining to the Collateral or any part thereof, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Borrowers (or either of them) (collectively, the "**Appurtenant Rights**"), and any and all such greater rights as the Borrowers (or either of them) may hereinafter acquire in and to the Appurtenant Rights; and

(d) All the Borrowers' respective right, title, and interest in and to all rents, issues, profits and revenues of the Collateral from time to time accruing, together with all proceeds of insurance, condemnation payments, security deposits and escrow funds, and all of the estate, right, title, interest, property, possession, claim and demand whatsoever at law, as well as in equity, of such Borrower of, in and to the same, reserving only the right to such Mortgagor to collect the same so long as an Event of Default (as herein defined) has not occurred hereunder or such collection is not otherwise restricted by this Mortgage; and

(e) All the Borrowers' respective right, title, and interest in and to any and all licenses, permits, general intangibles, accounts, trade names, trademarks, contract rights and other intangible property, now owned or hereafter acquired, relating to the foregoing real property or the business now or hereafter conducted thereat, it being agreed that the same may not be transferred to other real estate without the Lender's prior written consent.

(g) Proceeds and products of all of the foregoing real and personal property.

**TO HAVE AND TO HOLD** the Collateral and all parts thereof unto the Lender, its successors and assigns forever, subject however to the terms and conditions herein.

**PROVIDED, HOWEVER,** that these presents are upon the condition that, if the Borrowers shall pay or cause to be paid to the Lender the principal and interest and other indebtedness (including future advances) payable in respect to the Note, this Mortgage, and the other Loan Documents at the times and in the manner stipulated therein and herein, all without any deduction or credit for taxes or other similar charges paid by the Borrowers, and shall keep, perform, and observe all and singular the covenants and promises in the Note, this Mortgage, and the other Loan Documents expressed to be kept, performed, and observed by and on the part of the Borrowers, all without fraud or delay, then this Mortgage, and all the properties, interest, and rights hereby granted, bargained, and sold shall cease, determine, and be void, but shall otherwise remain in full force and effect.

**AND** the Borrowers covenant and agree with the Lender as follows:

**ARTICLE I**  
**DEFINITIONS; RULES OF CONSTRUCTION**

**1.01. Defined Terms.** As used herein, all defined terms shall have the meanings ascribed to them, and, in addition, the following terms will have the following meanings:

**"Applicable Environmental Law"** shall mean any applicable federal, state or local laws, rules or regulations pertaining to health or the environment, or petroleum products, or radon radiation, or oil or hazardous substances, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. § 6901, et seq., as amended, the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., as amended, the Clean Air Act, 42 U.S.C. § 741, et seq., as amended, the Clean Water Act 33 U.S.C. § 7401 et seq., as amended, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, as amended, the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j, as amended, and the Federal Emergency Planning and Community Right-To-Know Act of 1986, as amended. The terms "hazardous substance" and "release" shall have the meanings specified in CERCLA, and the terms "solid waste," "disposal," "dispose," and "disposed" shall have the meanings specified in RCRA, except that if such acts are amended to broaden the meanings thereof, the broader meaning shall apply herein prospectively from and after the date of such amendments; notwithstanding the foregoing, provided, to the extent that the laws of the State of Alabama establish a meaning for "hazardous substance" or "release" which is broader than that specified in CERCLA, as CERCLA may be amended from time to time, or a meaning for "solid waste," "disposal," and "disposed" which is broader than specified in RCRA, as RCRA may be amended from time to time, such broader meanings under said state law shall apply in all matters relating to the laws of such State.

**"Assignment of Contract"** means that certain Assignment of Contract and Contract Rights dated of even date herewith from RRDC in favor of Lender, as the same may hereafter be modified or amended.

**"Assignment of Rents"** means that certain Amended and Restated Assignment of Rents and Leases dated of even date herewith from Borrowers in favor of Lender, as the same may hereafter be modified or amended.

**"Default"** means the occurrence or existence of any event which, but for the giving of notice or expiration of time or both, would constitute an Event of Default.

**"Event of Default"** means any "Event of Default" as hereinafter defined.

**"Exhibit"** means an Exhibit to this Agreement, unless the context refers to another document, and each such Exhibit shall be deemed a part of this Agreement to the same extent as if it were set forth in its entirety wherever reference is made thereto.

**"Guarantors"** means, collectively Jeffrey A. Bayer, Jon W. Rotenstreich, David L. Silverstein.

**"Guaranty"** means that certain Amended and Restated Guaranty Agreement of even date herewith from the Guarantors in favor of the Lender, as the same may hereafter be modified or amended.

**"Indemnity"** means that certain Amended and Restated Environmental Indemnity Agreement of even date herewith from the Borrowers and Guarantors in favor of the Lender, as the same may hereafter be modified or amended.

**"Insurance Deficiency"** has the meaning set forth in Section 2.07(4)(iv).

**"Lender Commitment Letter"** means the Lender's letter to the Borrowers dated February 13, 2001, wherein the Lender agreed to make the Loan to the Borrowers on the terms and conditions therein stated.

**"Loan Documents"** means, collectively, the Loan Agreement, the Note, this Mortgage, the Assignment of Rents, the Assignment of Contract, the Guaranty, and the Indemnity, together with any other documents or instruments executed by the Borrowers or others evidencing, securing, or relating to the Loan.

**"Loan Obligations"** means the aggregate of all sums owing by the Borrowers from time to time under the Note and all expenses, charges and other amounts from time to time owing by the Borrowers under the Note, this Mortgage, or any of the other Loan Documents, and all covenants, agreements and other obligations of the Borrower from time to time owing to, or for the benefit of, Lender pursuant to the Loan Documents.

**"Monetary Default"** has the meanings set forth in Section 3.01(a) hereof.

**"Net Sales Price"** has the meanings set forth in Section 4.08 hereof.

**"Outparcel"** means the approximately 1.54 acre tract of land known as Lot 2, according to the Map of River Ridge Plaza, as recorded in Map Book 26, Page 14 in the Office of the Judge of Probate of Shelby County, Alabama.

**"Permitted Encumbrances"** means all matters set forth in Schedule B-II to the title insurance policy insuring this Mortgage, as approved by the Lender.



**"Permitted Liens"** means any of the following:

- (1) Liens at any time existing in favor of the Lender;
- (2) Inchoate Liens arising by operation of law for the purchase of labor, services, materials, equipment or supplies, provided payment shall not be delinquent and, if such Inchoate Lien becomes a lien upon the Collateral, which Lien is fully subordinate to this Mortgage, is disclosed to Lender and is being contested by the Borrowers in good faith, and Borrowers are diligently pursuing such contest to completion, and adequate reserves, as determined by Lender, are being maintained therefor;
- (3) Liens incurred in the ordinary course of business in connection with workmens compensation, unemployment insurance or other forms of governmental insurance or benefits, or to secure performance of tenders, statutory obligations, leases and contracts (other than for money borrowed or for credit received in respect of property acquired) entered into in the ordinary course of business as presently conducted or to secure obligations for surety or appeal bonds, excluding, however, in any such case any Lien arising in favor of the Pension Benefit Guaranty Corporation; and
- (4) Liens for current year's taxes, assessments or governmental charges or levies provided payment thereof shall not be delinquent.

**"Phase I Property"** means (i) the approximately 26.14 acre tract of land known as Lot 3, according to the Map of River Ridge Plaza, recorded in Map Book 26, page 14 in the Office of the Judge of Probate of Shelby County, Alabama, and (ii) the approximately 2.62 acre tract of land known as Lot 5, according to the Map of River Ridge Plaza, recorded in Map Book 26, page 14 in the Office of the Judge of Probate of Shelby County, Alabama.

**"Phase II Property"** means the approximately 14.79 acre tract of land known as Lot 6, according to the Map of River Ridge Plaza, recorded in Map Book 26, page 14 in the Office of the Judge of Probate of Shelby County, Alabama.

**"Proceeding"** has the meaning set forth in Section 2.06 hereof.

**"Release Price"** has the meanings set forth in Section 4.08 hereof.

**1.02. Singular and Plural.** Singular terms shall include the plural forms and vice versa, as applicable of the terms defined.

**1.03. UCC.** Terms contained in this Agreement shall, unless otherwise defined herein or unless the context otherwise indicates have the meanings, if any, assigned to them by the Uniform Commercial Code in effect in the State of Alabama.

**1.04. GAAP.** All accounting terms used in this Agreement shall be construed in accordance with GAAP, except as otherwise defined.

**1.05. References.** All references to other documents or instruments shall be deemed to refer to such documents or instruments as they may hereafter be extended, renewed, modified or amended, and all replacements and substitutions therefor.

**1.06. Loan Agreement.** All other capitalized terms not otherwise defined in this Mortgage shall have the meanings set forth in the Loan Agreement.

## **ARTICLE II**

### **COVENANTS, AGREEMENTS, AND REPRESENTATIONS OF BORROWERS**

**2.01. Warranty of Title.** Borrowers represent and warrant to Lender that RRRC is lawfully seized of an indefeasible estate in fee simple in the Phase I Property and the Outparcel hereby mortgaged, and RRDC is lawfully seized of an indefeasible estate in fee simple in the Phase II Property hereby mortgaged, and each of the Borrowers has good and absolute title to all other Collateral hereby mortgaged. Borrowers further represent and warrant to Lender that each of the Borrowers has good right, full power and lawful authority to sell, convey and mortgage its respective interests in the Collateral in the same in the manner and form aforesaid, and that, except for the Permitted Encumbrances, the Collateral is free and clear of all liens, charges, and encumbrances whatsoever, including, as to the personal property and fixtures, conditional sales contracts, chattel mortgages, security agreements, financing statements, and anything of a similar nature, and that Borrowers shall and will warrant and forever defend the title to their respective interests in the Collateral unto the Lender, its successors and assigns, against the lawful claims of all persons whomsoever.

**2.02. Performance of Loan Obligations.** Borrowers will perform, observe and comply with all provisions hereof, of the Note secured hereby and of the Loan Documents to which Borrowers are a party, and duly and punctually will pay to the Lender the sum of money expressed in the Note with interest thereon and all other sums required to be paid by the Borrowers pursuant to the provisions of this Mortgage or the Loan Documents, all without any deductions or credit for taxes or other similar charges paid by the Borrowers.

**2.03. Monthly Tax Deposits.** If required by the Lender, Borrowers will pay to the Lender monthly throughout the term of the Loan, an amount equal to one-twelfth (1/12) of the yearly taxes and assessments as estimated by the Lender to be sufficient to enable the Lender to pay, at least thirty (30) days before they become due, all taxes, assessments, and other similar charges against the Collateral or any part thereof. Such added payments shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of the Lender, and no interest shall be payable in respect thereof. Upon demand of the Lender, the Borrowers agree to deliver to the Lender such additional moneys as are necessary to make up any deficiencies in the amounts necessary to enable



the Lender to pay such taxes, assessments and similar charges when due. Upon an Event of Default, the Lender may apply to the reduction of the sums secured hereby, in such manner as the Lender shall determine, any amount under this Section 2.03 of Article I remaining to the Borrowers' credit.

**2.04. Other Taxes, Utilities and Liens.**

(a) Borrowers will pay promptly, when and as due, and will exhibit promptly to the Lender, upon request, receipts for the payment of, all taxes, assessments, water rates, dues, charges, fines and impositions of every nature whatsoever imposed, levied or assessed or to be imposed, levied or assessed upon or against the Collateral or any part thereof, or upon the interest of the Lender in the Collateral (other than any of the same for which provision has been made in Section 1.03 hereof), this Mortgage or the Note, as well as all income taxes, assessments and other governmental charges lawfully levied and imposed by the United States of America or any state, county, municipality, borough or other taxing authority upon the Borrowers or in respect of the Collateral or any part thereof, or any charge which, if unpaid, would become a lien or charge upon the Collateral.

(b) Borrowers will pay, or will cause to be paid, promptly all charges by utility companies, whether public or private, for electricity, gas, water, sewer, or other utilities with respect to the Collateral.

(c) Borrowers shall pay, or shall cause to be paid, promptly all charges for labor and materials and will not suffer any mechanic's, laborer's, statutory, or other lien to be filed against any of the Collateral, provided, however, that Borrowers shall have the opportunity to contest any such lien as long as arrangements satisfactory to Lender are made with respect thereto.

(d) In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation, subsequent to the date hereof, in any manner changing or modifying the laws now in force governing the taxation of mortgages or debts secured by mortgages or the manner of collecting taxes so as to affect adversely the Lender, the Borrowers shall have a period of ten (10) days from Lender's demand to make, or reimburse Lender for, payment of same. If it shall be unlawful for Borrowers to pay the same, the entire balance of the principal sum secured by this Mortgage and all interest accrued thereon shall, at the option of the Lender, become immediately due and payable upon one hundred twenty (120) days notice to Borrowers.

**2.05. Insurance.** Borrowers will procure for, deliver to, and maintain for the benefit of, Lender during the life of this Mortgage, the insurance policies required under Section 5.5 of the Loan Agreement. The form of such policies and the companies issuing them shall be reasonably acceptable to Lender. All fire and casualty insurance policies shall contain a New York standard, non-contributory mortgagee endorsement making losses to the building payable to Lender, and all liability insurance policies shall name the Lender as an additional insured. All policies must obligate the insurer to give to Lender not less than thirty (30) days' prior written notice of cancellation. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Borrowers shall



deliver to Lender receipts evidencing the payment of all such insurance policies and renewals. In the event of the foreclosure of this Mortgage or any other transfer of title to the Collateral in extinguishment of the indebtedness secured hereby, all right, title and interest of Borrowers in and to all insurance policies then in force shall pass to the purchaser or grantee.

The Lender is hereby authorized and empowered, at its option, to adjust or compromise any loss under any insurance policies on the Collateral, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses, directly to the Lender, instead of to the Borrowers and Lender jointly. After deducting from said insurance proceeds any expenses incurred by it in the collection or handling of said fund, the Lender may, subject to the provisions of Section 2.07 hereof, apply the net proceeds, at its option, either toward restoring the Improvements, or as a credit on any portion of the Loan Obligations selected by it, whether then matured or to mature in the future, or at the option of the Lender, such sums either wholly or in part may be paid over to the Borrowers to be used to repair such Improvements or to build new Improvements in their place or for any other purpose or object satisfactory to the Lender without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. Lender shall not be held responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

If required by the Lender, the Borrowers will pay to the Lender monthly throughout the term of the Note, an amount equal to one-twelfth (1/12) of the yearly premiums for insurance. Such amount shall be used by Lender to pay such insurance premiums when due. Such added payments shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of the Lender, and no interest shall be payable in respect thereof. Upon demand of the Lender, the Borrowers agree to deliver to the Lender such additional moneys as are necessary to make up any deficiencies in the amounts necessary to enable the Lender to pay such insurance premiums when due. Upon the occurrence of an Event of Default the Lender may apply to the reduction of the sums secured hereby, in such manner as the Lender shall determine, any amount paid in accordance herewith remaining to the Borrowers' credit.

**2.06. Condemnation.** If all or any material portion of the Collateral shall be damaged or taken through condemnation (which term when used in this Mortgage shall include any damage or taking by any governmental authority, and any transfer by private sale in lieu thereof), either temporarily or permanently, other than a taking of a part of the Collateral which does not, in Lender's opinion, materially and adversely affect access to or the use of the Collateral, the entire Loan Obligations shall, at the Lender's option, become immediately due and payable upon one hundred twenty (120) days' prior notice to Borrower. The Borrowers, immediately upon obtaining knowledge of the institution of any proceeding for the condemnation of the Collateral, or any portion thereof (a "**Proceeding**"), will notify the Lender immediately of the pendency of such Proceeding. The Lender shall be entitled to all compensation, awards, and other payments or relief therefor, is hereby authorized, at its option, to commence, appear in and prosecute, in its own or the Borrowers' name any actions or proceedings relating to any condemnation, and to settle or compromise any claim in connection therewith. So long as no Event of Default exists, Lender agrees to consult with Borrower

prior to any settlement or compromise of proceeds. All such compensation, awards, damages, claims, rights of action and proceeds and the right thereto are hereby assigned by the Borrowers to the Lender to the extent of the Loan Obligations secured by this Mortgage, and the Borrowers agree to execute such further assignments of any compensations, awards, damages, claims, rights of action and proceeds as the Lender may require. The Lender, after deducting therefrom all its reasonable expenses, including reasonable attorney's fees, may release any moneys so received by it from a Proceeding without affecting the lien of this Mortgage or may apply the same in such manner as the Lender shall determine to the reduction of the sums secured hereby (without prepayment premium or penalty), and any balance of such moneys then remaining shall be paid to the Borrowers.

**2.07. Restoration and Repair of Property Damaged or Taken.** Notwithstanding the provisions of Sections 2.05 and 2.06 hereof, Lender agrees that Lender shall apply the net proceeds of insurance or condemnation (after payment of costs and expenses pursuant to Section 2.05 and 2.06) to the repair or restoration of the Collateral on the following terms and subject to Borrowers' satisfaction of the following conditions:

(1) At the time of such loss or damage and at all times thereafter while Lender is holding any portion of such proceeds, there shall exist no Default or Event of Default hereunder;

(2) The property, buildings, improvements and fixtures for which a loss or damage has resulted shall be capable of being restored to its substantially pre-existing condition and utility with a value equal to or greater than prior to such loss or damage, shall be capable of being completed prior to the maturity of Note;

(3) Within thirty (30) days from the date of such loss or damage, Borrowers shall have given Lender a written notice electing to have the proceeds applied for such purpose;

(4) Within sixty (60) days following the date of notice under the preceding paragraph (or such longer period as may be reasonably necessary for the Borrowers to obtain the following) and prior to any proceeds being disbursed to Borrowers, Borrowers shall have provided to Lender all of the following:

- (i) complete plans and specifications for restoration of the property, buildings, improvements and fixtures damaged or taken to the condition and utility prior to such loss or damage,
- (ii) if loss or damage exceeds \$50,000, fixed-price or guaranteed maximum cost bonded construction contracts for completion of the repair and restoration work in accordance with such plans and specifications,
- (iii) builder's risk insurance for the full cost of construction with Lender named under a standard mortgagee loss-payable clause,



- (iv) such additional funds as in Lender's reasonable opinion are necessary to complete the repair and restoration (the "**Insurance Deficiency**"), or at Borrowers' option, the Insurance Deficiency may be funded in the same manner as a Construction Deficiency pursuant to Section 5.7 of the Loan Agreement, and
  - (v) copies of all permits and licenses necessary to complete the work in accordance with the plans and specifications;
- (5) Lender may, at Borrowers' expense, retain an independent inspecting engineer to review plans and specifications and completed construction and to certify all requests for disbursement;
- (6) No portion of such proceeds shall be made available by Lender for architectural reviews or for any other purposes which are not directly attributable to the cost of reconstructing those portions of the property for which a loss or damage has occurred;
- (7) Borrowers shall commence such work within one hundred twenty (120) days of such loss or damage and shall diligently pursue such work to completion;
- (8) Each disbursement by Lender of such proceeds and deposits shall be funded in accordance with disbursement procedures set forth in the Loan Agreement and the available amount of any such disbursements shall be not greater than the amount that would be available if the net proceeds were substituted for the "Loan" under the Loan Agreement;
- (9) Borrowers shall grant to Lender a first lien and security interest in all building materials and completed repair and restoration work and in all fixtures and equipment acquired with such proceeds, and Borrowers shall execute and deliver such mortgages, security agreements, financing statements and other instruments as Lender shall request to create, evidence, or perfect such lien and security interest;
- (10) In the event and to the extent such proceeds are not required or used for the repair and restoration of the damaged property, buildings, improvements or fixtures, or in the event Borrowers fails to timely make such election or having made such election fail to timely comply with the terms and conditions set forth herein, Lender shall be entitled without notice to or consent from Borrowers to apply such proceeds or the balance thereof at Lender's option either (i) to the full or partial payment or prepayment of the indebtedness under the Note (principal, interest, and prepayment premium, if any), or (ii) to the repair and/or restoration of the property, buildings, improvements or fixtures damaged or taken.



## **2.08. Care of the Property.**

(a) The Borrowers will preserve and maintain the Collateral in good condition and repair, and will not commit or suffer any waste and will not do or suffer to be done anything which will increase the risk of fire or other hazard to the Collateral or any part thereof. Borrowers are authorized to excavate, grade, and improve the Collateral in conformity with the Plans and Specifications or other plans approved by Lender.

(b) Except as otherwise provided herein, no buildings, fixtures, personal property, or other part of the Collateral shall be removed, demolished (except as contemplated in the Plans and Specifications) or substantially altered without the prior written consent of the Lender. The Borrowers may sell or otherwise dispose of, free from the lien of this Mortgage, furniture, furnishings, equipment, tools, appliances, machinery, fixtures or appurtenances, subject to the lien hereof, which may become worn out, undesirable, obsolete, disused or unnecessary for use in the operation of the Collateral, upon replacing the same by, or substituting for the same, other furniture, furnishings, equipment, tools, appliances, machinery, fixtures, or appurtenances not necessarily of the same character, but of at least equal value to the Borrowers and costing not less than the amount realized from the property sold or otherwise disposed of, which shall forthwith become, without further action, subject to the lien of this Mortgage.

(c) If the Collateral or any part thereof is damaged by fire or any other cause, the Borrowers will give immediate written notice of the same to the Lender.

(d) The Lender is hereby authorized to enter upon and inspect the Collateral at any time during normal business hours, but Lender shall not unreasonably interfere with any tenant's use and possession of their demised premises.

(e) The Borrowers will comply promptly with all present and future laws, ordinances, rules and regulations of any governmental authority affecting the Collateral or any part thereof, including, without limitation, all laws, ordinances, rules and regulations relating to zoning, building codes, set back requirements and environmental matters, and with all present and future restrictive covenants affecting the Collateral.

(f) If all or any part of the Collateral shall be damaged by fire or other casualty, the Borrowers will restore promptly the Collateral to the equivalent of its original condition, regardless of whether or not there shall be any insurance proceeds therefor. If a part of the Collateral shall be physically damaged through condemnation, the Borrowers will restore promptly, repair or alter the remaining property in a manner satisfactory to the Lender.

**2.09. Further Assurances; After Acquired Property.** At any time, and from time to time, upon request by the Lender, the Borrowers will make, execute and deliver or cause to be made, executed and delivered, to the Lender and, where appropriate, to cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or refiled at such time and in such offices and

places as shall be deemed desirable by the Lender any and all such other and further mortgages, instruments of further assurance, certificates and other documents as may, in the reasonable opinion of the Lender, be necessary or desirable in order to effectuate, complete, or perfect, or to continue and preserve the obligation of the Borrowers under the Note and this Mortgage, and the lien of this Mortgage as a first and prior lien upon all of the Collateral, whether now owned or hereafter acquired by the Borrowers. Upon any failure by the Borrowers so to do, the Lender may make, execute, and record any and all such mortgages, instruments, certificates, and documents for and in the name of the Borrowers and the Borrowers hereby irrevocably appoint the Lender the agent and attorney-in-fact of the Borrowers so to do. The lien hereof will automatically attach, without further act, to all after acquired property attached to and/or used in the operation of the Collateral or any part thereof.

**2.10. Expenses.** The Borrowers will pay or reimburse the Lender for all reasonable attorney's fees, costs, and expenses incurred by the Lender in any proceeding involving the estate of a decedent or an insolvent, affecting any of the Loan Documents, Borrowers, Guarantors or the Collateral, or in any action, proceeding, or dispute of any kind in which the Lender is made a party, or appears as party plaintiff or defendant, affecting any of the Loan Documents, Borrowers, Guarantors or the Collateral, including but not limited to the foreclosure of this Mortgage, any condemnation action involving the Collateral, or any action to protect the security hereof; and any such amounts paid by the Lender shall bear interest at the Default Rate if not paid within ten (10) days of Lender's demand therefor, shall be payable upon demand, and shall be secured by the lien of this Mortgage.

**2.11. Performance by Lender of Defaults by Borrowers.** Subject to the giving of any applicable notice and the expiration of any applicable cure periods, if the Borrowers shall default in the payment of any tax, lien, assessment, or charge levied or assessed against the premises; in the payment of any utility charge, whether public or private; in the payment of insurance premium; in the procurement of insurance coverage and the delivery of the insurance policies required hereunder; or in the performance or observance of any covenant, condition, or term of this Mortgage, then the Lender, at its option, may perform or observe the same, and all payments made for costs or incurred by the Lender in connection therewith, shall be secured hereby and shall be, without demand, immediately repaid by the Borrowers to the Lender with interest thereon at the Default Rate. The Lender shall be the sole judge of the legality, validity and priority of any such tax, lien, assessment, charge, claim and premium; of the necessity for any such actions and of the amount necessary to be paid in satisfaction thereof. The Lender is hereby empowered to enter and to authorize others to enter upon the premises or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or term, without thereby becoming liable to the Borrowers or any person in possession holding under the Borrowers.

**2.12. Books and Records.** The Borrowers shall keep and maintain at all times full, true and accurate books of accounts and records, adequate to reflect correctly the results of the operation of the Collateral. The Borrowers will furnish to the Lender financial and operating statements as required by Section 5.12 of the Loan Agreement.



**2.13. Estoppel Affidavits.** The Borrowers within ten (10) Business Days after written request from the Lender shall furnish a written statement, duly acknowledged, setting forth the unpaid principal of, and interest on, the Note and whether or not any offsets or defenses exist against such principal and interest.

**2.14. Security Agreement.** With respect to the apparatus, fittings, fixtures and articles of personal property referred to or described in this Mortgage, or in any way connected with the use and enjoyment of the Collateral, this Mortgage is hereby made and declared to be a security agreement encumbering each and every item of personal property included herein as a part of the Collateral, in compliance with the provisions of the Uniform Commercial Code as enacted in the state wherein the Land is situated, and Borrowers hereby grant to Lender a security interest in said personal property. A financing statement or statements affecting all of said personal property aforementioned shall be executed by Borrowers and appropriately filed. The remedies for any violation of the covenants, terms and conditions of the security agreement contained in this Mortgage, or otherwise in respect of an Event of Default hereunder, shall be (i) as prescribed herein, or (ii) as prescribed by general law, or (iii) as prescribed by the specific statutory consequences now or hereafter enacted and specified in said Uniform Commercial Code, all at Lender's sole election. Borrowers and Lender agree that the filing of such financing statement(s) in the records normally having to do with personal property shall not in any way affect the agreements of Borrowers and Lender that everything used in connection with the production of income from the Collateral or adapted for use therein or which is described or reflected in this Mortgage, is, and at all times and for all purposes and in all proceedings, both legal or equitable, shall be, regarded as part of the real estate conveyed hereby regardless of whether (a) any such item is physically attached to the Improvements, (b) serial numbers are used for the better identification of certain items capable of being thus identified in an Exhibit to this Mortgage, or (c) any such item is referred to or reflected in any such financing statement(s) so filed at any time. Similarly, the mention in any such financing statement(s) of the rights in and to (i) the proceeds of any fire and/or hazard insurance policy, or (ii) any award in eminent domain proceedings for taking or for loss of value, or (iii) Borrowers' respective interest as lessor in any present or future lease or rights to income growing out of the use and/or occupancy of the Collateral, whether pursuant to lease or otherwise, shall not in any way alter any of the rights of Lender as determined by this instrument or affect the priority of Lender's security interest granted hereby or by any other recorded document, it being understood and agreed that such mention in such financing statement(s) is solely for the protection of Lender in the event any court shall at any time hold, with respect to the foregoing items (i), (ii), or (iii), that notice of Lender's priority of interest, to be effective against a particular class of persons, must be filed in the Uniform Commercial Code records. This Mortgage may be filed as a financing statement in any office where Lender deems such filing necessary or desirable, and Borrower will promptly upon demand reimburse Lender for the costs therefor.

**2.15. Compliance with Applicable Environmental Law.** Borrowers represent and warrant to Lender that, to the best of Borrowers' knowledge, neither the Collateral nor the Borrowers are in violation of or subject to any existing, pending, or, threatened investigation or inquiry by any



governmental authority or any remedial obligations under any Applicable Environmental Laws. Borrowers further represent and warrant that there are no facts, conditions or circumstances known to them which could result in any such investigation or inquiry if such facts, conditions and circumstances, if any, were fully disclosed to the applicable governmental authority, and the Borrowers will promptly notify Lender if Borrowers become aware of any such facts, conditions or circumstances or any such investigation or inquiry. Borrowers further represent and warrant that they have not obtained and are not required to obtain any permits, licenses, or similar authorizations to construct, operate, or use any buildings, improvements, fixtures or equipment in connection with the Collateral or the Improvements to be constructed by reason of any Applicable Environmental Laws. Borrowers further represent and warrant that, to the best of Borrowers' knowledge, and except as otherwise set forth in the Environmental Site Assessments of the Collateral prepared by Gallet and Associates and delivered to Lender in connection with the Loan, no oil, toxic or hazardous substances or solid wastes have been disposed of or released on the Land and Borrowers agree that it they will not in their use of the Land dispose of or release oil, toxic or hazardous substances or solid wastes on the Land (except for de minimus amounts of cleaning and other materials in the normal use and operation of the Property and except for that which is brought onto the Property by a public utility). Borrowers agree to notify Lender in the event that any governmental agency or other entity notifies Borrowers that they or the Land may not be in compliance with any Applicable Environmental Law. Borrowers agree to permit Lender to have access to the Land at all reasonable times in order to conduct, at Borrowers' expense, any tests which Lender deems are reasonably necessary to ensure that Borrowers and the Collateral are in compliance with all Applicable Environmental Laws, provided that Lender's exercise of such right shall not materially and adversely interfere with the performance of the Site Improvement Work. Borrowers and Guarantors have executed and delivered to Lender the Indemnity Agreement with respect to environmental matters, the terms and conditions of which are incorporated herein by this reference, and the Borrowers covenant and agree to comply with all of their obligations set forth therein.

### **ARTICLE III**

#### **EVENTS OF DEFAULT; REMEDIES**

**3.01. Event of Default.** The term "**Event of Default**," wherever used in this Mortgage, shall mean any one or more of the following events:

(a) **Nonpayment of Indebtedness.** Failure of Borrowers to make any payment of interest or principal or any other sum due, whether by acceleration or otherwise (a "**Monetary Default**"), under the terms of the Note, this Mortgage, or any other Loan Document within ten (10) days after Lender's written notice to Borrower of such Default.

(b) **Nonperformance of Covenants.** Failure of Borrowers to comply with the terms and conditions of any provision hereof (other than a Monetary Default) within thirty (30) days of Lender's written notice to Borrowers of such Default; provided, however, that if such Default is of the nature that it reasonably cannot be cured within said thirty (30) days, such cure period shall

be extended for an additional period necessary to complete said cure (but in no event longer than an additional sixty (60) days), provided that (i) Borrowers shall commence to cure such Default within the initial thirty (30) days, and (ii) thereafter shall diligently and in good faith to prosecute said cure to completion.

(c) Sale or Transfer of Collateral. The sale, conveyance, lease (other than leases approved by Lender), mortgage, or other alienation of the Collateral other than sales of the Outparcel or the Phase II Property, which sales are expressly permitted subject to compliance with the terms and conditions set forth in Section 4.08 hereof.

(d) Liens or Encumbrances. Unless the written consent of the Lender is first obtained, which consent may be granted or refused by the Lender in its sole discretion, the creation or suffering to exist by the Borrowers of any lien or encumbrance on the Collateral, other than (i) the lien of this Mortgage, (ii) liens for ad valorem taxes and assessments not then delinquent, (iii) liens or encumbrances which are imposed without the consent or acquiescence of Borrowers and are bonded off or otherwise removed from the Collateral within thirty (30) days after Borrowers become aware that such a lien or encumbrance has been filed against all or a part of the Collateral (provided that Borrowers shall have the right to contest such liens as provided in Section 2.04 hereof), (iv) Permitted Encumbrances, or (vii) Permitted Liens; or

(e) Defaults Under Other Loan Documents. The occurrence of any Event of Default under any of the other Loan Documents which is not cured within applicable curative periods specified therein, which such Events of Default are incorporated herein by reference.

**3.02. Acceleration of Maturity.** If an Event of Default shall have occurred and be continuing, Lender shall have the rights and remedies provided in the Loan Agreement, this Mortgage, and the other Loan Documents, including, without limitation, the right to declare the entire Loan Obligations immediately due and payable. No omission on the part of the Lender to exercise any option when entitled to do so shall not be considered as a waiver of such right.

**3.03. Right to Enter and Take Possession.**

(a) If an Event of Default shall have occurred and be continuing, upon demand of Lender, Borrowers shall forthwith surrender to Lender the actual possession of the Collateral and, if and to the extent permitted by law, Lender itself, or by such officers or agents as it may appoint, may enter and take possession of all or any part of the Collateral without the appointment of a receiver or an application therefor, and, Lender may exclude Borrowers and their agents and employees wholly therefrom, and take possession of the books, papers and accounts of Borrower.

(b) If Borrowers' shall for any reason fail to surrender or deliver the Collateral or any part thereof after such demand by Lender, Lender may obtain a judgment or decree conferring upon Lender the right to immediate possession or requiring Borrowers to deliver immediate possession of the Collateral to Lender. Borrowers will pay to Lender, upon demand,



all expenses of obtaining such judgment or decree, including reasonable compensation for Lender's attorneys and agents, and all such expenses and compensation shall, until paid, become part of the Loan Obligations and shall be secured by this Mortgage.

(c) Upon every such entering upon or taking of possession, Lender may hold, store, use, operate, manage and control the Collateral and conduct the business thereof, and, from time to time (i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property; (ii) insure or keep the Collateral insured; (iii) manage and operate the Collateral and exercise all of the rights and powers of Borrowers to the same extent as Borrowers could in their own name or otherwise act with respect to the same; and (iv) enter into any and all agreements with respect to the exercise by others of any of the powers herein granted to Lender, all as Lender from time to time may determine to be in its best interest. Lender may collect and receive all the rents, issues, profits and revenues from the Collateral, including those past due as well as those accruing thereafter, and, after deducting (A) all expenses of taking, holding, managing and operating the Collateral (including compensation for the services of all persons employed for such purposes); (B) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements, purchases and acquisitions; (C) the cost of such insurance; (D) such taxes, assessments and other similar charges as Lender may at its option pay; (E) other proper charges upon the Collateral or any part thereof; and (F) the reasonable compensation, expenses and disbursements of the attorneys and agents of Lender, Lender shall apply the remainder of the monies and proceeds so received by Lender, first, to the payment of accrued interest; second, to the payment of deposits required in Section 2.04 and to other sums required to be paid hereunder; and third, to the payment of overdue installments of principal. Anything in this Section 3.03 to the contrary notwithstanding, Lender shall not be obligated to discharge or perform the duties of a landlord to any tenant or incur any liability as a result of any exercise by Lender of its rights under this Mortgage, and Lender shall be liable to account only for the rents, incomes, issues and profits actually received by Lender.

(d) Whenever all such interest, deposits and principal installments and other sums due under any of the terms, covenants, conditions and agreements of this Mortgage shall have been paid and all Events of Default shall have been cured, Lender shall surrender possession of the Collateral to Borrowers and their successors or assigns. The same right of taking possession, however, shall exist if any subsequent Event of Default shall occur and be continuing.

**3.04. Performance by Lender.** Upon the occurrence and during the continuance of an Event of Default in the payment, performance or observance of any term, covenant or condition of this Mortgage, Lender may, at its option, pay, perform or observe the same, and all payments made or costs or expenses incurred by Lender in connection therewith, with interest thereon at the Default Rate, shall be secured hereby and shall be, without demand, immediately repaid by Borrowers to Lender. Lender shall be the sole judge of the necessity for any such actions and of the amounts to be paid. Lender is hereby empowered, to enter and to authorize others to



enter upon the Collateral or any part thereof for the purpose of performing or observing any such defaulted term, covenant or condition without thereby becoming liable to Borrowers or any person in possession holding under Borrowers. Notwithstanding anything to the contrary herein, Lender shall have no obligation, explicit or implied, to pay, perform, or observe any term, covenant, or condition.

**3.05. Receiver.** If any Event of Default shall have occurred and be continuing, Lender, upon application to a court of competent jurisdiction, shall be entitled as a matter of strict right, without notice and without regard to the occupancy or value of any security for the Loan Obligations or the solvency of any party bound for its payment, to the appointment of a receiver to take possession of and to operate the Collateral and to collect and apply the rents, issues, profits and revenues thereof. The receiver shall have all of the rights and powers permitted under the laws of the state wherein the Land is situated. Borrowers will pay unto Lender upon demand all expenses, including receiver's fees, reasonable attorney's fees, costs and agent's compensation, incurred pursuant to the provisions of this Section 3.05, and upon Borrowers' failure to pay the same, any such amounts shall be added to the Loan Obligations and shall be secured by this Mortgage.

**3.06. Lender's Power of Enforcement and Power of Sale.**

(a) If an Event of Default shall have occurred and be continuing, the Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or any other appropriate proceeding or remedy (i) to enforce performance of this Mortgage or any right, power or remedy hereunder, (ii) to foreclose this Mortgage and to sell the Collateral, as an entirety or in separate lots or parcels, as provided by applicable law, and (iii) to pursue any other remedy available to it, all as the Lender shall deem most effectual for such purposes. The Lender shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, as the Lender may determine.

(b) If an Event of Default shall have occurred and be continuing, Lender may, sell the Collateral at public outcry to the highest bidder for cash in front of the Court House door in the county where the Land is located, either in person or by auctioneer, after having first given notice of the time, place and terms of sale by publication once a week for three (3) successive weeks prior to said sale in some newspaper published in said county, and, upon payment of the purchase money, Lender or any person conducting the sale for Lender is authorized to execute to the purchaser at said sale a foreclosure deed to the Collateral so purchased. Lender may bid at said sale and purchase said Collateral, or any part thereof, if the highest bidder therefor. At the foreclosure sale, the Collateral may be offered for sale and sold as a whole without first offering it in any other manner or may be offered for sale and sold in any other manner Lender may elect.

**3.07. Purchase by Lender.** Upon any foreclosure sale or sale of all or any portion of the Collateral under the power of sale herein granted, Lender may bid for and purchase the

Collateral and shall be entitled to apply all or any part of the Loan Obligations as a credit to the purchase price.

**3.08. Application of Proceeds of Sale.** In the event of a foreclosure or other sale of all or any portion of the Collateral, the proceeds of said sale shall be applied, first, to the expenses of such sale and of all proceedings in connection therewith, including reasonable attorneys' fees (attorneys fees and expenses shall become absolutely due and payable whenever foreclosure is commenced); then to insurance premiums, liens, assessments, taxes and charges including utility charges advanced by Lender hereunder, and interest thereon; then to payment of the Loan Obligations and accrued interest thereon, in such order of priority as Lender shall determine, in its sole discretion; and finally the remainder, if any, shall be paid to Borrowers, or to the person or entity lawfully entitled thereto.

**3.09. Borrowers as Tenants Holding Over.** In the event of any such foreclosure sale or sale under the powers herein granted Borrowers shall be deemed tenants holding over and shall forthwith deliver possession to the purchaser or purchasers at such sale or be summarily dispossessed according to provisions of law applicable to tenants holding over.

**3.10. Waiver of Appraisalment, Valuation, Etc.** Borrowers agree, to the fullest extent permitted by law, that upon the occurrence and during the continuation of an Event of Default, neither Borrowers nor anyone claiming through or under Borrowers will set up, claim or seek to take advantage of any appraisalment, valuation, stay, extension, exemption or laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Collateral, or the delivery of possession thereof immediately after such sale to the purchaser at such sale, and Borrowers, for themselves and all who may at any time claim through or under Borrowers, hereby waive to the full extent that they may lawfully so do, the benefit of all such laws, and any and all right to have the assets subject to the security interest of this Mortgage marshaled upon any foreclosure or sale under the power herein granted.

**3.11. Waiver of Homestead.** Borrowers hereby waive and renounce all homestead and exemption rights provided for by the Constitution and the laws of the United States and of any state, in and to the Collateral as against the collection of the Loan Obligations, or any part thereof.

**3.12. Discontinuance of Proceedings.** In case Lender shall have proceeded to enforce any right, power or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Lender, then in every such case, Borrowers and Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Lender shall continue as if no such proceedings had occurred.

**3.13. Remedies Not Exclusive.** Lender shall be entitled to exercise all rights and powers under this Mortgage or under any other of the Loan Documents or other agreement or



under any laws now or hereafter in force, notwithstanding that some or all of the Loan Obligations may now or hereafter be otherwise secured, whether by mortgages, deeds of trust, deeds to secure debt, pledges, liens, assignments or otherwise. Neither the acceptance of this Mortgage nor its enforcement, whether by court action or pursuant to the power of sale or other powers herein contained, shall prejudice or in any manner affect Lender's right to realize upon or enforce any other security now or hereafter held by Lender, it being agreed that Lender shall be entitled to enforce this Mortgage and any other security now or hereafter held by Lender in such order and manner as they or either of them may in their absolute discretion determine. No right or remedy herein conferred upon or reserved to Lender is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given by any of the Loan Documents to Lender or to which it otherwise may be entitled, may be exercised concurrently or independently, from time to time and as often as may be deemed expedient by Lender.

#### **3.14. No Waiver.**

(a) No delay or omission by Lender or by any holder of the Note to exercise any right, power or remedy accruing upon any default shall exhaust or impair any such right, power or remedy or shall be construed to be a waiver of any such default, or acquiescence therein, and every right, power and remedy given by this Mortgage to Lender may be exercised from time to time and as often as may be deemed expedient by Lender. No consent or waiver expressed or implied by Lender to or of any breach or default by Borrowers in the performance of the obligations of Borrowers hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of the same or any other obligations of Borrowers hereunder. Failure on the part of Lender to complain of any act or failure to act or failure to declare an Event of Default, irrespective of how long such failure continues, shall not constitute a waiver by Lender of its rights hereunder or impair any rights, powers or remedies of Lender hereunder.

(b) No act or omission by Lender shall release, discharge, modify, change or otherwise affect the original liability under or this Mortgage or any other obligation of Borrowers or any subsequent purchaser of the Collateral or any part thereof, or any maker, cosigner, endorser, surety or guarantor, nor preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in the event of any default then existing or of any subsequent default, nor alter the lien of this Mortgage, except as expressly provided in an instrument or instruments executed by Lender. Without limiting the generality of the foregoing, Lender may (i) grant forbearance or an extension of time for the payment of all or any portion of the Loan Obligations; (ii) take other or additional security for the payment of any of the Loan Obligations; (iii) waive or fail to exercise any right granted herein or in the Note; (iv) release any part of the Collateral from the security interest or lien of this Mortgage or otherwise change any of the terms, covenants, conditions or agreements of the Note or this Mortgage; (v) release any other collateral securing the Loan Obligations; (vi) consent to the filing of any map, plat or replat affecting the Collateral; (vii) consent to the granting of any



easement or other right affecting the Collateral; (viii) make or consent to any agreement subordinating the security title or lien hereof, or (ix) take or omit to take any action whatsoever with respect to the Note, this Mortgage, the Collateral or any document or instrument evidencing, securing or in any way related to the Loan Obligations, all without releasing, discharging, modifying, changing or affecting any such liability, or precluding Lender from exercising any such right, power or privilege or affecting the lien of this Mortgage. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Collateral, Lender, without notice, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Collateral or the Loan Obligations, or with reference to any of the terms, covenants, conditions or agreements hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any liabilities, obligations or undertakings.

**3.15. Suits to Protect the Collateral.** Lender shall have power to institute and maintain such suits and proceedings as it may deem expedient (a) to prevent any impairment of the Collateral by any acts which may be unlawful or constitute an Event of Default under this Mortgage; (b) to preserve or protect its interest in the Collateral and in the rents, issues, profits and revenues arising therefrom; and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order would materially impair the security hereunder or be prejudicial to the interest of Lender.

**3.16. Proofs of Claim.** In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other proceedings affecting Borrowers, their creditors or its property, Lender, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have the claims of Lender allowed in such proceedings for the entire amount due and payable by Borrowers under this Mortgage at the date of the institution of such proceedings and for any additional amount which may become due and payable by Borrowers hereunder after such date.

**3.17. Tradenames, etc.** During the exercise of any right in the Collateral pursuant to this Article III, Lender shall not be liable to Borrowers for any inadvertent violation or infringement upon any tradename, trademark, service mark, or logo relating to the Collateral, and Borrowers waive any claim for any such violation or infringement that occurs prior to notice of such infringement by Borrowers to Lender.

## **ARTICLE IV** **MISCELLANEOUS**

**4.01. Successors and Assigns.** This Mortgage shall inure to the benefit of and be binding upon Borrowers and Lender and their respective heirs, executors, legal representatives, successors, successors-in-title, and assigns. Whenever a reference is made in this Mortgage to "Borrowers" or "Lender," such reference shall be deemed to include a reference to the heirs,

executors, legal representatives, successors, successors-in-title and assigns of Borrowers or Lender, as the case may be, but shall not imply any permission to make or permit any transfer which is otherwise prohibited.

**4.02. Terminology.** All personal pronouns used in this Mortgage, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural, and vice versa. Titles and Articles are for convenience only and neither limit nor amplify the provisions of this Mortgage, and all references herein to Articles, Sections or subparagraphs shall refer to the corresponding Articles, Sections or subparagraphs of this Mortgage unless specific reference is made to Articles, Sections or subparagraphs of another document or instrument.

**4.03. Severability; Complete Agreement.** If any provisions of this Mortgage or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Mortgage and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law. This Mortgage constitutes the full and complete agreement of the parties and supersedes all prior negotiations, correspondence, and memoranda relating to the subject matter hereof, and this Mortgage may not be amended except by a writing signed by the parties hereto.

**4.04. Notices.** All notices and other communications provided for hereunder shall be in writing and be given in accordance with the applicable provisions of the Loan Agreement.

**4.05. Assignment.** This Mortgage may be assigned by the Lender, and any such assignment shall operate to vest in the assignee all rights and powers herein conferred upon and granted to Lender.

**4.06. Time of the Essence.** Time is of the essence with respect to each and every covenant, agreement and obligation of Borrowers under this Mortgage and any and all other instruments now or hereafter evidencing, securing or otherwise relating to the Loan Obligations.

**4.07. Counterparts.** This Mortgage may be executed in any number of counterparts, each of which shall be deemed an original, but such counterparts together shall constitute one and the same instrument.

**4.08. Partial Release of Collateral.**

(a) Upon a bona fide sale to an unrelated third party of the Outparcel, provided that no Default or Event of Default exists, Lender, by its acceptance hereof, agrees that it will release the Outparcel from the lien of this Mortgage and the other Loan Documents, upon the payment to Lender, in immediately available funds, of a "**Release Price**" (which such payment shall be applied against the outstanding principal balance of the Loan Obligations) equal Seven Hundred Twenty-Five Thousand Dollars (\$725,000).



(b) Upon a bona fide sale to an unrelated third party of Phase II Property, provided that no Default or Event of Default exists, Lender, by its acceptance hereof, agrees that it will release the Phase II Property from the lien of this Mortgage and the other Loan Documents, upon the payment to Lender, in immediately available funds, of a "**Release Price**" (which such payment shall be applied against the outstanding principal balance of the Loan Obligations) equal to the greater of the following amounts (i) seventy-five percent (75%) of the gross sales price due and payable to RRDC, or (ii) \$2,400,000, or (iii) an amount as shall be necessary to cause the Collateral which will remain subject to this Mortgage and the other Loan Documents to support the eighty percent (80%) loan-to-value requirements as set forth in the Lender Commitment Letter, based upon the appraisal of the Collateral delivered to the Lender in connection with the Loan (or, at Borrower's option and expense, based upon a current appraisal of the Collateral prepared by an appraiser reasonably acceptable to Lender, which such appraisal complies with the Lender's standard appraisal requirements).

(c) In the event that the Phase II Property is either refinanced by RRDC or developed by RRDC, provided that no Default or Event of Default exists, Lender will release the Phase II Property from the lien of this Mortgage and the other Loan Documents, upon payment to Lender, in immediately available funds, of a "**Release Price**" equal to the greater of (i) Two Million Four Hundred Thousand Dollars (\$2,400,000) or (ii) an amount as shall be necessary to cause the Collateral which will remain subject to this Mortgage and the other Loan Documents to support the eighty percent (80%) loan-to-value requirements as set forth in the Lender Commitment Letter, based upon the appraisal of the Collateral delivered to the Lender in connection with the Loan (or, at Borrower's option and expense, based upon a current appraisal of the Collateral prepared by an appraiser reasonably acceptable to Lender, which such appraisal complies with the Lender's standard appraisal requirements).

(d) At such time, if any, that the Phase II Property is released from the this Mortgage and the other Loan Documents in accordance with either subparagraph (b) or (c) above, Lender agrees that it will release RRDC from all liability for payment or performance of the Loan Obligations.

(e) Borrowers will be responsible for all reasonable costs associated with the preparation of any partial releases pursuant to this Section 4.08.

**4.09. Controlling Law. THIS MORTGAGE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF ALABAMA. THE LENDER'S PRINCIPAL PLACE OF BUSINESS IS LOCATED IN JEFFERSON COUNTY IN THE STATE OF ALABAMA, AND THE BORROWERS AGREE THAT THE LOAN SHALL BE FUNDED FROM AND THIS MORTGAGE SHALL BE HELD BY LENDER AT SUCH PRINCIPAL PLACE OF BUSINESS, AND THE HOLDING OF THIS MORTGAGE BY LENDER THEREAT SHALL CONSTITUTE SUFFICIENT MINIMUM CONTACTS OF BORROWERS WITH JEFFERSON COUNTY AND THE STATE OF ALABAMA FOR THE PURPOSE OF CONFERRING JURISDICTION UPON THE FEDERAL AND STATE COURTS PRESIDING IN SUCH COUNTY AND STATE. BORROWERS CONSENT THAT ANY LEGAL ACTION OR PROCEEDING ARISING**

HEREUNDER MAY BE BROUGHT IN THE CIRCUIT COURT OF THE STATE OF ALABAMA, JEFFERSON COUNTY, ALABAMA OR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA AND ASSENT AND SUBMIT TO THE PERSONAL JURISDICTION OF ANY SUCH COURT IN ANY ACTION OR PROCEEDING INVOLVING THIS MORTGAGE. NOTHING HEREIN SHALL LIMIT THE JURISDICTION OF ANY OTHER COURT.

4.10. Waiver of Jury Trial. BORROWERS HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY ON ANY CLAIM, COUNTERCLAIM, SETOFF, DEMAND, ACTION OR CAUSE OF ACTION (I) ARISING OUT OF OR IN ANY WAY PERTAINING OR RELATED TO THIS MORTGAGE OR THE LOAN, OR (II) IN ANY WAY CONNECTED WITH OR PERTAINING OR RELATED TO OR INCIDENTAL TO ANY DEALINGS OF LENDER AND BORROWERS WITH RESPECT TO THIS MORTGAGE, THE LOAN DOCUMENTS, OR THE LOAN, OR IN CONNECTION WITH THE TRANSACTIONS RELATED HERETO OR CONTEMPLATED HEREBY OR THE EXERCISE OF ANY PARTY'S RIGHTS AND REMEDIES HEREUNDER, OR THE CONDUCT OF THE RELATIONSHIP OF THE PARTIES HERETO, IN ALL OF THE FOREGOING CASES WHETHER NOW EXISTING OR HEREAFTER ARISING AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. BORROWERS AGREE THAT LENDER MAY FILE A COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY AND BARGAINED AGREEMENT OF BORROWERS IRREVOCABLY TO WAIVE THEIR RIGHTS TO TRIAL BY JURY, AND THAT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY DISPUTE OR CONTROVERSY WHATSOEVER BETWEEN BORROWERS AND LENDER SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.

IN WITNESS WHEREOF, the Borrowers have caused this Mortgage to be properly executed on the day and year first above written.

**BORROWERS:**

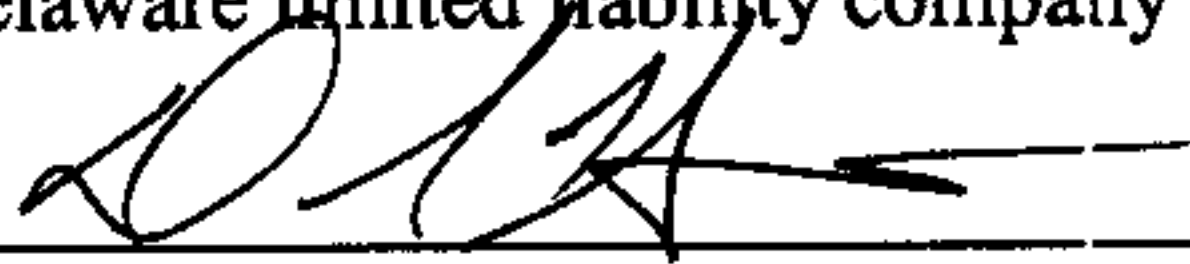
**RIVER RIDGE DEVELOPMENT COMPANY, L.L.C.,**  
a Delaware limited liability company

By: \_\_\_\_\_

David L. Silverstein  
Its Authorized Agent




**RIVER RIDGE RETAIL COMPANY, L.L.C.,**  
a Delaware limited liability company

By:   
David L. Silverstein  
Its Authorized Agent

**STATE OF ALABAMA     )**  
**JEFFERSON COUNTY    )**

I, the undersigned, hereby certify that **David L. Silverstein**, whose name as Authorized Agent of River Ridge Development Company, L.L.C., a Delaware limited liability company, is signed to the foregoing Agreement, and who is known to me, acknowledged before me on this day that, being informed of the contents of the Agreement, he, as such officer, executed the same voluntarily and with full authority for and as the act of said limited liability company.


Given under my hand and seal of office this 1<sup>st</sup> day of March, 2001.

  
Notary Public  
My commission expires: 8-6-2001

**STATE OF ALABAMA     )**  
**JEFFERSON COUNTY    )**

I, the undersigned, hereby certify that **David L. Silverstein**, whose name as Authorized Agent of River Ridge Retail Company, L.L.C., a Delaware limited liability company, is signed to the foregoing Agreement, and who is known to me, acknowledged before me on this day that, being informed of the contents of the Agreement, he, as such officer, executed the same voluntarily and with full authority for and as the act of said limited liability company.

Given under my hand and seal of office this 1<sup>st</sup> day of March, 2001.

  
Notary Public  
My commission expires: 8-6-2001

## **EXHIBIT A**

### **LEGAL DESCRIPTION**

Lot 2 and 3 of River Ridge Plaza as recorded in Map Book 26, Page 14 in the Probate Office of Shelby County, Alabama, being more particularly described as follows:

Begin at the Southeast corner of the N.E. 1/4 of the N.E. 1/4 of Section 35, Township 18 South, Range 2 West and run North (assumed) along the East line of said 1/4-1/4 section a distance of 616.11 feet to a point on the Southwesterly right-of-way line of U.S. Highway No. 280; thence North 62°25' West along the Southwesterly right-of-way line of U.S. Highway No. 280 a distance of 257.30 feet to the P.C. (point of curve) of a curve to the right having a radius of 2342.00 feet, a central angle of 9°54'12" and a chord bearing of North 57°27'53" West; thence along the arc of said curve and the Southwesterly right-of-way line of U.S. Highway No. 280 a distance of 404.81 feet to the Easternmost corner of Lot 1, River Ridge Plaza; thence South 40°21'57" West along the Southeasterly line of said Lot 1 a distance of 305.60 feet to a point; thence North 49°38'03" West along the Southwesterly line of said Lot 1 a distance of 430.37 feet to a point on the Southeasterly right-of-way line of Riverview Road; thence South 41°48'32" West along the Southeasterly right-of-way line of Riverview Road a distance of 67.63 feet to the P.C. (point of curve) of a curve to the left having a radius of 518.69 feet, a central angle of 17°26'30" and a chord bearing of South 33°05'17" West; thence along the arc of said curve and the Southeasterly right-of-way line of Riverview Road a distance of 157.90 feet to the P.T. (point of tangent) of said curve; thence South 24°22'02" West tangent to said curve along the Southeasterly right-of-way line of Riverview Road a distance of 13.75 feet to the P.C. (point of curve) of a curve to the right having a radius of 3874.83 feet, a central angle of 0°43'46" and a chord bearing of South 24°43'55" West; thence along the arc of said curve and the Southeasterly right-of-way of Riverview Road a distance of 49.33 feet to the point of intersection of the Southeasterly right-of-way line of Riverview Road and the Westerly right-of-way line of Riverview Parkway, said point being the P.R.C. (point of reverse curve) of a curve to the left having a radius of 50.27 feet, a central angle of 83°18'36" and a chord bearing of South 16°33'30" East; thence along the arc of said curve and the right-of-way line of Riverview Parkway a distance of 73.09 feet to the P.T. (point of tangent) of said curve; thence South 58°12'48" East along the right-of-way line of Riverview Parkway a distance of 90.14 feet to the Westernmost corner of Lot 6-A, Cahaba Commons Resurvey No. 2 as recorded in Map Book 15, Page 45 in the Probate Office of Shelby County, Alabama; thence North 40°21'57" East along the Northwesterly line of said Lot 6-A a distance of 297.36 feet to a point; thence South 49°38'03" East along the Northeasterly line of said Lot 6-A a distance of 183.00 feet to a point; thence South 40°21'57" West along the Southeasterly line of said Lot 6-A a distance of 297.48 feet to a point on the right-of-way line of Riverview Parkway, said point being on a curve to the right having a radius of 426.99 feet, a central angle of 3°14'09" and a chord bearing of South 35°57'09" East; thence along the arc of said curve and the right-of-way line of Riverview Parkway a distance of 24.11 feet to the P.T. (point of tangent) of said curve; thence tangent to said curve South 34°20'05" East along the right-of-way line of Riverview Parkway a distance of 101.07 feet to the P.C. (point of curve) of a curve to the right having a radius of 200.00 feet, a central angle of 62°57'17" and a chord bearing of South 2°51'26" East; thence along the arc of said curve and the right-of-way line of Riverview Parkway a distance of 219.75 feet to the P.T. (point of tangent) of said curve; thence tangent to said curve South 28°37'12" West along the right-of-way line of Riverview Parkway a distance of 115.50 feet to the Northernmost corner of Lot 4, River Ridge Plaza; thence South 44°24' East along the Northeasterly line of said Lot 4 a distance of 776.03 feet to a point; thence North 45°35'58" East a distance of 626.72 feet to the POINT OF BEGINNING.

AND

Lot 5, River Ridge Plaza as recorded in Map Book 26, Page 14 in the Probate Office of Shelby County, Alabama, being more particularly described as follows:



Begin at the Southernmost corner of Lot 1, Cahaba Commons as recorded in Map Book 13, Page 145 in the Probate Office of Shelby County, Alabama, and run North 61°22'48" West along the Southwesterly line of said Lot 1 a distance of 488.00 feet to a point; thence North 6°12'29" East along the Westerly line of said Lot 1 a distance of 101.78 feet to a point on the Southeasterly right-of-way line of Riverview Road, said point lying on a curve to the right having a radius of 308.06 feet, a central angle of 30°07'51" and a chord bearing of South 68°35'39" West; thence along the arc of said curve and the Southeasterly right-of-way line of Riverview Road a distance of 162.00 feet to the P.T. (point of tangent) of said curve; thence tangent to said curve South 83°39'34" West along the Southeasterly right-of-way line of Riverview Road a distance of 91.30 feet to the Northernmost corner of Lot 6 of said River Ridge Plaza; thence South 44°24'23" East along the Northeasterly line of said Lot 6 a distance of 592.02 feet to a point on the Northwesterly right-of-way line of Riverview Parkway, said point lying on a curve to the right having a radius of 275.00 feet, a central angle of 25°25'39" and a chord bearing of North 58°18'27" East; thence along the arc of said curve and the Northwesterly right-of-way line of Riverview Parkway a distance of 122.04 feet to the P.T. (point of tangent) of said curve; thence tangent to said curve North 71°01'16" East along the Northwesterly right-of-way line of Riverview Parkway a distance of 36.99 feet to the P.C. (point of curve) of a curve to the left having a radius of 225.00 feet, a central angle of 29°44'54" and a chord bearing of North 56°08'49" East; thence along the arc of said curve and the Northwesterly right-of-way line of Riverview Parkway a distance of 116.82 feet to a point; thence curve North 28°37'12" East along the Northwesterly right-of-way line of Riverview Parkway a distance of 18.87 feet to the POINT OF BEGINNING.

AND

Lot 6, River Ridge Plaza as recorded in Map Book 26, Page 14 in the Probate Office of Shelby County, Alabama, being more particularly described as follows:

Begin at the Southeast corner of the S.W.1/4 of the N.E.1/4 of Section 35, Township 18 South, Range 2 West; thence North 45°35'58" East a distance of 373.68 feet to the Southernmost corner of Lot 4, River Ridge Plaza; thence North 44°24'23" West along the Northeasterly line of said Lot 6 and the Southwesterly line of said Lot 4 and its extension (being the Southwesterly right-of-way line of Riverview Parkway) a distance of 826.47 feet to a point on the Northwesterly right-of-way line of Riverview Parkway; thence North 45°35'37" East along the Northwesterly right-of-way line of Riverview Parkway a distance of 395.00 feet to the Southernmost corner of Lot 5, River Ridge Plaza; thence North 44°24'23" West along the Northeasterly line of said Lot 6 and the Southwesterly line of said Lot 5 a distance of 592.02 feet to a point on the Southeasterly right-of-way line of Riverview Road; thence South 83°39'34" West along the Southeasterly right-of-way line of Riverview Road a distance of 4.31 feet to the P.C. (point of curve) of a curve to the left having a radius of 419.28 feet, a central angle of 27°06'30" and a chord bearing of South 70°06'19" West; thence along the arc of said curve and the Southeasterly right-of-way line of Riverview Road a distance of 198.37 feet to the Northeasterly corner of said Lot 6 and the Northernmost point of Lot 2-D, Resurvey of Lot 2-B Cahaba River Park as recorded in Map Book 8, Page 95 in the Probate Office of Shelby County, Alabama; thence South 4°28'34" East along the Westerly line of said Lot 6 and the Easterly line of said Lot 2-D a distance of 1475.30 feet to the Southwesterly corner of said Lot 6 also being a point on the South line of the S.W.1/4 of the N.E.1/4 of Section 35, Township 18 South, Range 2 West; thence South 88°33'13" East along the South line of said Lot 6 and along the South line of said 1/4-1/4 section a distance of 517.52 feet to the POINT OF BEGINNING.

Inst # 2001-07390

03/05/2001-07390  
09:03 AM CERTIFIED  
SHELBY COUNTY JUDGE OF PROBATE  
027 CJ1 16487.75