

STATE OF ALABAMA )

COUNTY OF SHELBY )

20050304000102060 Pg 1/4 252.20  
Shelby Cnty Judge of Probate, AL  
03/04/2005 08:31:00 FILED/CERTIFIED

## FUTURE ADVANCE MORTGAGE

THIS INDENTURE is made and entered into this 28th day of February, 2005 by and between FOOTHILLS HOMES, INC. (hereinafter "Mortgagor", whether one or more) and First American Bank, an Alabama banking corporation having its principal place of business in Birmingham, Alabama (hereinafter "Mortgagee").

WHEREAS, THORNTON CONSTRUCTION COMPANY, INC. (the "Borrower") is justly indebted to the Mortgagee in the amount of ONE HUNDRED FIFTY-FOUR THOUSAND EIGHT HUNDRED & NO/100----- (Dollars), \$ 154,800.00

as evidenced by promissory note of even date bearing interest and payable as provided therein:

WHEREAS, the Mortgagor has requested the Mortgagee to make available to the Borrower said indebtedness and, in reliance on the Mortgagor executing and delivering this mortgage to the Mortgagee, the Mortgagee has extended said indebtedness to the Borrower.

WHEREAS, the Mortgagor expressly acknowledges that the Mortgagor has received good and valid consideration for the execution and delivery of this mortgage and that the Mortgagee is relying on the security afforded by this mortgage in extending said indebtedness to the Borrower.

NOW, THEREFORE, in consideration of the premises and to secure the payment of the debt evidenced by said note or notes and any and all extensions and renewals thereof, or of any part thereof, and all interest payable on all of said debt and on any and all such extensions and renewals (the aggregate amount of such debt and interest thereon, including any extensions and renewals and the interest thereon, is (hereinafter collectively called "Debt") and the compliance with all the stipulations herein contained, the Mortgagor does hereby grant, bargain, sell and convey unto the Mortgagee the following described real estate situated in Shelby County, Alabama (hereafter the "Real Estate"):

Lot 35 according to the subdivision plat of Foothills Point, as recorded in Map Book 32 Page 33 in the Probate Office of Shelby County, Alabama; being situated in Shelby County, Alabama.

Together with all building materials, equipment, fixtures and fittings of every kind or character now or hereafter acquired by the Borrower and used or useful in connection with the improvements, wherever the same may be located, including, without limitation, all lumber and lumber products, bricks, stones and buildings blocks, sand and cement, roofing material, paint, doors, windows, hardware, wires and wiring, plumbing and plumbing fixtures, air-conditioning and heating equipment and appliances, electrical and gas equipment and appliances, pipes and piping, ornamental and decorative fixtures and all plans and specifications for the improvements or any portion thereof and all contracts with architects and engineers responsible for the design of any of the improvements and all construction contracts to which the Borrower is a party providing for the construction of any of the improvements or the furnishing of labor or material in connection therewith and providing for the management of the construction of any of the improvements and all rights of the Borrower as a third party under the contracts and sub-contracts pertaining to the improvements as to which the Borrower is a party and all payments and performance bonds relating to any of the improvements and all government licenses and permits relating to the construction, renovation, and operation thereof (collectively the "Personal Property"). The Real Estate, the improvements, and the Personal Property are hereinafter collectively referred to as the "Collateral".

Together with all the rights, privileges, tenements, appurtenances and fixtures appertaining to the Real Estate, all of which shall be deemed Real Estate and conveyed by this mortgage.

To have and to hold the Real Estate unto the Mortgagee, its successors and assigns forever. The Mortgagor covenants with the Mortgagee that the Mortgagor is lawfully seized in fee simple of the Real Estate and has good right to sell and convey the Real Estate as aforesaid; that the Real Estate is free of all encumbrances, except as otherwise set forth herein, and the Mortgagor will warrant and forever defend the title to the Real Estate unto the Mortgagee, against the lawful claims of all persons.

If this mortgage is subordinate to a prior mortgage, the Mortgagor expressly agrees that if default should be made in the payment of principal, interest or any other sum payable under the terms and provisions of such prior mortgage, the Mortgagee may, but shall not be obligated to, cure such default, without notice to anyone, by paying whatever amounts may be due under the terms of such prior mortgage so as to put the same in good standing; and any and all payments so made, together with interest thereon at the rate of 8% per annum or the highest rate then permitted by law, whichever is less, shall be added to the indebtedness secured by this mortgage. Any such amount paid by Mortgagee, with interest thereon, shall be immediately due and payable; and, if such amount is not paid in full immediately by Mortgagor, then at the option of the Mortgagee, the mortgage shall be in default and subject to immediate foreclosure in all respects as provided by law and by the provisions hereof.

For the purpose of further securing the payment of the Debt, the Mortgagor agrees to : (1) pay all taxes, assessments, and other liens taking priority over this mortgage (hereinafter "Liens"), and if default is made in the payment of the Liens, or any part thereof, the Mortgagee, at its option, may pay the same; (2) keep the Real Estate continuously insured, in such manner and with such companies as may be satisfactory to the Mortgagee, against loss by fire, vandalism, malicious mischief and other perils usually covered by a fire insurance policy with standard extended coverage endorsement, with loss, if any, payable to the Mortgagee, as its interest may appear; such insurance to be in an amount sufficient to cover the Debt and the indebtedness secured by any prior mortgage. The original insurance policy and all replacements therefor, shall be delivered to and held by the Mortgagee until the Debt is paid in full. The insurance policy must provide that it may not be cancelled without the insurer giving at least fifteen days prior written notice of such cancellation to the Mortgagee at: P.O. Box 2203, Decatur, Alabama 35602, ATTENTION: Loan Department.

The Mortgagor hereby assigns and pledges to the Mortgagee as further security for the payment of the Debt each and every policy of hazard insurance now or hereafter in effect which insures said improvements or any part thereof, together with all right, title and interest of the Mortgagor in and to each and every such policy, including but not limited to all of the Mortgagor's right, title and interest in and to any premiums paid on such hazard insurance, including all rights to return premiums. If the Mortgagor fails to keep the Real Estate insured as specified above then, at the election of the Mortgagee and without notice to any person, the Mortgagee may declare the entire Debt due and payable and this mortgage subject to foreclosure, and this mortgage may be foreclosed as hereinafter provided; and, regardless of whether the Mortgagee declares the entire Debt due and payable and this mortgage subject to foreclosure, the Mortgagee may, but shall not be obligated to, insure the Real Estate for its full insurable value (or for such lesser amount as the Mortgagee may wish) against such risks of loss, for its own benefit, the proceeds from such insurance (less the cost of collecting same), if collected, to be credited against the Debt, or, at the election of the Mortgagee, such proceeds may be used in repairing or reconstructing the improvements located on the Real Estate. All amounts spent by the Mortgagee for insurance or for the payment of Liens shall become a debt due by the Mortgagor and at once payable, without demand upon or notice to the Mortgagor, and shall be secured by the lien of this mortgage, and shall bear interest from date of payment by the Mortgagee until paid at the rate of 8% annum or the highest rate then permitted by law, whichever shall be less.

The mortgagor hereby further assigns and pledges to the Mortgagee as further security for the payment of the Debt the following rights, claims, rents, profits, issues and revenues:

1. All rents, profits, issues, and revenues of the Real Estate from time to time accruing, whether under leases or tenancies now existing or hereafter created, reserving to the Mortgagor, so long as the Mortgagor is not in default hereunder, the right to receive and retain such rents, profits, issues and revenues;
2. All judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the Real Estate, or any part thereof, under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the Real Estate, or any part thereof, or to any rights appurtenant thereto, including any award for change of grade of streets, and all payments made for the voluntary sale of the Real Estate, or any part thereof, in lieu of the exercise of the power of eminent domain. The Mortgagee is hereby authorized on behalf of, and in the name of, the Mortgagor to execute and deliver valid acquittances for, and appeal from, any such judgments or awards. The Mortgagee may apply all such sums so received, or any part thereof, after the payment of all the Mortgagee's expenses, including court costs and attorney's fees, on the Debt in such manner as the Mortgagee elects, or, at the Mortgagee's option, the entire amount or any part thereof so received may be released or may be used to rebuild, repair or restore any or all of the improvements located on the Real Estate.

The Mortgagor agrees to take good care of the Real Estate and all improvements located thereon and not to commit or permit any waste thereon, and at all times to maintain such improvements in as good condition as they now are, reasonable wear and tear excepted. Mortgagor will not cut or allow to be cut any timber situated on the Real Estate without the prior written consent of Mortgagee.

Notwithstanding any other provision of this mortgage or the note or notes evidencing the Debt, if the Real Estate, or any part thereof, or any interest therein, is sold, conveyed or transferred, without written consent, the Mortgagee may, at its option, declare the Debt immediately due and payable; and the Mortgagee may, in its sole discretion, require the payment of a higher rate of interest on the unpaid principal portion of the Debt as a condition to not exercising such option to accelerate the Debt or escalate the rate of interest payable on the Debt for the purpose of (1) obtaining a higher rate of interest on the Debt or (2) protecting the security of the mortgage.

The Mortgagor agrees that no delay or failure of the Mortgagee to exercise any option to declare the Debt due and payable shall be deemed a waiver of the Mortgagee's right to exercise such option, either as to any past or present default, and it is agreed and signed on behalf of the Mortgagee by one of its officers.

Upon condition, however, that if the Mortgagor pays the Debt (which Debt includes the indebtedness evidenced by the promissory note or notes referred to hereinbefore and any and all extensions and renewals thereof and all interest on said indebtedness and on any and all such extensions and renewals) and reimburses the Mortgagee for any amounts the Mortgagee has paid in payment of Liens, or insurance premiums, and sums due under any prior mortgage, and interest thereon, and fulfills all of its obligations under this mortgage, this conveyance shall be null and void. But if: (1) any warranty or representation made in this mortgage is breached or proves false in any material respect; (2) default is made in the due performance of any covenant or agreement of the Mortgagor contained in this mortgage or the Loan Agreement by and between Mortgagor and Mortgagee of even date herewith; (3) default is made in the payment to the Mortgagee of any sum paid by the Mortgagee under the authority of any provision of this mortgage; (4) the Debt, or any part thereof, remains unpaid at maturity; (5) the interest of the Mortgagee in the Real Estate becomes endangered by reason of the enforcement of any prior lien or encumbrance thereon; (6) any statement of lien is filed against the Real Estate, or any part thereof, under the statutes of Alabama relating to the liens of mechanics and materialmen (without regard to the existence or nonexistence of the debt or the lien on which such statement is based); (7) any law is passed imposing or authorizing the imposition of any specific tax upon this mortgage or the Debt or permitting or authorizing the deduction of any such tax from the principal or interest of the Debt, or by virtue of which any tax, lien or assessment upon the Real Estate shall be chargeable against the owner of this mortgage; (8) any of the stipulations contained in this mortgage is declared invalid or inoperative by any court of competent jurisdiction; (9) Mortgagor, or any of them (a) shall apply for or consent to the appointment of a receiver, trustee or liquidator thereof or of the Real Estate or of all or a substantial part of such Mortgagor's assets, (b) be adjudicated as bankrupt or insolvent or file a voluntary petition in bankruptcy, (c) fail, or admit in writing such Mortgagor's inability generally to pay such Mortgagor's debts as they come due, (d) make a general assignment for the benefit of creditors, (e) file a petition or an answer seeking reorganization or an arrangement with creditors or taking advantage of any insolvency law, or (f) file an answer admitting the material allegations of, or consent to, or default in answering, a petition filed against such Mortgagor in any bankruptcy, reorganization or insolvency proceedings; or (10) an order for relief or other judgment or decree shall be entered by a court of competent jurisdiction, approving a petition seeking liquidation or reorganization of the Mortgagor, or any of them if more than one, or appointing a receiver, trustee or liquidator of any Mortgagor or of the Real Estate or of all or a substantial part of the assets of any Mortgagor, then, upon the happening of any one or more of said events, at the option of the Mortgagee, the unpaid balance of the Debt (which includes principal and accrued interest) shall at once become due and payable and this mortgage shall be subject to foreclosure and may be foreclosed as now provided by law in case of past-due mortgages; and the Mortgagee shall be authorized to take possession of the Real Estate and, after giving at least twenty-one days notice of the time, place and terms of sale by publication once a week for three consecutive weeks in some newspaper published in the county in which the Real Estate is located, to sell the Real Estate in front of the courthouse door of said county, at public outcry, to the highest bidder for cash, and to apply the proceeds of said sale as follows: first, to the expense of advertising, selling and conveying the Real Estate and foreclosing this mortgage, including a reasonable attorney's fees (provided, however, that if this mortgage is subject to §5-19-10, Code of Alabama 1975, such attorney's fees shall not exceed 15% of the unpaid Debt after default and referral to an attorney not a salaried employee of the Mortgagee and no such attorney's fees shall be collectible if the original amount or the original amount financed does not exceed \$300); second, to the payment of any amounts that have been spent, or that may then be necessary to spend, in paying insurance premiums, Liens or other encumbrances, with interest thereon; third, to the payment in full of the balance of the Debt (which includes principal and accrued interest) whether the same shall or shall not have fully matured at the date of said sale, but no interest shall be collected beyond the day of sale; and fourth, the balance, if any, to be paid to the party or parties appearing of record to be the owner of the Real Estate at the time of the sale, after deducting the cost of ascertaining who is such owner. The Mortgagor agrees that the Mortgagee may bid at any sale had under the terms of this mortgage and may purchase the Real

Estate if the highest bidder therefore. At the foreclosure sale the Real Estate may be offered for sale and sold as a whole without first offering it any other manner or it may be offered for sale and sold in any other manner the Mortgagee may elect.

The Mortgagor agrees to pay all costs, including reasonable attorney's fees (not exceeding 15% of the unpaid Debt after a default and referral to an attorney not a salaried employee of the Mortgagee, if this mortgage is subject to §5-19-10 Code of Alabama 1975, and no such attorney's fees shall be collectible if the original amount or original amount financed does not exceed \$300) incurred by the Mortgagee in collecting or securing or attempting to collect or secure the Debt, or any part thereof, or in defending or attempting to defend the priority of this mortgage against any lien or encumbrance on the Real Estate unless this mortgage is herein expressly made subject to any such lien or encumbrance; and/or all costs incurred in the foreclosure of this mortgage, either under the power of sale contained herein, or by virtue of the decree of any court of competent jurisdiction. The full amount of such costs incurred by the Mortgagee shall be a part of the Debt and shall be secured by this mortgage. The purchaser at any such sale shall be under no obligation to see to the proper application of the purchase money. In the event of a sale hereunder, the Mortgagee, or the owner of the Debt and mortgage, or auctioneer, shall execute to the purchaser, for and in the name of the Mortgagor, a deed to the Real Estate.

Borrower represents to Lender that its business and affairs constitute substantial interstate commerce and that it contemplates using the proceeds of the Note in substantial interstate commerce. Except as otherwise specifically set forth below, any action, dispute, claim, counterclaim or controversy ("Dispute" or "Disputes"), between or among Lender, Borrower or any other Obligor, including without limitation any claim based on or arising from an alleged tort, shall be resolved by arbitration as set forth below. As used herein, Disputes shall include all actions, disputes, claims, counterclaims or controversies arising in connection with the Loan, any extension of or commitment to extend credit by the Lender, any collection of any indebtedness owed to the Lender, any security or collateral given to the Lender, any action taken (or any omission to take any action) in connection with any of the foregoing, any past, present or future agreement between or among the Lender, the Borrower or any other Obligor (including without limitation this Agreement, the Note and the Mortgage, and any past, present or future transactions between or among the Lender, the Borrower or any other Obligor. Without limiting the generality of the foregoing, Disputes shall include actions commonly referred to as lender liability actions. All Disputes shall be resolved by binding arbitration in accordance with Title 9 of the U. S. Code and the Commercial Arbitration Rules of the American Arbitration Association (the "AAA"). Defenses based on statutes of limitation, estoppel, waiver, laches and similar doctrines, that would otherwise be applicable to an action brought by a party, shall be applicable in any such arbitration proceeding, and the commencement of an arbitration proceeding with respect to this Note shall be deemed the commencement of an action for such purposes. Notwithstanding the foregoing, the Borrower and each other Obligor agrees that the Lender shall have the option, but not the obligation, to submit to and pursue in a court of law any claim against the Borrower or any other Obligor for a debt due. The Borrower and each other Obligor agrees that, if the Lender pursues such a claim in a court of law, (i) failure of the Lender to assert any additional claim in such proceeding shall not be deemed a waiver of, or estoppel to pursue, such claim as a claim or counterclaim in arbitration as set forth above, and (ii) the institution or maintenance of a judicial action hereunder shall not constitute a waiver of the right of any party to submit any other action, dispute, claim or controversy as described above, even though arising out of the same transaction or occurrence, to binding arbitration as set forth herein. If the Borrower asserts a claim against the Lender in arbitration or otherwise during the pendency of a claim brought by the Lender in a court of law, the court action shall be stayed and the parties shall submit to arbitration all claims. No provision of, nor the exercise of any rights under this paragraph, shall limit the right of any party (i) to foreclose against any real or personal property collateral by exercise of any rights of foreclosure or of sale under applicable law, (ii) to exercise self-help remedies such as set-off, or (iii) to obtain provisional or ancillary remedies such as injunctive relief, attachment or the appointment of a receiver from a court having jurisdiction before, during or after the pendency of any arbitration or referral. The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary remedies or exercise of self-help remedies shall not constitute a waiver of the right of any party, including the plaintiff in such an action, to submit the Dispute to arbitration or, in the case of actions on a debt, to judicial resolution. Whenever an arbitration is required hereunder, the arbitrator shall be selected in accordance with the Commercial Arbitration Rules of the AAA. The AAA shall designate a panel of ten (10) potential arbitrators knowledgeable in the subject matter of the Dispute. Each of the Lender and the Obligor shall designate, within thirty (30) days of the receipt of the list of potential arbitrators, one of the potential arbitrators to serve, and the two arbitrators so designated shall select a third arbitrator from the eight remaining potential arbitrators. The panel of three (3) arbitrators shall determine the resolution of the Dispute.

Plural or singular words used herein to designate the undersigned shall be construed to refer to the maker or makers of this mortgage, whether one or more natural persons, corporations, associations, partnerships or other entities. All covenants and agreements herein made by the undersigned shall bind the heirs, personal representatives, successors and assigns of the undersigned; and every option, right and privilege herein reserved or secured to the Mortgagee shall inure to the benefit of the Mortgagee's successors and assigns.

The said indebtedness of \$ 154,800.00 which is secured hereby is loaned by Mortgagee to Mortgagor in accordance with a Construction Loan Agreement of even date herewith, the terms of which Agreement are incorporated by reference as a part hereof. In the event of default in the terms of said Loan Agreement, or any other contract or agreement between Mortgagor and Mortgagee, such default shall be and constitute an event of default entitling the Mortgagee herein to foreclose this mortgage in accordance with the terms hereof. (This paragraph applicable if completed)

IN WITNESS WHEREOF, the undersigned Mortgagor has executed this mortgage on the first date written above.

**FOOTHILLS HOMES, INC.**

By: Deborah G. Maple

Deborah G. Maple, Its Treasurer

\_\_\_\_\_

\_\_\_\_\_

This instrument prepared by: Kay Tyller

## ACKNOWLEDGMENT FOR CORPORATION

**STATE OF ALABAMA**

COUNTY                      SHELBY

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that Deborah G. Maple whose name as Treasurer of Foothills Homes, Inc., a corporation, 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 said conveyance, (he)(she)(they), as such officer, and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 28th day of February, 2005

**AFFIX NOTARIAL SEAL**

**Notary Public:**

My Commission Expires: 11/6/08

## ACKNOWLEDGMENT FOR PARTNERSHIP

**STATE OF ALABAMA**

**COUNTY**

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that \_\_\_\_\_ whose name(s) as (general)(limited) \_\_\_\_\_ partner(s) of \_\_\_\_\_ a(n) \_\_\_\_\_ (general)(limited) \_\_\_\_\_ partnership, and whose name(s) is (are) signed to the foregoing conveyance, and who is (are) known to me, acknowledged before me on this day that, being informed of the contents of said conveyance, (he)(she)(they), as such (general)(limited) \_\_\_\_\_ partner(s), and with full authority, executed the same voluntarily for and as the act of said partnership.

Given under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**AFFIX NOTARIAL SEAL**

**Notary Public:**

**My Commission Expires:**

## ACKNOWLEDGEMENT FOR LLC

**STATE OF ALABAMA )**

**COUNTY**

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that \_\_\_\_\_ whose name(s) as \_\_\_\_\_ of \_\_\_\_\_, a LLC, 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 said conveyance, (he)(she)(they), as such member, and with full authority, executed the same voluntarily for and as the act of said LLC.

Given under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**AFFIX NOTARIAL SEAL**

**Notary Public:**

**My Commission Expires:**