

UNOFFICIAL COPY



Doc#: 0421812119
Eugene "Gene" Moore Fee: \$44.50
Cook County Recorder of Deeds
Date: 08/05/2004 02:28 PM Pg: 1 of 11

Prepared by:
Michael B. Benner, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd 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

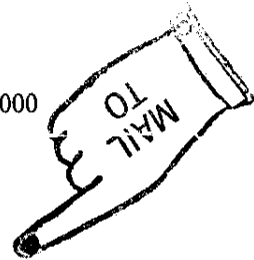
FRANK'S NURSERY & CRAFTS, INC.,
Mortgagor/Trustor/Grantor/Debtor
-TO-
KIMCO CAPITAL CORP.,
Mortgagee/Beneficiary/Grantee/Secured Party

Store No.: 87

Address:
3720 95th Street
Evergreen Park, IL 60605

Tax Parcel ID No.: 24-02-330-019-0000

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



*Syes
PM
S no
m yes
fr*

UNOFFICIAL COPY

**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 obligation.

Store No.: 87

Address:
3720 95th Street
Evergreen Park, IL 60605

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. 20613484, 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. 30229025, 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").

UNOFFICIAL COPY

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:

UNOFFICIAL COPY

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.

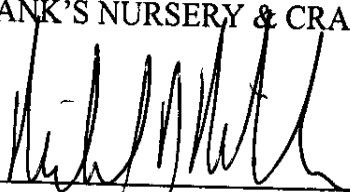
[Signature page follows on the next page.]

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 & Katz
51 West 52nd 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 SEAL]
NOTARY PUBLIC IN AND FOR THE STATE OF MICHIGAN
MY COMMISSION EXPIRES NOV 6, 2006
NOTING 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 & Katz
51 West 52nd Street
New York, New York 10019-6150
(212) 403-1253

UNOFFICIAL COPY

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 14 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. 01GA4721128
Qualified in Suffolk County
My Commission Expires 4/30/06

Notary Public

[NOTARY SEAL]

UNOFFICIAL COPY

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.

UNOFFICIAL COPY

SCHEDULE "A"

LOT 19 IN TUINSTRA'S GARDEN SUBDIVISION OF THE EAST 1/2 OF THE SOUTHWEST 1/4 OF
THE SOUTH EAST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 2, TOWNSHIP 37 NORTH, RANGE 13
EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS

Property of Cook County Clerk's Office