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# COMMERCIAL REAL ESTATE MORTGAGE AND ASSIGNMENT OF LEASES AND RENTS

| NAME(S) / ADDRESS(ES) OF MORTGAGOR(S) ("Mortgagor") | NAME / ADDRESS OF LENDER ("Lender") |
|---|---|
| MMM PROPERTIES LLC BY<br>HPHB LLC (SOLE MEMBER)<br>2236 CAHABA VALLEY DR<br>BIRMINGHAM AL, 35242 | COLONIAL BANK, N.A.<br>2501 20TH PL SOUTH<br>BIRMINGHAM, AL 35223 |

**DATE OF MORTGAGE**
Mar. 30, 2005

**MAXIMUM PRINCIPAL AMOUNT** One Million Four Hundred Eighty Two Thousand Two Hundred Fifty And 00/100 Dollars $1,482,250.00

**PROPERTY DESCRIPTION** (Include legal description, street address and sidwell/tax item number):

Lots 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94 and 96, 97, 98, 99, 100, 101, 102, 103, 104,105 and 159, 160, 161 and 162, according to the Survey of The Reserve at Timberline, as recorded in Map Book 34, Pages 117 A, B, C & D, in the Probate Office of Shelby County, Alabama.

This mortgage is made on this date between the parties listed above. The Mortgagor in consideration of the maximum principal amount shown above and for other valuable consideration, the receipt of which is acknowledged, hereby mortgages and warrants to the Lender, its successors and assigns, forever, the land and property described above, together with the privileges, improvements, rents and profits, easements, hereditaments, appurtenances, equipment, and other personal goods of whatsoever description which may now or hereafter be located, situated or affixed on and used in connection therewith (hereinafter called the Property). Mortgagor covenants that Mortgagor is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant, convey and assign the Property (and, if this mortgage is on a leasehold, that the ground lease is in full force and effect without modification except as noted above and without default on the part of either lessor or lessee thereunder), that the Property is unencumbered, and that Mortgagor will warrant and defend generally the title to the Property against all claims and demands, subject to any easements and restrictions listed in a schedule of exceptions to coverage in any title insurance policy insuring Lender's interest in the Property.

## SIGNATURE(S)

By signing this Mortgage, each Mortgagor acknowledges that all provisions have been read and understood, including those on pages two, three, and four. Signed and sealed by Mortgagor:

X _____ (Seal) 3/30/05
Date

X _____ (Seal)
Date

X _____ (Seal)
Date

X _____ (Seal)
Date

## WITNESSED BY

X _____

X _____

X _____

X _____

| WHEN RECORDED RETURN TO: | DRAFTED BY / ADDRESS |
|---|---|
| COLONIAL BANK<br>PO BOX 6<br>ANNISTON, AL<br>36202- | Jule Ann Martin<br>2501 20th Place South Suite 201<br>Birmingham, Al<br>35223 |

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**The Mortgagor Covenants and Agrees With the Lender as Follows:**

1. This mortgage secures the maximum principal amount shown on page one as may be evidenced by a promissory note or notes of even, prior or subsequent date hereto, including future advances and every other Indebtedness of any and every kind now or hereafter owing from Mortgagor to Lender howsoever created or arising, whether primary, secondary or contingent, together with any interest or charges provided in or arising out of such Indebtedness, as well as the agreements and covenants of this mortgage, any promissory note or of any other mortgage, assignment of leases or rents, security agreement, loan agreement, or any other agreement of whatsoever nature, whether written or oral, now existing or hereafter arising between the Mortgagor and the Lender (hereinafter all referred to as the Indebtedness).

2. The Mortgagor promises to pay the Indebtedness in accordance with the terms thereof and to perform all of the terms and conditions from which the Indebtedness may arise.

3. Lender may apply all payments received from the Mortgagor in any order Lender deems appropriate.

4. The Mortgagor promises at all times to preserve and to maintain the Property and every part thereof in good repair, working order, and condition, and will from time to time, make all needful and proper repairs so that the value of the Property shall not in any way be impaired. Mortgagor certifies that as to any real estate which has been, is now, or will be in the future owned or occupied by Mortgagor, that such real estate has not in the past, nor will now or in the future be allowed in any manner to be exposed to or contain hazardous or environmentally harmful substances as may be defined or regulated by any state or federal law or regulation which impacts, in any way, such substances, except to the extent the existence of such substances has been presently disclosed in writing to Lender, and Mortgagor will immediately notify Lender in writing of any assertion made by any party to the contrary. Mortgagor indemnifies and holds Lender and Lender's directors, officers, employees, and agents harmless from any liability or expense of whatsoever nature, including reasonable attorney fees, incurred directly or indirectly as a result of Mortgagor's involvement with hazardous or environmentally harmful substances as may be defined or regulated as such under any state or federal law or regulation. The Mortgagor certifies that the Property is and will be used and maintained in a manner that complies with all aspects of the Federal Americans with Disabilities Act. The Lender shall have the right and access to inspect the Property at all reasonable times and if the Property, or any part thereof, shall require inspection, repair, or maintenance which the Mortgagor has failed to provide, the Lender, after reasonable notice, may enter upon the Property to effect such obligation; and the cost thereof shall be added to the Indebtedness and paid on the Lender's demand by the Mortgagor.

5. The Mortgagor promises to pay and to discharge liens, encumbrances, taxes, assessments, and governmental charges at any time levied or assessed against the Mortgagor or the Property, and the Mortgagor will not do or permit to be done any act of whatsoever nature which would impair the lien of this mortgage; provided, however, that the Mortgagor shall not be required to pay any tax, assessment, or governmental charge so long as the Mortgagor in good faith disputes the validity thereof and provides for payment in a manner satisfactory to Lender in the event the Mortgagor fails in the dispute.

6. The Mortgagor promises to keep the Property insured against such risks, in such form and with such carriers as may within the sole discretion of the Lender be acceptable, causing the Lender to be named as loss payee or alternatively if requested by Lender, Mortgagee, in such form and manner as prescribed by the Lender. The Mortgagor hereby directs each and every insurer of the Property to make payment of loss to the Lender with the proceeds to be applied, only at the Lender's option, to the repair and replacement of the damage or loss or to be applied to the Indebtedness with the surplus, if any, to be paid by the Lender to the Mortgagor.

7. The Mortgagor hereby assigns to the Lender all judgments, decrees, and awards for injury, damage, or condemnation of or to the Property and authorizes the Lender, at its sole option, to apply the proceeds thereof to the payment of the Indebtedness in such manner as the Lender may elect.

8. The Mortgagor promises to abstain from the commission of any waste on the Property and to comply with all present and future statutes, regulations, and rules of any governmental authority governing the Property or in any way concerning the use and occupancy thereof.

9. The Mortgagor promises not to remove any part of the Property from its present location, except for replacement, maintenance and relocation in the ordinary course of business, nor to sell, further encumber, or otherwise dispose of, except as herein provided, any or all of its interest in any part of or all of the Property without first obtaining the written consent of the Lender.

10. At any time, upon a request of the Lender, the Mortgagor will execute and deliver to the Lender, and if appropriate, cause to be recorded, such further mortgages, assignments, assignments of leases and rents, security agreements, pledges, financing statements, or such other document as the Lender may require, in the Lender's sole discretion, to effectuate, complete, and to perfect as well as to continue to preserve the Indebtedness, or the lien or security interest created by this mortgage. In the event the Mortgagor shall fail or refuse to execute and deliver any such document to the Lender, the Mortgagor hereby irrevocably constitutes and appoints the Lender, or any of its officers or employees, as the Mortgagor's true and lawful attorney-in-fact to do so, and the expenses thereof shall be added to the Indebtedness and paid by the Mortgagor upon demand by the Lender. This power of attorney shall not be affected by the disability of Mortgagor.

11. The Mortgagor agrees to supply the Lender such financial and other information concerning its affairs and the status of any of its assets as the Lender, from time to time, may reasonably request. The Mortgagor further agrees to permit the Lender, its employees and agents, to have access to the Property for the purpose of inspecting it, together with all of the Mortgagor's other physical assets, if any, and to permit the Lender, from time to time, to verify accounts as well as to inspect, copy and to examine the books, records and files of the Mortgagor.

12. At Lender's request, Mortgagor will supply Lender with an acknowledged estoppel certificate which shall reflect the Indebtedness and any and all rights of setoff, counterclaims or defenses which exist against the Indebtedness.

13. Mortgagor will comply with the provisions of any Construction Loan Agreement, which if one exists, is incorporated by reference and shall become a part of this Mortgage.

Any advances or disbursements made by Lender under such Construction Loan Agreement shall become a part of the Indebtedness hereunder and shall bear interest at the rate stated in the Note from the date of advance or disbursement, provided such calculation of interest shall not be in conflict with applicable law, in which case, Lender shall calculate interest at the highest allowable rate.

Any default under the terms of the Construction Loan Agreement will constitute a default under the provisions of this Mortgage and Lender shall be entitled to the rights and remedies as herein provided, and/or as may be provided by law.

14. Mortgagor agrees to comply with the provisions of any ground lease related to the Property and will give Lender notice of any default on the part of the Lessor. If an option to renew or extend the ground lease occurs during the duration of this Indebtedness, Mortgagor agrees to exercise such option and to submit evidence of same to Lender. Mortgagor hereby assigns its rights in any such ground lease to Lender; however, Lender shall not be liable or responsible for any of the covenants or promises stated therein.

Mortgagor promises not to alter or amend any such ground lease nor to cancel, terminate or surrender its interest in such ground lease without first obtaining the written consent of the Lender.

15. As additional security for the Indebtedness and the performance of all of the Mortgagor's covenants hereunder, the Mortgagor:

(a) hereby grants to the Lender a security interest in any personal property or fixtures which may now or hereafter constitute any part of the Property, in all personal property in possession of the Lender but belonging to the Mortgagor, and in any balance of deposit account with the Lender which may be applied by the Lender upon the Indebtedness in the event of default hereunder; and

(b) hereby (pursuant to any statute now or hereafter existing and applicable) sells, assigns, transfers and sets over to the Lender all of the rents, profits, and income under any lease or leases of the Property, including any extensions, amendments, or renewals thereof, whether due or to become due, including all such leases in existence or coming into existence during the period this mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor or those claiming by, under, or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the period of any foreclosure or other action to enforce this mortgage, during any receivership created hereunder, and during the period of redemption, including the period of deficiency in the repayment of the Indebtedness. The Mortgagor acknowledges that this assignment is given as collateral security only and shall not be construed as obligating the Lender to perform any of the covenants or undertakings required to be performed by the Mortgagor contained in any such assigned leases. In the event of surrender or the taking of possession of the Property by the Lender upon the Mortgagor's default, the Lender may thereafter collect the rents and income therefrom, rent or lease the Property or any portion thereof upon such terms as the Lender may deem, in its sole discretion, advisable, and apply all proceeds derived therefrom to (i) preservation of the Property; (ii) payment of taxes; (iii) payment of insurance premiums; (iv) payment of interest or principal due on the Indebtedness.

16. The following shall constitute default of this mortgage and any note or other agreement it secures:

(a) the failure to pay either the interest or principal upon the Indebtedness when due;

(b) the failure to perform or keep any of the covenants of this mortgage or any agreement, oral or written, out

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of which the Indebtedness arises or which governs any of the terms of the Indebtedness;

(c) the insolvency of the Mortgagor;

(d) the filing by or against the Mortgagor of any insolvency, bankruptcy or receivership proceeding;

(e) the institution of any assignment by the Mortgagor for the benefit of the Mortgagor's creditors;

(f) the insolvency or death of any guarantor of this Indebtedness;

(g) the death of the Mortgagor, if a natural person, or of any partner or member if the Mortgagor is a partnership or limited liability company;

(h) the dissolution, merger and consolidation or transfer of a substantial part of the ownership of the Mortgagor or any guarantor of the Indebtedness if the Mortgagor or such guarantor is a corporation or limited liability company;

(i) the non-payment of any taxes or insurance when due, which shall constitute waste and entitle the Lender to the appointment of a receiver under applicable law;

(j) the sale or transfer by Mortgagor of any interest in the Property, whether by deed, land contract, contract of sale, or the like;

(k) the Lender deems itself insecure for any reason whatsoever.

17. In the event of default, the Lender may, without demand or notice, pay any taxes, assessments, premiums or liens required to be paid by the Mortgagor, effect any insurance provided for herein, make such repairs, cause the abstracts of title or title insurance policy and tax histories of said premises to be certified to date, or procure new abstracts of title or title insurance and tax histories in case none were furnished to it, and procure title reports covering said premises, including surveys. The sums paid for any such purposes shall be added to the Indebtedness and shall bear interest at the rate of interest otherwise accruing on the Indebtedness secured hereby until paid. In the event of foreclosure, the abstracts of title or title insurance shall become the property of the Lender. All abstracts of title, title insurance, tax histories, surveys, and other documents pertaining to the Indebtedness shall remain in the Lender's possession until the Indebtedness is paid in full.

18. In the event of default, the Lender may, without notice, and at its option, declare the entire Indebtedness due and payable, as it may elect, regardless of the date or dates of maturity thereof and, if permitted by state law, is authorized and empowered to sell or to cause the Property to be sold at public auction, and to execute and deliver to the purchaser or purchasers at such sale any deeds of conveyance good and sufficient at law, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder and all costs and charges of the sale, including attorney fees, rendering any surplus monies to the party or parties entitled to the excess. Any such sale or a sale made pursuant to a judgment or a decree for the foreclosure hereof may, at the option of the Lender, be made en masse. The commencement of proceedings to foreclose this mortgage in any manner authorized by law shall be deemed an exercise of the above option. In the event of default or the commission of waste, the Lender shall forthwith be entitled to the appointment of a receiver of the Property and of the earnings, income, issue, and profits hereof, with such powers as the court making such appointments shall confer. The Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor. IN THE EVENT OF THE SALE OF THIS PROPERTY UNDER THE PROCEDURE FOR FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, AS PROVIDED BY APPLICABLE LAW, OR IN THE EVENT THE LENDER EXERCISES ITS RIGHTS UNDER THE ASSIGNMENT OF RENTS AND LEASES, THE MORTGAGOR HEREBY WAIVES ANY RIGHT TO ANY NOTICE OTHER THAN THAT PROVIDED FOR SPECIFICALLY BY STATUTE, OR TO ANY JUDICIAL HEARING PRIOR TO SUCH SALE OR OTHER EXERCISE OF RIGHTS.

19. Lender shall have the exclusive right to determine the order in which the Property securing this Mortgage shall be sold and the proceeds applied to the Indebtedness in the event Lender exercises the remedies provided it in this Mortgage.

20. The Mortgagor expressly acknowledges that it is the intent of both itself and the Lender to have a default of any of the provisions of this mortgage constitute a default of any other agreement which may now exist or hereafter arise between them and that, likewise, a breach of any such agreement shall constitute a breach and default of this mortgage. It is the expressed intent of the Mortgagor to cross collateralize all of its Indebtedness and obligations to the Lender howsoever arising and whensoever incurred.

21. Mortgagor warrants that no provision, warranty or promise made by the Mortgagor in any document related to this transaction causes any conflict whatsoever with the terms of any document related to any other transaction Mortgagor may be involved with, with any other person or entity.

22. It is further agreed that:

(a) no forbearance on the part of the Lender and no extension of the time payment of any of the Indebtedness given by the Lender shall operate to release, discharge, modify, or change or affect the original liability of the Mortgagor herein or of its continued performance of the covenants herein contained or in the covenants and terms of any portion of the liabilities;

(b) any reference to the Lender herein shall also include the Lender's successors and assigns;

(c) the covenants and conditions hereof shall bind and the benefits and advantages hereof shall inure to the respective heirs, executors, administrators, assigns and successors of the parties hereto;

(d) the Mortgagor agrees to pay the Lender, in addition to payment of the Indebtedness, a pro rata portion of the taxes, assessments, mortgage guarantee insurance premiums (so long as this mortgage is insured by a mortgage guarantee insurance policy), hazard insurance premiums next to become due, as estimated by the Lender so the Lender will have sufficient funds on hand to pay taxes, assessments and insurance premiums within thirty (30) days before the due date thereof, and to pay the Lender, immediately, any deficit thereon, the monies so held not to bear any interest and, upon default, to be applied by the Lender on account of the Indebtedness;

(e) all rights and remedies granted to the Lender hereunder shall be cumulative and not exclusive of one or the other or of any other remedy provided for by law or agreement, and may be exercised either successively or concurrently;

(f) if any provision of this mortgage shall be prohibited by state law, such prohibitions shall apply only to that provision and all other provisions of the mortgage shall remain in full force and effect;

(g) upon payment of all sums secured by this mortgage, the mortgage shall become null and void, and Lender shall release this mortgage. Mortgagor shall pay Lender's reasonable costs incurred in releasing this mortgage; and that

(h) Mortgagor hereby waives all rights of exemption as to personal property and relinquishes all right of dower and curtesy in the Property.

ADDITIONAL PROVISIONS

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By initialing, I acknowledge this is page 3 of 4 of the
Commercial Real Estate Mortgage and Assignment of Leases and Rents.

| Initials | Initials | Initials | Initials |
|---|---|---|---|
| | | | |

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## NOTARIZATION

### INDIVIDUAL

STATE OF ALABAMA County ss:

On this day of I

a Notary Public in and for said county and in said state, hereby certify that

whose name(s) signed to the foregoing conveyance, and who known to me, acknowledged before me that, being informed of the contents of the conveyance, executed the same voluntarily and as act on the day the same bears date.

Given under my hand and seal of office this day of

My Commission expires: _____

Notary Public

### PARTNERSHIP

STATE OF ALABAMA County ss:

On this day of I

a Notary Public in and for said county and in said state, hereby certify that

whose name(s) signed to the foregoing conveyance, and who known to me, acknowledged before me that, being informed of the contents of the conveyance, executed the same voluntarily and as partner(s) on behalf of a partnership, on the day the same bears date.

Given under my hand and seal of office this day of

My Commission expires: _____

Notary Public

### CORPORATION

STATE OF ALABAMA County ss: SHELBY

On this 30th day of MARCH 2005 I, THE UNDERSIGNED,

a Notary Public in and for said county and in said state, hereby certify that ALAN HOWARD

whose name(s) IS signed to the foregoing conveyance, and who IS known to me, acknowledged before me that, being informed of the contents of the conveyance, HAS executed the same voluntarily and as MEMBER/MANAGER of MMM PROPERTIES LLC BY HPHB LLC (SOLE MEMBER) a corporation, on behalf of the corporation on the day the same bears date.

Given under my hand and seal of office this 30th day of MARCH 2005.

My Commission expires: _____

Notary Public

JULIE ANN MARTIN NOTARY PUBLIC MARCH 3, 2006 JEFFERSON COUNTY, ALABAMA

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By initialing, I acknowledge this is page 4 of 4 of the Commercial Real Estate Mortgage and Assignment of Leases and Rents.

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