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Shelby Cnty Judge of Probate, AL  
11/15/2002 14:11:00 FILED/CERTIFIED

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Prepared by and return to:  
Patrick M. Shelley, Esq.  
McGuire Woods LLP  
7 Saint Paul Street, Suite 1000  
Baltimore, Maryland 21202

#### LEASEHOLD MORTGAGE

THIS LEASEHOLD MORTGAGE made and entered into as of the 25<sup>TH</sup> day of September, 2002, by and between LOWE'S HOME CENTERS, INC., a North Carolina corporation, whose address is Box 1111, Highway 268 East, North Wilkesboro, North Carolina 28656 (hereinafter called "Mortgagor" whether one or more in number), and McWHORTER PROPERTIES - BIRMINGHAM, L.L.C., an Alabama limited liability company, with a business address of 1200 Walnut Avenue, Anniston, Alabama 36201 (hereinafter called "Mortgagee" or "McWhorter");

#### RECITALS:

WHEREAS, Mortgagor has entered into an Agreement to Enter Into Ground Lease with DEVELOPERS DIVERSIFIED OF ALABAMA, INC. ("Landlord") (the "AGL"), which AGL provides that, upon the satisfaction of various conditions, Mortgagor shall enter into a ground lease with Landlord (the "Ground Lease") whereby Mortgagor shall ground lease from Landlord the property located in or near the City of Birmingham, County of Shelby, State of Alabama upon which certain "Improvements" shall be constructed; and

WHEREAS, Mortgagee and Mortgagor have or will enter into a Contract for the Construction of Improvements (the "Contract") whereunder Mortgagee is to construct certain Improvements (as defined in said Contract) on the Premises (as defined herein); and

WHEREAS, Under the Contract, Mortgagor is obligated to pay Mortgagee certain sums subject to the terms and conditions therein set forth including the completion of the Improvements, (the "Lowe's Obligations").

NOW, THEREFORE, in order (a) to secure the payment by Mortgagor of the Lowe's Obligations; and (b) to also charge the properties, interests and rights hereinafter described with such performance and observance; and for and in consideration of the sum of One Dollar (\$1.00), and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Mortgagor does hereby grant, bargain, sell, alien, remise, release, convey, assign, transfer, mortgage, hypothecate, pledge, deliver, set over, warrant and confirm unto Mortgagee, its successors and assigns forever all right, title and interest of Mortgagor in and to the following property (hereinafter referred to as

**“Premises”):**

(a) Mortgagor’s leasehold interest in the real property located in or near the City of Birmingham, County of Shelby, State of Alabama and more particularly described in EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE (the “Land”); and

(b) All buildings and other improvements now or hereafter located in, on or about the Land, and all of Mortgagor’s building materials intended for incorporation but not incorporated into the improvements to the Land, and all furnishings, furniture, fixtures, machinery, equipment, tools, and all other personal property or chattels used in connection with the operation of such improvements, specifically including, without limitation, appliances, gas and electric fixtures and systems, radiators, heaters, engines and machinery, boilers, ranges, elevators and motors, plumbing and heating fixtures and systems, carpeting and other floor coverings, water heaters, air conditioning apparatus and systems, window screens, awnings, storm sashes AND ANY OTHER PERSONAL PROPERTY COLLATERAL DESCRIBED IN ANY SCHEDULE OF ADDITIONAL PERSONAL PROPERTY COLLATERAL ATTACHED HERETO, whenever acquired by Mortgagor and now or hereafter located in, upon or under the Land, together with all additions and accessions thereto and replacements and proceeds thereof (the “Improvements”); and

(c) All leases, rents, issues, profits, royalties, income and other benefits derived from the Land and the Improvements (the “Rents”), subject to the right, power and authority hereinafter given to Mortgagor to collect and apply such Rents, and the proceeds from any insurance or condemnation award relating to the Land and the Improvements.

It is the specific intention of the parties to this Mortgage that this Mortgage shall continue in full force and effect until satisfied by a written satisfaction executed and delivered by Mortgagee to Mortgagor.

TO HAVE AND TO HOLD the Premises unto Mortgagee its successors and assigns, forever subject to the terms of Article 4 hereof;

And Mortgagor covenants with Mortgagee that pursuant to the Ground Lease, Mortgagor is seized of the above described interests in the Premises and has the right to mortgage, pledge, hypothecate and encumber the same; that the same are free and clear of all encumbrances except the Ground Lease, the Contract and those matters of record in the Probate Office of Shelby County, Alabama, or not of record, if any, affecting the Premises; that Mortgagor has done no other act to encumber the Premises and that Mortgagor will warrant and defend the title to the same against the lawful claims of all persons.

PROVIDED, HOWEVER, that if Mortgagor complies with the Lowe’s Obligations, this conveyance shall be released and canceled of record at the request of Mortgagor and at the cost of Mortgagee.

Mortgagor hereby further covenants and agrees with Mortgagee as follows:

**Section 1. Protection of Security.** If any legal proceeding (such as bankruptcy of Mortgagor, condemnation, forfeiture or other legal or regulatory proceeding) that may affect Mortgagee’s rights or interests in the Premises (or any part thereof) and result from the actions of Mortgagor is commenced, Mortgagee may act to protect or preserve such rights or interests (including, without limitation, the employment of an attorney or other professional(s)). Mortgagee may expend such sums of money as Mortgagee, in its sole discretion, deems necessary for any such purpose, and Mortgagor hereby agrees to pay to Mortgagee, within thirty (30) days of demand therefor, all sums so expended by Mortgagee, together with interest thereon from the date of each such payment at the rate provided for in the Contract. All sums so expended by Mortgagee, and the interest thereon, shall be added to the amount due under the Contract.

**Section 2. Condemnation.** Subject to the terms of the Ground Lease, upon condemnation of the Premises or any part thereof, this Mortgage shall become a lien, charge and encumbrance upon the proceeds or award realized as a result of any such proceeding or of any settlement or



payment made in lieu of any such proceeding to the extent of Mortgagor's obligation under the Contract ("Condemnation Proceeds"). Mortgagor hereby grants to Mortgagee a security interest in any Condemnation Proceeds to the extent of Mortgagor's obligation to Mortgagee under the Contract and hereby agrees to execute such further assignments of the Condemnation Proceeds as Mortgagee may require to evidence same.

**Section 3. Events of Default.** The following shall constitute defaults or events of default hereunder ("Event of Default"):

(a) Failure by Mortgagor to pay the Lowe's Obligations within ten (10) days after written notice to Mortgagor, which notice is sent when or after the Lowe's Obligations are due; or

(b) If (i) Mortgagor or any guarantor of Mortgagor's obligations under the Contract (1) files a petition or has a petition filed against it under the Bankruptcy Code or any proceeding for the relief of insolvent debtors; (2) generally fails to pay its debts as such debts become due; (3) has a custodian appointed for Mortgagor, or a guarantor of Mortgagor's obligations under the Contract; (4) benefits from or is subject to the entry of an order for relief by any court of insolvency; (5) makes an admission of insolvency seeking the relief provided in the Bankruptcy Code or any other insolvency law; (6) makes an assignment for the benefit of creditors; (7) has a receiver appointed, voluntarily or otherwise, for its property; (8) suspends business; or (9) becomes insolvent, however otherwise evidenced; and (ii) Mortgagee is not able to comply with and perform the Lowe's Obligations.

(c) Default by Mortgagor under the Ground Lease which default is not cured within any applicable cure period contained in the Ground Lease.

**Section 4. Remedies on Default.** Upon the occurrence of an Event of Default, then and thereupon Mortgagee may do any one or more of the following:

(i) pay any sums in any form or manner deemed expedient by Mortgagee to protect the security of this instrument or to cure any Event of Default; make any payment hereby authorized to be made according to any bill, statement or estimate furnished or procured from the appropriate public officer or the party claiming payment without inquiry into the accuracy or validity thereof, and the receipt of any such public officer or party in the hands of Mortgagee shall be conclusive evidence of the validity and amount of items to be paid, in which event the amounts so paid shall be added to and become a part of the Lowe's Obligations and be immediately due and payable to Mortgagee; and Mortgagee shall be subrogated to any encumbrance, lien, claim or demand, and to all the rights and securities for the payment thereof, paid or discharged with the payment(s) so made secured hereby or by Mortgagee under the provisions hereof, and any such subrogation rights shall be additional and cumulative security to this instrument;

(ii) Mortgagee may institute foreclosure proceedings under the appropriate law. It is agreed that if any legal proceedings are instituted for foreclosure of this Mortgage, or if the Mortgagee should become a party to any suit involving this Mortgage or the title to the Premises, all costs and expenses incurred by Mortgagee, including a reasonable fee for Mortgagee's attorney, shall thereupon become due and payable immediately, as a part of the obligations secured hereby and may be secured and recovered hereunder;

(iii) enter upon and take possession of the Premises and after, or without, taking such possession of the same, sell the same at public outcry, in front of the courthouse door of the Shelby County Courthouse in Birmingham, Alabama, to the highest bidder for cash, either in person or by auctioneer, after first giving notice of the time, place and terms of such sale by publication once a week for three (3) successive weeks in a newspaper of general circulation published in said county, and, upon the payment of the purchase money, Mortgagee or any person conducting said sale for it is authorized and empowered to execute to the purchaser at said sale an assignment of the leasehold interest held by Mortgagee or a deed to the property so purchased in the name and on behalf of Mortgagor, and the

certificate of the holder of the mortgage indebtedness, appointing such auctioneer to make such sale, shall be prima facie evidence of his authority in the premises, or the equity of redemption from the Mortgage may be foreclosed by suit in any court of competent jurisdiction as now provided by law in the case of past due mortgages; Mortgagee, or the then holder of the indebtedness hereby secured, may bid at any such sale and become the purchaser of said property if the highest bidder therefor. The proceeds of any such sale shall be applied (a) to the expenses incurred in making the sale and in all prior efforts to effect collection of the indebtedness secured hereby, including a reasonable attorney's fee, or reasonable attorney's fees, for such services as may be, or have been, necessary in any one or more of the foreclosure of this Mortgage, of the collection of said indebtedness and of the pursuit of any efforts theretofore directed to that end, including, but without limitation to, the defense of any proceedings instituted by Mortgagor, or anyone liable for said indebtedness, or interested in the security of this instrument or the Premises, to prevent or delay, by any means, the exercise of said power of sale on foreclosure of this Mortgage; (b) to the payment of whatever sum or sums Mortgagee may have paid out or become liable to pay, in carrying out the provisions of this Mortgage (c) to the payment and satisfaction of the Lowe's Obligations; and (d) the balance, if any, shall be paid over to Mortgagor or Mortgagor's successors or assigns. In any event, the purchaser under any foreclosure sale shall be under no obligation to see to the proper application of the purchase money.

**Section 5. Delay Not to Operate as Waiver; Indemnification of Mortgagee.** No delay or forbearance by Mortgagee in exercising any rights hereunder or otherwise afforded by law, shall operate as a waiver thereof or preclude the exercise thereof during the continuance of any default hereunder, and all such rights shall be cumulative. In case Mortgagee voluntarily or otherwise shall become a party to any suit or legal proceeding to protect the Premises or the lien of this Mortgage, Mortgagee shall be saved harmless and reimbursed by Mortgagor for any amounts paid, including all reasonable costs, charges and attorneys' fees incurred in any such suit or proceeding. The rights, powers and remedies conferred upon or reserved to Mortgagee by this Mortgage, or the Contract is intended to be non-exclusive of any other rights, powers or remedies, and each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or now or hereafter existing at law or in equity or by statute. No act of the Mortgagee shall be construed as a waiver or as an election to proceed under any provision herein (or under the Contract after an event of default thereunder) to the exclusion of any other provisions, and Mortgagee shall be entitled to enforce all remedies severally or concurrently as it shall see fit. No release or subordination by Mortgagee of any part of the Premises or any other property, collateral, or obligation securing the Obligations secured by this Mortgage shall release or impair the lien or title of unreleased property.

**Section 6. Restoration to Former Positions.** In case Mortgagee shall have proceeded to enforce any right or remedy under this Mortgage by suit, receiver, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason or shall have been determined adversely to Mortgagee, then and in every such case, Mortgagor and Mortgagee shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Mortgagee shall continue as if no such proceeding had been taken.

**Section 7. Non-Recourse.** Notwithstanding anything herein to the contrary, Mortgagee hereby expressly acknowledges that the obligations and liability of Mortgagor under this leasehold mortgage are limited to Mortgagor's leasehold interest in the Premises.

**Section 8. Mortgage Subject to Ground Lease.** Notwithstanding anything herein to the contrary, this Leasehold Mortgage is subject to the terms, covenants and conditions of the Ground Lease, and in the event of any conflict between the two, the terms, covenants and conditions contained in the Ground Lease shall control.

**Section 9. Condominium.** Mortgagor intends to create a condominium regime with respect to the Premises. If requested by Mortgagor, Mortgagee will join in any documents necessary to create such condominium regime.

**Section 10. Notices.** All notices and other communications required under this Mortgage



shall be in writing and shall be deemed to have been properly given, if personally delivered, on the date of such delivery, or, if sent by Certified or Registered U.S. Mail, return receipt requested, on the third (3rd) business day following deposit in the U.S. Mail, postage prepaid or if sent by overnight courier with guaranteed overnight delivery, on the day following the date delivered to such overnight courier. All notices shall be addressed to the party to whom it is intended at its address set forth on the first page of this Mortgage. Any party may designate a change of address by written notice to the other, given at least ten (10) business days before such change of address is to become effective.

**Section 11. Successors and Assigns.** The covenants, terms and conditions herein contained shall bind, and the benefits and powers shall inure to the respective heirs, executors, administrators, successors and assigns of the parties hereto. Whenever used herein, the singular number shall include the plural, the plural the singular. Mortgagee may assign this Mortgage and Mortgagee's rights hereunder to Lender, and upon said assignment, Lender shall enjoy all of the rights of Mortgagee hereunder.

**Section 12. Governing Law.** This Mortgage shall be governed by and construed in accordance with the laws of the State of Alabama without regard to principles of conflict of laws.

**Section 13. Severability.** If any provisions of this Mortgage or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent under applicable law, 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.

**Section 14. Headings.** The headings of the sections, paragraphs, and subparagraphs of this Mortgage are for the convenience of reference only, are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof.

**Section 15. Waiver of Jury Trial.** THE MORTGAGOR AND MORTGAGEE HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EITHER OF THEM MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED UPON THIS MORTGAGE OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THE NOTE, THIS MORTGAGE AND ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HERewith, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE MORTGAGEE EXTENDING CREDIT TO THE MAKER.

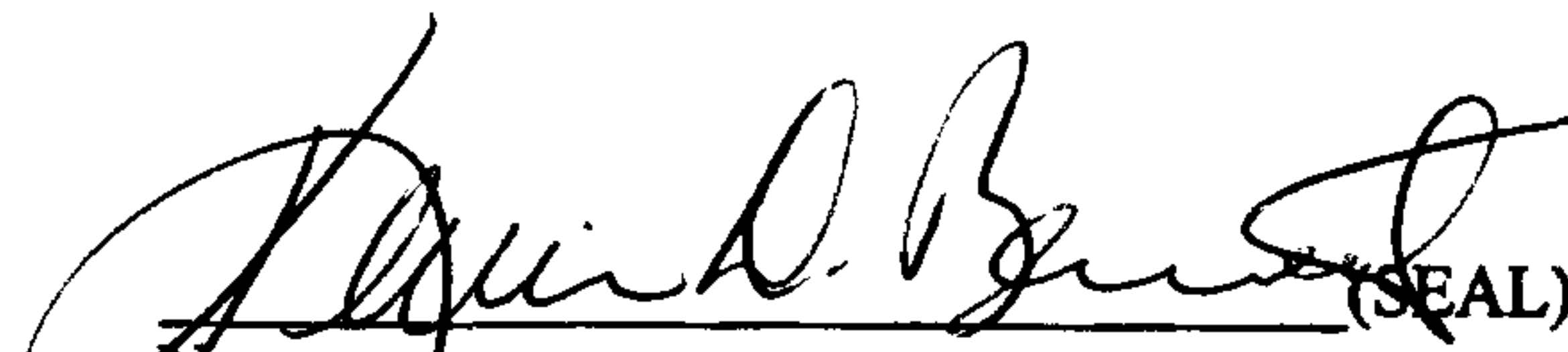
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IN WITNESS WHEREOF, Mortgagor and Mortgagee have caused this Mortgage to be executed under seal the day and year first above written.

Attest:

MORTGAGOR:

LOWE'S HOME CENTERS, INC.

  
Name: Kevin D. Bennett  
Its: Assistant Secretary

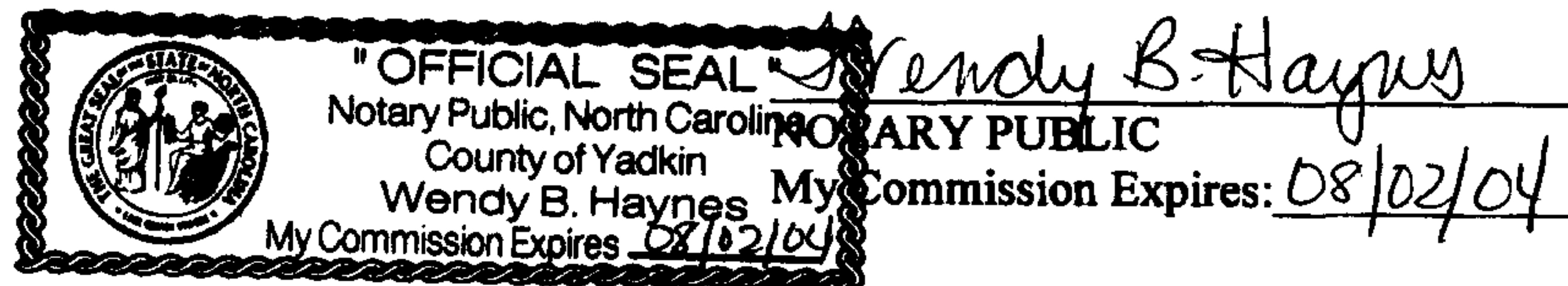
  
Name: David E. Shelton  
Its: Senior Vice President

ABJ REP E#  
[Handwritten initials]

STATE OF NORTH CAROLINA,  
COUNTY OF WILKES

I, the undersigned, a Notary Public in and for said State and County, hereby certify that David E. Shelton, whose name as Senior Vice-President of Lowe's Home Centers, Inc., is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he/she, in his/her capacity as Senior Vice President and with full authority, executed the same voluntarily on behalf of Lowe's Home Centers, Inc., the day the same bears date.

Given under my hand and seal this 21 day of October, 2002.



[SEAL]

Witness/Attest:

MORTGAGEE:

McWHORTER PROPERTIES - BIRMINGHAM,  
L.L.C.



By: Earlon C. McWhorter (SEAL)  
Name: Earlon C. McWhorter  
Its: Manager

STATE OF ALABAMA  
CALHOUN COUNTY

I, the undersigned, a Notary Public in and for said State and County, hereby certify that Earlon C. McWhorter, whose name as Manager of McWhorter Properties-Birmingham, L.L.C., is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such Manager and with full authority, executed the same voluntarily on behalf of McWhorter Properties-Birmingham, L.L.C., on the day the same bears date.

Given under my hand and seal this 9th day of November, 2002.

[SEAL]

  
NOTARY PUBLIC  
My Commission Expires: MY COMMISSION EXPIRES APRIL 22, 2006

**EXHIBIT A**

**Legal Description**

**Parcel I:**

Lot 2-A, according to the Map of Lowe's Addition to Brook Highland Plaza as recorded in Map Book 30, page 11, in the office of the Judge of Probate Office of Shelby County, Alabama.

Said parcel being more particularly described as follows:

Parts of Lot 1 and Lot 2, Brook Highland Plaza Resurvey, Map Book 18, Page 99 as recorded in the Probate Office of Shelby County, Alabama and particularly described as follows:

Begin at the Southeast corner of said Lot 2 and run in a northwesterly direction along the east boundary line of said Lot and the west right of way line of Shelby County Highway 495 for a distance of 621.02 feet; thence turn an interior angle of 90 degrees 06 minutes 26 seconds to the right and run in a southwesterly direction for a distance 471.63 feet; thence turn an interior angle of 166 degrees 31 minutes 24 seconds to the right and run in a southwesterly direction for a distance of 28.54 feet; thence turn an interior angle of 193 degrees 28 minutes 36 seconds to the right and run in a southwesterly direction for a distance of 210.00 feet; thence turn an interior angle of 90 degrees 00 minutes 00 seconds to the right and run in a southeasterly direction for a distance of 46.00 feet; thence turn an interior angle of 270 degrees 00 minutes 00 seconds to the right and run in a southwesterly direction for a distance of 184.32 feet; thence turn an interior angle of 90 degrees 00 minutes 00 seconds to the right and run in a southeasterly direction for a distance of 340.80 feet; thence turn an interior angle of 270 degrees 00 minutes 00 seconds to the right and run in a southwesterly direction for a distance of 51.74 feet to a point on a curve to the right with a radius of 314.45 feet, a central angle of 20 degrees 15 minutes 22 seconds and a chord length of 110.59 feet; thence turn an interior angle to chord of said curve 74 degrees 14 minutes 15 seconds to the right and run along the arc of said curve in a southeasterly direction for a distance of 111.17 feet; thence continue in a southeasterly direction along the tangent extended from said curve for a distance of 204.03 feet; thence turn an interior angle of 51 degrees 17 minutes 18 seconds to the right and run in a northeasterly direction for a distance of 31.72 feet; thence turn an interior angle of 224 degrees 36 minutes 27 seconds to the right and run in a northeasterly direction for a distance of 566.01 feet; thence turn an interior angle of 89 degrees 59 minutes 13 seconds to the right and run in a northwesterly direction for a distance of 63.64 feet; thence turn an interior angle of 270 degrees 00 minutes 00 seconds to the right and run in a northeasterly direction for a distance of 307.56 feet to the Point of Beginning. Said lot containing 585,903 square feet or 13.450 acres more or less.

**Parcel II:**

Together with the non exclusive easements and rights of ingress and egress, parking, utility and other purposes pursuant to that certain Declaration of Easements and Restrictive Covenants as recorded in Real Volume 307, page 985 and that certain Easement Agreement recorded under Instrument 1994-37773 re-executed under Instrument Number 1995-27233.

**ALSO:**

Together with beneficial rights and interests as created by the Covenants, Conditions and Restrictions by and between Developers Diversified of Alabama, Inc. and Lowe's Home Centers, Inc., recorded or intended to be recorded on the date of the Ground Lease.