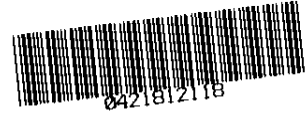


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Doc#: 0421812118  
Eugene "Gene" Moore Fee: \$44.50  
Cook County Recorder of Deeds  
Date: 08/05/2004 02:26 PM Pg: 1 of 11

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Prepared by:  
Michael B. Benner, Esq.  
Wachtell, Lipton, Rosen & Katz  
51 West 52<sup>nd</sup> Street  
New York, New York 10019-6150  
(212) 403-1253

**FOURTH AMENDMENT TO MORTGAGE, OPEN END MORTGAGE, DEED OF TRUST,  
ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FINANCING  
STATEMENT**

Dated: As of June 30, 2004

FRANK'S NURSERY & CRAFTS, INC.,  
Mortgagor/Trustor/Grantor/Debtor  
-TO-  
KIMCO CAPITAL CORP.,  
Mortgagee/Beneficiary/Grantee/Secured Party

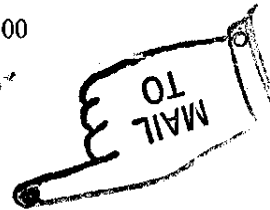
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Store No.: 38

Address:  
817 W. Golf  
Schaumburg, IL 60194

Tax Parcel ID No.: 07-16-101-038-0000

**WHEN RECORDED RETURN TO:**  
Fidelity National Title Insurance Company  
100 West Big Beaver Road, Suite 380  
Troy, MI 48084  
File No:



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# UNOFFICIAL COPY

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FOURTH AMENDMENT TO MORTGAGE, OPEN END MORTGAGE,  
DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS,  
SECURITY AGREEMENT AND FINANCING STATEMENT

Dated: As of June 30, 2004

FRANK'S NURSERY & CRAFTS, INC.,  
Mortgagor/Trustor/Grantor/Debtor  
-TO-  
KIMCO CAPITAL CORP.,  
Mortgagee/Beneficiary/Grantee/Secured Party

---

This instrument is a Mortgage, Open End Mortgage, Deed of Trust, Assignment of Leases and Rents, Security Agreement and Financing Statement covering both real property and fixtures. Notwithstanding anything to the contrary herein contained (a) as to any property located in the States of Maryland and Missouri, this instrument is, among other things, a Deed of Trust; and (b) as to any property located in the States of Florida, Illinois, Indiana, Kentucky, Michigan, Minnesota, New Jersey, and Pennsylvania, this instrument is, among other things, a Mortgage. For purposes of Section 5301.232 of the Ohio Revised Code and Section 42, Sections 8143-8144 of the Pennsylvania Consolidated Statutes, et seq., this instrument is, among other things, an Open-End Mortgage. THIS INSTRUMENT SECURES, AMONG OTHER THINGS, FUTURE ADVANCES AND FUTURE OBLIGATIONS, AND THE PARTIES INTEND THAT THIS INSTRUMENT SECURE FUTURE ADVANCES. As to any property located in Missouri, future advances shall be governed by Section 443.055 RSMO. This instrument contains after-acquired property provisions and secures obligations containing provisions for changes in interest rates, extensions of time for payment and other modifications in the terms of the obligations.

Store No.: 38

Address:  
817 W. Golf  
Schaumburg, IL 60194

# UNOFFICIAL COPY

**FOURTH AMENDMENT TO MORTGAGE, OPEN END MORTGAGE, DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FINANCING STATEMENT** (this "Fourth Amendment") dated as of June 30, 2004, by **FRANK'S NURSERY & CRAFTS, INC.**, a Delaware corporation, having its principal office at 580 Kirts Blvd., Suite 300, Troy, Michigan 48084, as mortgagor, trustor and grantor hereunder ("Grantor"), and **KIMCO CAPITAL CORP.**, a Delaware corporation, having an office at 3333 New Hyde Park Road, P.O. Box 5020, New Hyde Park, New York 11042-0020, as mortgagee hereunder to the extent that this Mortgage operates as a mortgage or an open end mortgage ("Mortgagee").

## WITNESSETH:

WHEREAS, Grantor has previously delivered to Mortgagee a certain Mortgage, Open End Mortgage, Deed of Trust, Assignment of Leases and Rents, Security Agreement and Financing Statement dated as of May 20, 2002, which was recorded May 31, 2002 as Document No. 0020613478, in the records of Cook County, Illinois (the "Original Mortgage"), a First Amendment to Mortgage, Open End Mortgage, Deed Of Trust, Assignment of Leases and Rents, Security Agreement and Financing Statement dated as of January 23, 2003, which was recorded February 19, 2003 as Document No. 0030229021, in the records of Cook County, Illinois (the "First Amendment"), a Second Amendment to Mortgage, Open End Mortgage, Deed Of Trust, Assignment of Leases and Rents, Security Agreement and Financing Statement dated as of October 30, 2003, which was recorded in the records of Cook County, Illinois prior to the recordation hereof (the "Second Amendment"), and a Third Amendment to Mortgage, Open End Mortgage, Deed Of Trust, Assignment of Leases and Rents, Security Agreement and Financing Statement dated as of January 21, 2004, which was recorded in the records of Cook County, Illinois prior to the recordation hereof (the "Third Amendment"; the Original Mortgage, as amended by the First Amendment, the Second Amendment, and the Third Amendment, being sometimes referred to hereinafter as the "Existing Mortgage"), each as security, in part, for various loans made or to be made to Grantor in the aggregate principal sum of up to SIXTY FIVE MILLION DOLLARS (\$65,000,000.00), all in accordance with that certain Credit and Security Agreement dated as of May 20, 2002, between Grantor and Mortgagee, as lender (the "Original Credit Agreement"), as modified by that certain First Amendment and Waiver to Credit and Security Agreement, dated as of January 23, 2003 (the "First Amendment to Credit Agreement"), that certain Second Amendment to Credit and Security Agreement, dated as of July 7, 2003 (the "Second Amendment to Credit Agreement"), that certain Third Amendment to Credit and Security Agreement, dated as of October 30, 2003 (the "Third Amendment to Credit Agreement"), that certain Fourth Amendment to Credit and Security Agreement, dated as of January 16, 2004 (the "Fourth Amendment to Credit Agreement"), and that certain Fifth Amendment to Credit and Security Agreement, dated as of January 21, 2004 (the "Fifth Amendment to Credit Agreement"; the Original Credit Agreement, as amended by the First Amendment to Credit Agreement, the Second Amendment to Credit Agreement, the Third Amendment to Credit Agreement, the Fourth Amendment to Credit Agreement, and the Fifth Amendment to Credit Agreement, being sometimes referred to as the "Existing Credit Agreement").

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WHEREAS, pursuant to that certain Sixth Amendment to Credit and Security Agreement, dated as of the date hereof (the "Sixth Amendment to Credit Agreement"), Grantor and Mortgagee have now agreed to modify the Existing Credit Agreement to, among other things, increase the aggregate principal amount of the Revolving Credit Loans (as defined in the Existing Credit Agreement) by an aggregate amount not to exceed FIFTEEN MILLION DOLLARS (\$15,000,000.00) (the Existing Credit Agreement, as modified by the Sixth Amendment to Credit Agreement, and as the same may hereafter be further amended, modified or supplemented from time to time, the "Credit Agreement").

WHEREAS, Grantor and Mortgagee now desire to amend the Existing Mortgage in order to, among other things, secure the Revolving Credit Loans, as increased by the Sixth Amendment to Credit Agreement, to the same extent, and with the same priority as if same were advanced in connection with the Existing Mortgage (the Existing Mortgage, as modified by this Fourth Amendment, and as the same may hereafter be further amended, modified or supplemented from time to time, the "Mortgage").

NOW, THEREFORE, for and in consideration of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, Grantor and Mortgagee agree as follows:

1. Definitions. Each reference in the Existing Mortgage to (a) the "Mortgage" shall henceforth refer to the Mortgage, and (b) the "Credit Agreement" shall henceforth refer to the Credit Agreement. Capitalized terms not otherwise defined herein shall have the respective meanings ascribed to such terms in the Existing Mortgage, including, but not limited to, the "Land" as more particularly described on "Schedule A" attached hereto.

2. Secured Indebtedness. The Revolving Loan Amount is hereby increased from FORTY FIVE MILLION DOLLARS (\$45,000,000.00) to SIXTY MILLION DOLLARS (\$60,000,000.00). The terms "Revolving Loan Amount", "Mortgage Amount" and "Secured Indebtedness" shall hereinafter be deemed to include such increased amount, and the Mortgage shall secure such increased amount, to the same extent, and with the same priority as if the same were advanced in connection with the Existing Mortgage, and without affecting the priority of the lien created thereunder.

3. Miscellaneous. Except as specifically modified by this Fourth Amendment, all the provisions of the Existing Mortgage are hereby ratified and confirmed to be unmodified and in full force and effect. This Fourth Amendment may be executed in two or more separate counterparts, each of which when executed and delivered shall be an original. This Fourth Amendment shall be governed by and construed in accordance with the internal laws of the state in which the Real Property is located.

4. Additional Matters. Notwithstanding anything to the contrary herein contained:

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a. Wherever herein contained, the phrase "Trustee and Mortgagee, as applicable" or "Trustee" or any similar phrase

1. shall be deemed to refer to "Trustee for the benefit of Mortgagee, as beneficiary, to the extent the Mortgaged Property is located in Maryland;

2. shall be deemed to refer to "Mortgagee" to the extent the Mortgaged Property is located in any of the following States: Florida, Illinois, Indiana, Kentucky, Michigan, Minnesota, New Jersey, Pennsylvania, and Ohio and in such states Trustee shall have no rights, powers or obligations and all references herein to Trustee and Beneficiary shall be deemed deleted; and

3. to the extent the Mortgaged Property is located in Missouri, shall be deemed to refer (i) to Trustee for the benefit of Mortgagee in relation to the grant of a lien on real property, to the habendum clause and to the provisions relating to power of sale, (ii) to both Trustee and Mortgagee in relation to the grant of a security interest in personal property and fixtures and rights related thereto, and (iii) to Mortgagee in all other instances; provided, however, that nothing contained in the Mortgage shall be construed to give Trustee the authority to exercise any rights or remedies granted in the Mortgage without prior written authorization by Mortgagee or the right or obligation to receive any payment of rents or other amounts except in connection with the exercise of the power of sale.

b. To the extent the Mortgaged Property is located in Maryland or Missouri, references to Mortgagee shall, if the context so requires, be deemed to be references to Mortgagee, as beneficiary.

c. To the extent the Mortgaged Property is located in Missouri, the term "Mortgaged Property," whenever used in the Mortgage, shall be deemed to be references to "Trust Property."

d. Notwithstanding anything to the contrary herein contained, to the extent the Mortgaged Property is located in the Commonwealth of Pennsylvania, the Mortgage shall not be deemed to be a purchase money mortgage.

e. Notwithstanding anything to the contrary herein contained, to the extent the Mortgaged Property is located in the State of Illinois, for purposes of Ill. Rev. Stat. ch. 110, paragraph 15-1302, all monies advanced to Grantor pursuant to the terms of the Credit Agreement or other Fundamental Document (as defined therein) subsequent to the recording date of this Fourth Amendment shall be deemed to be in furtherance of the terms of the Existing Mortgage, as modified hereby, and the Credit Agreement secured by the Mortgage.

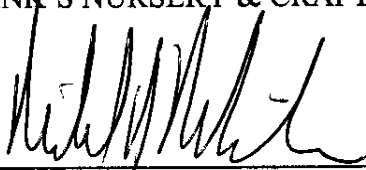
[Signature page follows on the next page.]

# UNOFFICIAL COPY

THE GRANTOR HEREBY DECLARES THAT THE GRANTOR HAS READ THIS FOURTH AMENDMENT, AND HAS SIGNED THIS FOURTH AMENDMENT AS OF THE DATE SET FORTH AT THE TOP OF THE FIRST PAGE, AND THE GRANTOR HEREBY ACKNOWLEDGES THAT IT HAS RECEIVED A TRUE AND COMPLETE COPY OF THIS FOURTH AMENDMENT.

IN WITNESS WHEREOF, the Grantor and Mortgagee have duly caused this Fourth Amendment to be duly executed and delivered as of the day and year first above written.

FRANK'S NURSERY & CRAFTS, INC.

By:  [SEAL]  
Michael D. McBride, Vice President  
Legal and Real Estate

Address: 580 Kirts Blvd., Suite 300,  
Troy, Michigan 48084

KIMCO CAPITAL CORP.

By: \_\_\_\_\_ [SEAL]  
Raymond Edwards, Vice President

Address: c/o Kimco Realty Corporation  
3333 New Hyde Park Road  
New Hyde Park, NY 11042-0020

~~This instrument was prepared by, and after  
recording shall be returned to:~~

Michael B. Benner, Esq.  
Wachtell, Lipton, Rosen and Katz  
51 West 52<sup>nd</sup> Street  
New York, New York 10019-6150  
(212) 403-1253



# UNOFFICIAL COPY

## ACKNOWLEDGEMENT

STATE OF MICHIGAN :  
: ss.:  
COUNTY OF OAKLAND :

On the 14th day of July, in the year 2004, before me, the undersigned, a Notary Public in and for said State, personally appeared Michael D. McBride, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\*Vice President Legal and Real Estate

Darlene M. Brown

Notary Public  
DARLENE M. BROWN  
NOTARY PUBLIC MACOMB CO., MI  
MY COMMISSION EXPIRES Nov 3, 2008  
ACTING IN OAKLAND COUNTY, MI

STATE OF NEW YORK :  
: ss.:  
COUNTY OF NASSAU :

~~On the \_\_\_ day of \_\_\_\_\_, in the year 2004, before me, the undersigned, a Notary Public in and for said State, personally appeared Raymond Edwards, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.~~

\_\_\_\_\_  
Notary Public

[NOTARY SEAL]

# UNOFFICIAL COPY

THE GRANTOR HEREBY DECLARES THAT THE GRANTOR HAS READ THIS FOURTH AMENDMENT, AND HAS SIGNED THIS FOURTH AMENDMENT AS OF THE DATE SET FORTH AT THE TOP OF THE FIRST PAGE, AND THE GRANTOR HEREBY ACKNOWLEDGES THAT IT HAS RECEIVED A TRUE AND COMPLETE COPY OF THIS FOURTH AMENDMENT.

IN WITNESS WHEREOF, the Grantor and Mortgagee have duly caused this Fourth Amendment to be duly executed and delivered as of the day and year first above written.

FRANK'S NURSERY & CRAFTS, INC.

By: \_\_\_\_\_ [SEAL]  
Michael D. McBride, Vice President  
Legal and Real Estate

Address: 580 Kirts Blvd., Suite 300,  
Troy, Michigan 48084

KIMCO CAPITAL CORP.

By: Raymond Edwards [SEAL]  
Raymond Edwards, Vice President

Address: c/o Kimco Realty Corporation  
3333 New Hyde Park Road  
New Hyde Park, NY 11042-0020

~~This instrument was prepared by, and after recordation shall be returned to:—~~

Michael B. Benner, Esq.  
Wachtell, Lipton, Rosen and Katz  
51 West 52<sup>nd</sup> Street  
New York, New York 10019-6150  
(212) 403-1253

Property of Cook County Clerk's Office



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## ACKNOWLEDGEMENT

STATE OF MICHIGAN :  
 : ss.:  
 COUNTY OF OAKLAND :

On the \_\_\_ day of \_\_\_\_\_, in the year 2004, before me, the undersigned, a Notary Public in and for said State, personally appeared Michael D. McBride, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
 Notary Public

[NOTARY SEAL]

STATE OF NEW YORK :  
 : ss.:  
 COUNTY OF NASSAU :

On the 12th day of July, in the year 2004, before me, the undersigned, a Notary Public in and for said State, personally appeared Raymond Edwards, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\*Vice President

KATHLEEN M. GAZERRO  
 Notary Public, State of New York  
 No. 01GA472112B  
 Qualified in Suffolk County  
 My Commission expires 4/30/06 *up*

*Kathleen M. Gazerro*  
 \_\_\_\_\_  
 Notary Public

[NOTARY SEAL]

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THIS RIDER CONTAINS PROVISIONS APPLICABLE TO THE LAWS AND CUSTOMS OF THE STATE OF ILLINOIS WHICH, TO THE EXTENT PROVIDED HEREIN, MODIFY, SUPPLEMENT AND SUPERSEDE THE MORTGAGE MODIFICATION TO WHICH THIS RIDER IS ANNEXED. IF AND TO THE EXTENT THAT ANY OF THE PROVISIONS OF THIS RIDER CONFLICT WITH, OR ARE OTHERWISE INCONSISTENT WITH, ANY OF THE PROVISIONS OF THE WITHIN MORTGAGE MODIFICATION, WHETHER OR NOT SUCH INCONSISTENCY IS EXPRESSLY NOTED IN THIS RIDER, THE PROVISIONS OF THIS RIDER SHALL PREVAIL.

1. Definition of Terms. Except as herein otherwise expressly provided, all capitalized terms used herein shall have the same definition as in the Existing Mortgage. In case of any conflict or inconsistency between any provision of this Rider and the Credit Agreement, the provisions of the Credit Agreement shall control.
2. The Mortgage constitutes a financing statement filed as a fixture filing in the Official Records of the County in which the Real Property is located under the Illinois Uniform Commercial Code with respect to any Real Property which now or hereafter may become fixtures.

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## SCHEDULE "A"

Lease Agreement dated February 1, 1977 between Frankwood Management Company, as landlord, and Frank's Nursery Sales, Inc., predecessor in interest to Frank's Nursery & Crafts, Inc., a Michigan corporation, as tenant, a memorandum of which is dated February 1, 1977 and recorded February 8, 1978 as document 24317328.

The Lease encumbers the real property more particularly described as follows:

Lot 1 in Frank's Nursery Subdivision, being a Subdivision of part of the East 1/2 of the Northwest Quarter of Section 16, Township 41 North, Range 10 East of the Third Principal Meridian, in the Village of Schaumburg, Cook County, Illinois, excepting that part thereof described as follows:

Beginning at the Northeast corner of said Lot 1; thence Southward along the Easterly line of said Lot 1, S 2° 53' 41" W, a distance of 140.26 feet; thence S 89° 25' 31" W, a distance of 140.00 feet; thence N 00° 34' 29" W, a distance of 140.00 feet to a point on the Northerly line of said Lot 1, thence Eastward along the said Northerly line, N 89° 25' 31" E, a distance of 148.49 feet to the point of beginning, in Cook County Illinois.

Also known as Lot 2 in Frank's Nursery Resubdivision in Schaumburg, being a resubdivision of Lot 1 in Frank's Nursery Subdivision, being a subdivision of part of the East 1/2 of the Northwest 1/4 of Section 16, Township 41 North, Range 10, East of the Third Principal Meridian, in Cook County, Illinois.