

UNOFFICIAL COPY

3 Documents (GLG)
Contract No. L-500101-C5 (LTA)

0 3 5 9 9

ORIGINAL INSTRUMENT
TARRANTS OFFICE COPY

3599429

MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

NOTE IDENTIFIED

BORROWER: JERRY H. BIEDERMAN,
as Trustee under a Trust Agreement dated as of
August 1, 1986 and known as Trust Number 11

LENDER: MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
a Massachusetts corporation

THIS INDENTURE IS EFFECTIVE AND SHALL BE EFFECTIVE AS A FINANCING STATEMENT FILED AS A FIXTURE FILING WITH RESPECT TO ALL GOODS WHICH ARE OR ARE TO BECOME FIXTURES INCLUDED WITHIN THE PROPERTY AND IS TO BE FILED FOR RECORD IN THE REAL ESTATE RECORDS OF COOK COUNTY, ILLINOIS. THE MAILING ADDRESS OF LENDER AND THE ADDRESS OF BORROWER ARE SET FORTH WITHIN. A PHOTOGRAPHIC OR OTHER REPRODUCTION OF THIS INDENTURE OR ANY FINANCING STATEMENT RELATING TO THIS INDENTURE SHALL BE SUFFICIENT AS A FINANCING STATEMENT.

3599429

This instrument prepared by
(and return after recording to):

James A. Winkler
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603

Street Address of Property:

Golf Plaza II Shopping Center
Southwest corner of Golf and
Elmhurst Roads
Mount Prospect, Illinois

Property Tax Index No.:

08-14-204-021-0000
08-14-204-022-0000
08-14-204-023-0000
08-14-204-024-0000
Vol. 049

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

CONTENTS

1. GRANTING CLAUSES
2. REPRESENTATIONS AND COVENANTS
 - 2.1 Title to Mortgaged Premises
 - 2.2 Due Organization, Authority
 - 2.3 Execution, Delivery and Effect of Loan Documents
 - 2.4 Other Obligations
 - 2.5 Licenses and Permits
 - 2.6 Compliance with Laws
 - 2.7 Construction and Completion of Improvements
 - 2.8 Independence of the Mortgaged Premises
3. BORROWER'S COVENANTS OF PAYMENT AND OPERATION
 - 3.1 Performance of Covenants in Loan Documents
 - 3.2 Payment of Taxes and Tax Deposits
 - 3.3 Insurance
 - 3.4 Maintenance, Repairs, Restoration, Compliance with Laws
 - 3.5 Sale, Assignment, Further Encumbrance and Other Liens and Charges
 - 3.6 Impairment of Security
 - 3.7 Lease Conditions and Assignment of Leases and Rents
 - 3.8 Books and Records; Financial Statements
 - 3.9 Management and Use of Premises; Licenses; Compliance with Laws; Prohibition of Certain Liens
 - 3.10 Taxes on Lender
 - 3.11 Use of Loan Proceeds
 - 3.12 Evasion of Prepayment Premium
 - 3.13 Recorded Instruments
 - 3.14 Indemnity; Payment of Charges
 - 3.15 Estoppel Certificates
 - 3.16 Additional Acts, Etc.
 - 3.17 Subordination of Property Manager's Lien
 - 3.18 Lost Note
4. CONDEMNATION AND EMINENT DOMAIN
5. SECURITY AGREEMENT; FINANCING STATEMENT
 - 5.1 Security Agreement
 - 5.2 Financing Statement

3599429

6. EVENTS OF DEFAULT; REMEDIES

- 6.1 Defaults
- 6.2 Remedies
- 6.3 Sums Received by Lender
- 6.4 Fees and Expenses; Distribution of Foreclosure Sale Proceeds
- 6.5 Lender's Exercise of Rights
- 6.6 Interest on Advances
- 6.7 Valuation and Appraisement
- 6.8 Release and Waiver of Homestead and Equity of Redemption

7. GENERAL

- 7.1 Modification
- 7.2 Notices
- 7.3 Definition of Terms
- 7.4 Releases
- 7.5 Successors and Assigns
- 7.6 No Merger
- 7.7 Assignment by Lender
- 7.8 Applicable Law
- 7.9 Severability
- 7.10 No Partnership
- 7.11 Subrogation
- 7.12 Headings

8. POSSESSION AND DEFEASANCE

- 8.1 Possession
- 8.2 Defeasance

9. LIMITATIONS ON LIABILITY

- 9.1 Limitation on Liability
- 9.2 Limitation on Liability of Land Trustee

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

THIS INDENTURE, made this 12th day of March, 1987, by and between JERRY H. BIEDERMAN, of 208 South LaSalle Street, Chicago, Illinois 60604, not personally, but as Trustee under a Trust Agreement dated as of August 1, 1986 and known as Trust Number 11 ("Borrower"), and MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation, having its principal office and place of business at 1295 State Street, Springfield, Massachusetts 01111 ("Lender");

WITNESSETH:

A. Borrower has executed and delivered to Lender a Promissory Note in the principal amount of SEVEN MILLION EIGHT HUNDRED FIFTY THOUSAND DOLLARS (\$7,850,000.00) (which note, together with all notes issued and accepted in substitution or exchange therefor, and as any of the foregoing may from time to time be modified or extended, are hereinafter sometimes collectively called the "Note"), which Note provides, among other things, for final payment of principal and interest under the Note, if not sooner paid or payable as provided therein, to be due on March 1, 2002, the Note by this reference thereto being incorporated herein; and

B. Lender is desirous of securing the prompt payment of the Note together with interest and prepayment fee, if any, thereon in accordance with the terms of the Note, and any additional indebtedness accruing to Lender on account of any future payments, advances or expenditures made by Lender pursuant to the Note or this mortgage (all hereinafter sometimes collectively referred to as the "indebtedness secured hereby");

NOW, THEREFORE, Borrower, to secure payment of the indebtedness secured hereby and the performance of the covenants and agreements herein contained to be performed by Borrower, and for good and valuable consideration in hand paid, the receipt and sufficiency whereof are hereby acknowledged, hereby agrees and covenants that:

1. GRANTING CLAUSES.

Borrower hereby irrevocably and absolutely does by these presents grant, mortgage, convey, transfer, assign, bargain, and sell to Lender, its successors and assigns, with all powers of sale and statutory rights under the laws of the State of Illinois, all of Borrower's estate, right, title and interest in, to and under, and grants to Lender a security interest in, the following:

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

(a) The real property described in Exhibit A attached hereto and incorporated herein by this reference, together with all buildings, structures and improvements now or hereafter erected thereupon and the fixtures and personal property hereinafter described (which real property, buildings, structures, improvements, fixtures and personal property is hereinafter sometimes referred to as "the Mortgaged Premises"); and

(b) All and singular the easements, rights-of-way, licenses, rights of use or occupancy, privileges, tenements, appendages, hereditaments and appurtenances and other rights and privileges thereunto belonging or in any wise appertaining, whether now or in the future, and all the rents, issues and profits therefrom;

(c) All right, title and interest, if any, of Borrower, in and to the land lying within any street, alley, avenue, roadway or right-of-way open or proposed or hereafter vacated in front of or adjoining said Mortgaged Premises; and all right, title and interest, if any, of Borrower in and to any strips and gores adjoining said Mortgaged Premises;

(d) All machinery, apparatus, equipment, goods, systems, building materials, carpeting, furnishings, fixtures and property of every kind and nature whatsoever, now or hereafter located in or upon or affixed to the said Mortgaged Premises, or any part thereof, or used or usable in connection with any construction on or any present or future operation of said Mortgaged Premises, now owned or hereafter acquired by Borrower, including, but without limitation of the generality of the foregoing, all items described in Exhibit B attached hereto; all heating, lighting, refrigerating, ventilating, air-conditioning, air-cooling, fire extinguishing, plumbing, cleaning, communications and power equipment, systems and apparatus; and all elevators, switchboards, motors, pumps, screens, awnings, floor coverings, cabinets, partitions, conduits, ducts and compressors, and also including any of such property stored on said Mortgaged Premises or in warehouses and intended to be used in connection with or incorporated into said Mortgaged Premises; it being understood and agreed that all such machinery, equipment, apparatus, goods, systems, fixtures, and property are a part of the said Mortgaged Premises and are declared to be a portion of the security for the indebtedness secured hereby (whether in single units or centrally controlled, and whether physically attached to said real estate or not), excluding, however, personal property owned by tenants of the Mortgaged Premises; and

(e) Any and all awards, payments or insurance proceeds, including interest thereon, and the right to receive the same, which may be paid or payable with respect to the Mortgaged Premises as a result of (1) the exercise of the right of eminent domain, or (2) the alteration of the grade of any street, or (3)

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

any fire, casualty, accident, damage or other injury to or decrease in the value of the Mortgaged Premises, to the extent of all amounts which may be secured by this mortgage at the date of receipt of any such award or payment by Lender, and of the reasonable counsel fees, costs and disbursements incurred by Lender in connection with the collection of such award or payment. Borrower agrees to execute and deliver, from time to time, such further instruments as may be requested by Lender to confirm such assignment to Lender of any such award or payment.

TO HAVE AND TO HOLD the Mortgaged Premises with all rights, privileges and appurtenances thereunto belonging, and all rents, issues and profits therefrom, unto Lender, its successors and assigns, forever, for the uses and purposes herein expressed.

THIS MORTGAGE IS GIVEN TO SECURE:

- (1) Payment of the indebtedness secured hereby;
- (2) Payment of such additional sums with interest thereon which may hereafter be loaned to Borrower by Lender or advanced under the Loan Documents (hereinafter defined), even though the aggregate amount outstanding at any time may exceed the original principal balance stated herein and in the Note (provided, however, that the indebtedness secured hereby shall in no event exceed an amount equal to two hundred percent (200%) of the face amount of the Note); and
- (3) The due, prompt and complete performance of each and every of the covenants, conditions, and agreements contained in this mortgage, the Note, and any other agreement, document, or instrument to which reference is expressly made in this mortgage or which evidences or secures the indebtedness evidenced by the Note (this mortgage, the Note, and all such other instruments are hereinafter sometimes referred to as the "Loan Documents").

2. REPRESENTATIONS AND COVENANTS.

It is a condition of this indenture that the representations and covenants made in this Section 2 be true, correct and complete in all material respects upon the execution and delivery of the Loan Documents, and Borrower hereby represents and covenants to Lender that:

2.1 Title to Mortgaged Premises. As of the date of delivery of this mortgage Borrower is well and lawfully seized of the Mortgaged Premises as a good and indefeasible estate in fee simple free and clear of all liens, encumbrances, easements, covenants, conditions, and restrictions (including, with respect to the fixtures and personal property referred to herein, security interests, conditional sales contracts, and anything of a similar nature except those made or entered into by a tenant of

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

the Mortgaged Premises), subject, however, to the matters set forth in Exhibit C attached hereto ("the Permitted Exceptions"), and has good and full power and lawful authority to grant, mortgage, convey and grant a security interest in the same in the manner herein provided; and that Borrower will make any further assurances of title that Lender may require and will defend the Mortgaged Premises against all claims and demands whatsoever.

2.2 Due Organization, Authority. Borrower has power adequate to carry on his business as presently conducted, to own the Mortgaged Premises, to make and enter into the Loan Documents and to carry out the transactions contemplated therein.

2.3 Execution, Delivery and Effect of Loan Documents. The Loan Documents have each been duly authorized, executed and delivered by Borrower, and each is a legal, valid and binding obligation of Borrower, subject to the limitation on personal liability stated in Section 9 hereof, enforceable in accordance with its terms, except to the extent that the enforceability thereof may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights generally and subject to the exercise of judicial discretion in accordance with general principles of equity (regardless whether enforcement is sought in a proceeding in equity or at law).

2.4 Other Obligations. The execution and performance of the Loan Documents and all agreements and covenants therein and the consummation of the transactions contemplated thereby will not result in any breach of, or constitute a default under, any contract, agreement, document or other instrument to which Borrower is a party or by which Borrower may be bound or affected, and do not and will not violate or contravene any law to which Borrower is subject; nor do any such instruments impose or contemplate any obligations which are or will be inconsistent with the Loan Documents. No approval by, authorization of, or filing with any federal, state or municipal or other governmental commission, board or agency or other governmental authority is necessary in connection with the authorization, execution and delivery of the Loan Documents.

2.5 Licenses and Permits. Except as hereinafter provided, there are presently, to the best of Borrower's knowledge, in full force and effect all certificates, licenses, and permits (herein collectively "permits") required by applicable laws, ordinances, codes, and regulations for the operation of the Mortgaged Premises as a retail shopping center, and Borrower agrees that such permits shall be available for Lender's inspection at all reasonable times and that copies thereof shall be furnished to Lender upon request. In the event that Home Savings of America, F.A. ("Home Savings") has not obtained all permits and approvals required in connection with construction of improvements at their lease site, Borrower will enforce provisions of the Home Savings

3599129

lease which require such tenant to obtain such permits and approvals. Borrower agrees to keep all such permits, now or hereafter required, in full force and effect and to obtain renewals thereof before expiration. Borrower further agrees that it shall constitute an Event of Default (as hereinafter defined) hereunder if Borrower at any time shall fail to keep in full force and effect all necessary permits and licenses as described above.

2.6 Compliance with Laws.

(a) To the best of Borrower's knowledge, the improvements forming part of the Mortgaged Premises and the use of the Mortgaged Premises as a retail shopping center comply with all applicable laws and regulations, including without limitation environmental protection, building and zoning laws and ordinances and set-back and parking requirements; and it shall constitute an Event of Default hereunder, entitling Lender to declare the Note secured hereby immediately due and payable, if the improvements forming part of the Mortgaged Premises or the use of the Mortgaged Premises are at any time determined not to be in compliance with all applicable laws and regulations and Borrower fails to commence and to satisfactorily complete corrective action with respect to such lack of compliance within the period of time permitted for such correction under applicable laws.

(b) To the best of Borrower's knowledge, the environmental and ecological condition of the Mortgaged Premises is not in violation of any law, ordinance, rule or regulation applicable thereto, including, without limitation, the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Illinois Environmental Protection Act, the Federal Resource Conservation and Recovery Act, the Federal Toxic Substance Control Act, the Federal Clean Air Act, the Federal Water Pollution Control Act, or rules and regulations of the Federal Environmental Protection Agency, the Illinois Environmental Protection Agency, the Illinois Pollution Control Board, or any other agency or governmental board or entity having jurisdiction over the Mortgaged Premises; and the soil, surface, water and ground water of or on the Mortgaged Premises are free from any solid waste, toxic or hazardous substance or contaminant. Neither Borrower nor Borrower's beneficiaries have received notice of violation of applicable laws regarding such matters, nor have they, or either of them, committed or permitted any activity in violation of the foregoing representation.

(c) To the best of Borrower's knowledge, the Mortgaged Premises has not been used for the treatment, storage or disposal of any hazardous waste material. Neither Borrower nor Borrower's beneficiaries have received notice of violation of applicable laws regarding such matters, nor have they, or either of them,

3599129

committed or permitted any activity in violation of the foregoing representation.

(d) For the purposes of this paragraph, either of the following shall be considered a determination of non-compliance with laws and regulations:

(i) Determination by any governmental authority of such non-compliance, if the effect of such determination is not stayed within thirty (30) days by the commencement of an appropriate administrative or judicial appeal; or

(ii) A judgment by a court of competent jurisdiction of such non-compliance, if the effect of such judgment is not stayed within thirty (30) days by the commencement of an appropriate judicial appeal.

(e) Borrower's Beneficiaries shall indemnify and hold harmless Lender from and against any and all costs and expenses incurred by Lender with respect to clean-up costs and litigation expenses assessed under any law or regulation referred to in (b) above.

2.7 Construction and Completion of Improvements. To the best of Borrower's knowledge, the presently existing improvements located on the Mortgaged Premises have been completed and installed in a good and workmanlike manner, in compliance with applicable laws and ordinances and with the plans and specifications therefor previously delivered to Lender. Borrower agrees to enforce all provisions of the Home Savings lease which require improvements constructed by Home Savings to be so constructed. The improvements are served by electric, gas, sewer, water, telephone and other utilities required for the present and contemplated uses and operation thereof. Any and all streets and driveways necessary for access to the Mortgaged Premises, and other on-site and off-site improvements necessary for the present and contemplated uses and operation of the Mortgaged Premises and for service by utilities have been completed, are serviceable and have been accepted or approved by appropriate governmental bodies.

2.8 Independence of the Mortgaged Premises. Borrower has not by act or omission permitted any building or other improvements on property not covered by this mortgage to rely on the Mortgaged Premises or any part thereof or any interest therein to fulfill any municipal or governmental requirement for the existence of such property, building or improvement; and no improvements on the Mortgaged Premises shall rely on any property not covered by this mortgage or any interest therein to fulfill any governmental or municipal requirement. Borrower has not by act or omission impaired the integrity of the Mortgaged Premises as a

3599129

single, separate parcel for zoning purposes separate and apart from all other property.

3. BORROWER'S COVENANTS OF PAYMENT AND OPERATION.

3.1 Performance of Covenants in Loan Documents. Borrower shall fully perform, observe, and comply with all agreements, covenants, conditions, and provisions hereof and of the Note and of the other Loan Documents and shall duly and punctually pay to Lender the sum of money expressed in the Note with interest thereon and all other sums required to be paid by Borrower pursuant to the provisions of this mortgage, all without any deductions or credits for taxes or other similar charges paid by Borrower.

3.2 Payment of Taxes and Tax Deposits.

(1) Payment of Taxes. Borrower shall pay or cause to be paid all taxes, assessments, and other similar charges of whatever nature, ordinary and extraordinary, and to whomever assessed which are now or may hereafter be assessed or levied against the Mortgaged Premises or any portion thereof or interest therein or which become payable with respect thereto or with respect to the occupancy, use or possession thereof, before the same become delinquent, and shall deliver to Lender within thirty (30) days of the payment thereof receipts of the proper officers for such payment. In default thereof, Lender may, but shall not be obligated to, pay such taxes, assessments, and other similar charges, including any penalties or interest thereon (without inquiring into the validity or invalidity of such taxes, assessments or other similar charges and of which payment, amount and validity thereof, the receipt of the proper officer shall be conclusive evidence), and any amount so paid by Lender shall become immediately due and payable by Borrower with interest as described in Section 6.6 hereof until paid and shall be secured by this mortgage. Borrower shall have the right (i) that to contest the amount or validity of any such tax, assessment or other similar charge by appropriate legal proceedings, or (ii) to apply for a refund of any such taxes or assessments; provided, however, that Borrower shall at all times make all payments required to prevent such taxes and assessments from being delinquent, and to prevent the sale of the Mortgaged Premises to satisfy the lien of such taxes and assessments.

(2) Tax Escrow Payments.

(a) Borrower shall pay to Lender, concurrently with and in addition to each monthly installment payable on the Note, such amount as Lender from time to time estimates will be required to maintain thereafter a balance from which to pay taxes, assessments and other governmental liens or charges against the Mortgaged Premises at least thirty (30) days prior to the date on which the same become delinquent or past due. Borrower shall

3599129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

procure and deliver to Lender statements for such charges at least ten (10) days prior to the due date. Payments for such purposes may be made by Lender at its discretion, even though subsequent owners of the Mortgaged premises may benefit thereby. Lender shall not be a trustee of such funds, and such funds received pursuant to the foregoing may be commingled with the general funds of Lender, and no interest shall be payable in respect thereof. Upon demand by Lender, Borrower shall deliver and pay over to Lender from time to time such additional sums or such additional security as are necessary to make up any deficiency in the amount necessary to enable Lender to fully pay any of the items hereinabove mentioned as they become payable. If any Event of Default occurs under the terms of this mortgage, any part or all of the balance of said amounts received by Lender pursuant to the foregoing may be applied to any part of the indebtedness secured hereby in the discretion of Lender and in refunding any part of said amounts Lender may deal with whomever is represented to be the owner of the Mortgaged Premises at that time. The obligations of Borrower pursuant to covenants contained in this mortgage relating to taxes and assessments shall not be affected by this subsection (2) or payments made pursuant hereto, except to the extent that said obligations have actually been satisfied by compliance with this subparagraph.

(b) Notwithstanding the provisions of (a) above Lender shall not require Borrower to make monthly deposits for taxes and assessments as long as there is strict compliance with the following requirements:

- (i) No Event of Default by Borrower shall have occurred under this Mortgage, the Note secured hereby, or any other Loan Documents which has not been cured in a manner satisfactory to Lender;
- (ii) No sale, transfer, conveyance or assignment of Borrower's interest in the Mortgaged Premises or of the beneficial interest in Borrower shall have occurred, except as permitted under Section 3.5(3) hereof;
- (iii) All taxes and assessments shall be paid when due and before penalty attaches; and
- (iv) Borrower shall promptly provide to Lender satisfactory evidence of timely payment of all taxes and assessments.

3.3 Insurance.

(1) Required Coverage. Borrower shall procure, deliver to, and maintain for the benefit of Lender as an additional insured to the extent of the balance of the indebtedness secured hereby during the continuance of this mortgage and until the same is fully satisfied and released, the following insurance policies:

3599129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

(a) "All-Risk" casualty insurance policies insuring the buildings, structures, improvements and fixtures now existing or hereafter constructed upon the Mortgaged Premises against all loss or damage occasioned by casualties which, under good insurance practice, are commonly insured against for buildings, structures, and improvements of like character in Cook County, Illinois. The amount of such insurance shall be not less than one hundred percent (100%) of the full replacement cost of such buildings, structures and improvements, without deduction for depreciation, as determined by Lender from time to time, and in any event not less than \$7,850,000.00;

(b) Rent Insurance against loss arising out of the perils insured against in the policy or policies referred to in subparagraph (1) above in an amount equal to not less than six (6) months' gross revenue from the operation and rental of all improvements now or hereafter forming part of the Mortgaged Premises based upon one hundred percent (100%) occupancy of such improvements, less any allocable charges and expenses which do not continue during the period of restoration;

(c) Insurance covering pressure vessels, pressure piping and machinery, if any, and all major components of any centralized heating or air-conditioning systems located in the buildings and improvements forming part of the Mortgaged Premises, in an amount satisfactory to Lender, such policies also to insure against physical damage to such buildings and improvements arising out of an accident covered thereunder;

(d) Insurance on the items described in Section 5 hereof and in Exhibit B attached hereto and any replacements and substitutions therefor (hereinafter sometimes collectively referred to as "the Equipment") against loss or damage by fire and other hazards presently included in so-called "extended coverage" policies and against vandalism and malicious mischief in an amount satisfactory to Lender, but in any event in such amount as is necessary to preclude the Borrower from being a co-insurer;

(e) Comprehensive general public liability and property damage coverage with a broad form coverage endorsement and a combined single limit of at least \$1,000,000.00; and

(f) Such other insurance on the Mortgaged Premises, the buildings and improvements forming a part thereof and the Equipment (and any replacements or substitutions therefor) and in such amounts as may from time to time be reasonably required by the Lender against other insurable hazards and perils which at the time are commonly insured against for buildings, structures, improvements and equipment of like character in Cook County, Illinois, due regard being given to the height and type of the

3599429

buildings and improvements, and their construction, location, use and occupancy.

(2) Form of Policies. All policies of insurance required hereunder shall be in such form, issued by such companies, and in such amounts as may be acceptable to Lender, shall be kept on deposit with Lender, and shall contain a non-contributory standard mortgagee clause acceptable to Lender, with loss payable to Lender (as its interest may appear), a lender's loss payable endorsement, a waiver of subrogation endorsement, and a replacement cost endorsement or equivalent clauses or endorsements acceptable to Lender. In the event there are blanket policies in effect with respect to the Mortgaged Premises, Borrower shall deliver to Lender a copy of any such blanket policy certified as true and complete by the insurer, together with an original certificate of such coverage issued by the insurer, stating the amount of coverage in effect with respect to the Mortgaged Premises. Borrower shall promptly pay when due any premiums on any policy or policies of insurance required hereunder, and will deliver to Lender renewals of such policy or policies at least fifteen (15) days prior to the expiration dates thereof, said policies and renewals to be marked "paid" by the issuing company or agent. Upon Borrower's failure to comply with the requirements of this Section 3.3, Lender may, in its discretion, procure any insurance required hereunder in the amounts required pursuant to the terms and provisions of this instrument and pay the premiums due therefor, and any amounts so paid by Lender shall become immediately due and payable by Borrower with interest as described in Section 6.6 hereof, and shall be secured by this mortgage. The delivery to Lender of any policy of insurance hereunder or renewals thereof shall constitute an assignment to Lender of all unearned premiums thereon as further security for the payment of the indebtedness secured hereby. In the event any foreclosure action or other proceeding hereunder is successfully maintained by Lender, all right, title, and interest of Borrower in or to any policy or policies of insurance then in force shall vest in Lender insofar as such policy or policies apply to the Mortgaged Premises.

(3) Application of Loss Proceeds. In the event of any loss or damage, Borrower shall give immediate notice thereof to Lender, and Lender may make proof of such loss or damage, if the same is not promptly made by Borrower or if the Lender deems it desirable to do so. In the event of such loss or damage: (1) all proceeds of insurance shall be payable to Lender to the extent of the full amount of the principal and interest then remaining unpaid secured hereby, (2) any affected insurance company is authorized and directed to make payment thereof directly to Lender to the extent of the full amount of the principal and interest then remaining unpaid secured hereby and (3) Lender is authorized and empowered to settle, adjust, or compromise any claims for loss, damage, or destruction under any

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

policy or policies of insurance. Borrower agrees to execute upon demand by Lender all receipts, vouchers, releases and other instruments which may be necessary or desirable in aid of the aforementioned authorizations. All such insurance proceeds may, at the sole discretion of Lender, be (a) applied to the restoration, repair, replacement, or rebuilding of the Mortgaged Premises, or (b) applied to the payment of the last maturing installment or installments of the indebtedness secured hereby (whether or not then due and payable); or (c) paid over to the Borrower, on such terms and conditions as the Lender in its discretion may specify, to be used to repair the buildings, structures, improvements or Equipment, or to build or install new ones in their place, or for any other purpose or object satisfactory to the Lender, without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. The Lender shall not be held responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure. In the event that such insurance proceeds are made available for repair, restoration or rebuilding of the Mortgaged Premises, any portion of such proceeds not used in such repair, restoration, rebuilding or building shall be applied to the payment of the indebtedness secured hereby, as provided above. In the event such proceeds of insurance are applied to the payment of the indebtedness secured hereby as provided in (b) above, no prepayment premium as provided in the Note shall be payable.

(4) Insurance Escrow Payments.

(a) Borrower shall pay to Lender, to the extent reasonably requested by Lender, on dates on which interest is payable, such amounts as Lender from time to time estimates to be necessary to create and maintain a reserve fund from which to pay premiums for insurance as herein covenanted to be furnished by Borrower. Borrower shall procure and deliver to Lender in advance statements for such charges. Payments for such purposes may be made by the Lender at its discretion, even though subsequent owners of the Mortgaged Premises may benefit thereby. Lender shall not be a trustee of such funds, and such funds received pursuant to the foregoing may be commingled with the general funds of Lender, and no interest shall be payable in respect thereof. If any Event of Default occurs under the terms of this mortgage, any part or all of the balance of said amounts received by Lender pursuant to this subsection (4) may be applied to any part of the indebtedness secured hereby in the discretion of Lender and in refunding any part of said amounts Lender may deal with whomever is represented to be the owner of the Mortgaged Premises at that time. The obligations of Borrower pursuant to covenants contained in this mortgage relating to insurance shall not be affected by this subsection (4) or payments made pursuant hereto, except to the extent that said obligations have actually been satisfied by compliance with this subsection.

3599129

(b) Notwithstanding the provisions of (a) above Lender shall not require Borrower to make monthly deposits for insurance premiums as long as there is strict compliance with the following requirements:

- (i) No Event of Default by Borrower shall have occurred under this Mortgage, the Note secured thereby, or any other Loan Document which has not been cured in a manner satisfactory to Lender;
- (ii) No sale, transfer, conveyance or assignment of Borrower's interest in the Mortgaged Premises or of the beneficial interest in Borrower shall have occurred, except as permitted under Section 3.5(3) hereof;
- (iii) All insurance premiums shall be paid when due; and
- (iv) Borrower shall promptly provide to Lender satisfactory evidence of timely payment of all insurance premiums.

3.4 Maintenance, Repairs, Restoration, Compliance with Laws.

(1) Maintenance and Repair. Borrower shall keep and maintain the Mortgaged Premises in good order, condition and repair and will make, regardless of the availability of insurance proceeds, as and when the same shall become necessary, all structural and non-structural, exterior and interior, ordinary and extraordinary, foreseen and unforeseen, repairs, restorations and maintenance, including any replacements, necessary or appropriate including, without limitation, repairs of damage or destruction caused by fire or other casualty or as the result of any taking under the power of eminent domain. Borrower shall give Lender immediate written notice of any damage or destruction to the Mortgaged Premises caused by fire or other casualty. Borrower will suffer or commit no waste to the Mortgaged Premises or any portion thereof. All repairs and maintenance required of Borrower must restore the improvements being repaired to their condition prior to the time the need for repair and restoration arose and shall in all respects be in compliance with all matters and things provided in subparagraph (2) of this Section 3.4 and with respect to any such proposed action, Borrower shall comply with all reasonable requirements which may be imposed by Lender, including, without limitation, the furnishing of additional title insurance against liens, architectural inspections and certificates, and the furnishing of security guaranteeing the completion of all such work. Except for the construction being undertaken by Home Savings as permitted under its lease, Borrower shall not cause, suffer or permit the construction of any buildings, structures, or improvements on the Mortgaged Premises without the prior written consent of the Lender to the proposed

3599.129

action as well as to the plans and specifications relating thereto. None of the buildings, structures, or capital improvements now or hereafter erected or located on the Mortgaged Premises shall be removed, demolished or substantially or structurally altered in any material respect, without the prior written consent of Lender. Borrower shall, however, have the right, at any time and from time to time, to remove and dispose of any equipment or appliances which may have become obsolete or unfit for use or which is no longer useful in the operation of said Mortgaged Premises, provided Borrower promptly replaces any such equipment or appliances so removed or disposed of with other equipment and appliances, of at least equal usefulness and quality, subject to the lien and security interest of this mortgage and free of superior title, security interest, liens or claims. Lender and any person authorized by Lender shall have the right, but not the obligation, to enter upon and inspect the Mortgaged Premises at all reasonable times.

(2) Compliance with Laws. Borrower shall promptly comply or cause compliance with all restrictions affecting the Mortgaged Premises and with all present and future laws, ordinances, rules, regulations and other requirements, including, without limitation, pollution controls and environmental protection laws of all governmental authorities with respect to the Mortgaged Premises or any portion thereof or the use or occupation thereof. Borrower shall have the right to contest the validity or application of any such laws, ordinances, rules, regulations and other requirements by appropriate legal proceedings, so long as (i) such legal proceedings shall be prosecuted with diligence by Borrower and shall operate to prevent the taking of the Mortgaged Premises by any governmental authority, and (ii) Borrower shall have deposited with the Lender such security, with such subsequent additions thereto as may reasonably be deemed necessary by Lender, as is reasonably acceptable to Lender and is sufficient in Lender's reasonable opinion to pay any fines, penalties, charges and interest thereon which in Lender's opinion may be awarded or assessed or which may become a charge or lien upon the Mortgaged Premises.

3.5 Sale, Assignment, Further Encumbrance and Other Liens and Charges.

(1) Borrower. Borrower covenants and represents that, as of the date hereof, the sole beneficiaries of Borrower, with sole and complete power of direction over Borrower, are Salvatore J. DiMucci, Jr., Robert DiMucci and Anthony DiMucci (hereinafter sometimes referred to collectively as "Beneficiaries" and individually as a "Beneficiary"). Borrower has been appropriately directed to, and Borrower shall, give immediate written notice to Lender of the receipt by Borrower of any directions to convey, assign or transfer any legal or beneficial interest in the Mortgaged Premises or in Borrower to any third

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

party, or of any conveyance, assignment or transfer by operation of law of any legal or beneficial interest in the Mortgaged Premises or in Borrower, or of any contract, lease, option or mortgage to accomplish such conveyance, assignment or transfer.

(2) Prohibition on Transfer of Ownership and Beneficial Interests. Except as specifically permitted pursuant to the terms and conditions of paragraph (3) of this Section 3.5, Lender, at its option, shall have the unqualified right to accelerate the maturity of the Note causing the full principal balance and accrued interest under the Note, together with a prepayment premium as provided in the Note, to be immediately due and payable without notice to Borrower, in the event that:

(a) Borrower shall, without the prior written consent of Lender, sell, contract to sell on an installment basis, transfer, convey, or assign the legal title to, all or any portion of the Mortgaged Premises, whether by operation of law, voluntarily, or otherwise (it being understood and agreed that the leasing of portions of the Mortgaged Premises not exceeding 3,000 square feet in area on lease forms approved by Lender to bona fide tenants in the ordinary course of business as provided in Section 3.7 hereof shall not require the prior written consent of Lender); or

(b) Any Beneficiary shall, without the prior written consent of Lender, sell, contract to sell on an installment basis, transfer, convey, or assign his beneficial interest, or any part thereof, in Borrower (including a collateral assignment thereof), whether by operation of law, voluntarily, or otherwise.

(3) Permitted Transfers of Ownership and Beneficial Interests. Notwithstanding the provisions of paragraph (2) of this Section 3.5, Lender shall have no right to accelerate the maturity of the Note in the event of the following transfers:

(a) Any Beneficiary may transfer or assign all or a portion of his beneficial interest in Borrower to any other Beneficiary, or to the spouse or to a lineal descendent (including adopted children) of such Beneficiary, or to a trust established for the benefit of such Beneficiary or for the spouse or lineal descendants (including adopted children) of such Beneficiary; and

(b) The Beneficiaries collectively, or any Beneficiary individually, may transfer or assign all or a portion of the beneficial interest in Borrower of such Beneficiary or Beneficiaries to a corporation, not less than 51% of the stock of which is owned and controlled by such transferring Beneficiary or Beneficiaries, or to a partnership, the sole general partner(s) of which are such transferring Beneficiary or Beneficiaries.

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

The conveyance and assignments referred to in (a) and (b) above of this Section 3.5(3) may be made without the prior written consent of Lender, but only upon compliance with the following terms and conditions:

(i) No Event of Default which has not been fully cured shall have occurred prior to the time that such conveyance or assignment is made; and

(ii) Lender shall be furnished written notice of the proposed transfer or conveyance not less than thirty (30) days prior to the making of such assignment or conveyance, together with copies of the documentation which is to effect such transfer or assignment; and

(iii) Borrower shall reimburse Lender for all Lender's out-of-pocket expenses for legal fees and other costs which Lender may issue with respect to such conveyance or assignment.

(4) Prohibition on Further Encumbrances. Borrower covenants and agrees that this mortgage is and will be maintained as a valid first lien on the Mortgaged Premises, subject to the Permitted Exceptions, and that Borrower will not, without the prior written consent of Lender, directly or indirectly, create, suffer or permit to be created or filed against the Mortgaged Premises, or any portion thereof, or against the rents, issues and profits therefrom (including, without limitation, any lien arising with respect to the payment of taxes, assessments and other charges described in Section 3.2 above), or against the beneficial interest in Borrower, any mortgage lien, security interest, or other lien or encumbrance superior or inferior to the lien of this Mortgage, except (a) the lien of current general taxes duly levied and assessed but not yet due and payable and (b) a junior mortgage loan to be made by an institutional lender (the term "institutional lender" means a bank, insurance company, savings and loan association or pension fund regularly engaged in the business of making real estate mortgage loans), but only so long as (i) no Event of Default which has not been fully cured shall have occurred prior to the time such junior mortgage becomes a lien upon the Mortgaged Premises, (ii) Lender shall be furnished written notice of the proposed junior mortgage not less than thirty (30) days prior to the execution of such mortgage and the documents evidencing and securing the indebtedness secured thereby, such notice to include the amount and terms of the proposed junior mortgage loan and the identity of the lender, and Lender shall have approved such documents, the terms of the proposed junior loan and the identity of the junior lender, and (iii) the then current documentable net operating income from the Mortgaged Premises, as reasonably determined by Lender, on an annualized basis is equal to not less than 115% of the aggregate annual amount of all payments (whether paid or accrued) required to be made to Lender hereunder and to the holder of the junior mortgage pursuant to the terms and provisions of such junior

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

mortgage. In the event Lender consents to the making of such junior mortgage loan, there shall be no increase in the interest rate or other terms of the indebtedness secured hereby, and Section 3.5(5) hereof shall not be applicable. If Lender does not consent to the making of such junior mortgage loan, Lender shall advise Borrower in writing of Lender's specific objection(s) to such proposed junior mortgage loan, and such junior mortgage loan shall not be made unless Borrower shall, within thirty (30) days after receipt of Lender's written objections, cause the matters giving rise to such objections to be corrected or cured. If such objections are corrected or cured within such 30-day period, such junior mortgage loan may be made. As used herein, the term "documentable net operating income" means the aggregate rental income from the Mortgaged Premises, less the sum of all taxes and operating expenses payable with respect to the Mortgaged Premises. In the event Borrower shall suffer or permit, without the prior written consent of Lender, any other superior or junior lien to be attached to the Mortgaged Premises or to the beneficial interest in Borrower, the Lender, at its option, has the unqualified right to accelerate the maturity of the Note causing the full principal balance and accrued interest to be immediately due and payable without notice to Borrower, together with a prepayment premium as provided in the Note.

(5) Increase in Interest Rate as Condition of Consent. In connection with Lender giving its consent to any sale or transfer of the Mortgaged Premises other than as permitted under Section 3.5(3) or to a junior lien or encumbrance other than as expressly permitted under Section 3.5(4), Borrower agrees that Lender shall have the right to increase the interest rate called for in the Note to a rate not in excess of the rate then being offered by Lender on mortgage loans secured by real property similar to the Mortgaged Premises and to increase the amount of the monthly installment payments required to be made pursuant to the terms and provisions of the Note.

(6) Consent Not a Waiver. Any consent by Lender, or any waiver by Lender of an event of default as provided in Section 3.5(2), 3.5(3) or 3.5(4) hereof, shall not constitute a consent to, or a waiver of any right, remedy or power of the Lender upon, a subsequent event of default under Section 3.5(2), 3.5(3) or 3.5(4).

In connection with Lender giving its consent to any sale, assignment or other transfer referred to in Section 3.5(2), it is agreed by Borrower that such buyer, assignee or transferee of any interest referred to in Section 3.5(2) shall agree to perform all obligations hereunder of his or its seller, assignor or transferor.

(7) Mechanic's Liens; Utility Charges. Borrower shall keep and maintain the Mortgaged Premises free from all liens and en-

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

cumbrances, whether claimed by operation of law or by virtue of any expressed or implied contract, of persons supplying labor or materials, or both of them, entering into the construction, modification, repair, restoration or maintenance of the Mortgaged Premises or any portion thereof. If any such liens shall be filed against the Mortgaged Premises, Borrower agrees to discharge the same of record within thirty (30) days after Borrower has notice thereof, provided, however, Borrower shall have the right, at Borrower's sole expense, to contest the validity of any such liens asserted by persons allegedly supplying such labor and materials by appropriate legal proceedings so long as (i) such legal proceedings shall be diligently prosecuted and shall operate to prevent the collection of such liens so contested and the sale of the Mortgaged Premises or any part thereof to satisfy the same, and (ii) Borrower shall deposit such security as is reasonably satisfactory to Lender to be held by Lender or by an appropriate court or other governmental authority or title insurance company satisfactory to Lender until such contested liens are removed of record or are satisfied. If such security is in the form of cash and is held by Lender, it shall be held without payment of interest. Lender agrees, however, that such cash security may be held by a title insurance company satisfactory to Lender, and if held by such title insurance company may be invested for the benefit of Borrower in government securities or other investment proposed by Borrower and approved by Lender. Borrower shall pay promptly when due, all charges for utilities or services, including but without limitation, any charges for electricity, gas, water, and sewer, and all license fees, rents, and other charges for the use of vaults, canopies, or other appurtenances to the Mortgaged Premises. In the event Borrower fails to pay promptly all such charges described above, Lender may, but shall not be obligated to, pay same and any amounts so paid by Lender shall become immediately due and payable by Borrower with interest as described in Section 6.6 hereof and shall be secured by this mortgage. Borrower agrees that Lender is under no obligation to inquire into or establish the validity of any liens or claims of lien or interest before making advances to satisfy or settle all or any part of said claims.

(8) Legal Proceedings. If any action or proceeding shall be instituted to evict Borrower or recover possession of the Mortgaged Premises or any part thereof or for any other purposes affecting the Mortgaged Premises or this mortgage, Borrower will, immediately upon service thereof on or by Borrower, deliver to Lender a true copy of each petition, summons, complaint, notice of motion, order to show cause, and all other process, pleadings and papers, however designated, served in any such action or proceeding.

(9) Reasonableness of Provisions. With respect to the provisions of Section 3.5(2), 3.5(3) or 3.5(4), Borrower ack-

knowledges that, in determining whether or not to make the loan secured hereby, Lender has examined the credit-worthiness of Borrower and its beneficiary, found it acceptable and relied and continues to rely upon same as the means of repaying the loan. Lender also evaluated the background and experience of Borrower and its beneficiary in owning and operating property such as the Mortgaged Premises, found them acceptable and relied and continues to rely upon same as the means of maintaining the value of the Mortgaged Premises which is Lender's security for the loan. Borrower's beneficiary is well-experienced in borrowing money and owning and operating property such as the Mortgaged Premises, was ably represented by a licensed attorney at law in the negotiation and documentation of the loan secured hereby and bargained at arm's length and without duress of any kind for all of the terms and provisions of the loan, including this provision. Borrower recognizes that Lender is entitled to keep its loan portfolio at current interest rates by either making new loans at such rates or collecting assumption fees and/or increasing the interest rate of a loan, the security for which is purchased by a party other than the original Borrower. Borrower and Borrower's beneficiary further recognize that any secondary or junior financing placed upon the Mortgaged Premises (1) may divert funds which would otherwise be used to pay the Note, (2) could result in acceleration and foreclosure by any such junior lender which would force Lender to take measures and incur expenses to protect its security, (3) would detract from the value of the Mortgaged Premises should Lender come into possession thereof with the intention of selling same, and (4) would impair Lender's right to accept a deed in lieu of foreclosure, as a foreclosure by Lender would be necessary to clear title to the Mortgaged Premises.

In recognition of such considerations and for the purposes of (i) protecting Lender's security, both of the repayment by Borrower and value of the Mortgaged Premises, (ii) giving Lender the full benefit of its bargain and contract with Borrower, (iii) allowing Lender to raise the interest rate and/or collect assumption fees and (iv) keeping the Mortgaged Premises free of any subordinate financing liens, Borrower has agreed to the provisions of Sections 3.5(2), 3.5(3) and 3.5(4), and agrees that if such provisions may be deemed a restraint on alienation that they are reasonable restraints.

3.6 Impairment of Security.

(1) Without limitation of any other provisions hereof, Borrower shall not, except in connection with a junior financing permitted pursuant to Section 3.5(4) hereof, assign, in whole or in part, the rents, income or profits arising from the Mortgaged Premises without the prior written consent of Lender; any such assignment made without Lender's prior written consent shall be null and void and of no force and effect, and the making thereof

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

shall at the option of Lender constitute an Event of Default under this mortgage. Without limitation of the foregoing, Borrower will not without the prior written consent of Lender in any other manner impair the security of this mortgage for the payment of the indebtedness secured hereby, it being understood that any such impairment shall at the option of Lender also constitute an Event of Default hereunder.

(2) Lender shall have the power (i) to institute, become a party to, and maintain such suits and proceedings as it may deem expedient to prevent any impairment of the Mortgaged Premises by any acts which may be unlawful or in violation of this mortgage; (ii) to preserve or protect its interest in the Mortgaged Premises and in the rents, issues, profits and revenues arising therefrom; and (iii) to restrain the enforcement of or compliance with any legislation or other governmental enactment, regulation, rule, order or other requirement that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, regulation, rule, order or other requirement would impair the security hereunder or be prejudicial to the interest of the Lender, and all reasonable costs and expenses incurred by the Lender in connection therewith (including, without limitation, reasonable attorneys' fees) shall be paid by Borrower to Lender on demand, with interest at the rate specified in Section 6.6 hereof, and shall be additional indebtedness secured hereby. Lender's right to proceed as provided in part (iii) of this Section 3.6(2) shall be exercised only in the event that Borrower does not itself, in Lender's reasonable judgment, take prompt and effective action to so restrain such enforcement or compliance. Lender shall, however, at all times have the right to intervene in or participate in, or to initiate, any actions which Lender considers necessary to protect the value of its security in the Mortgaged Premises.

3.7 Lease Conditions and Assignment of Leases and Rents.

(1) Borrower shall observe and perform all covenants, conditions, and agreements in any lease now or hereafter affecting the Mortgaged Premises, or any portion thereof, on the part of Borrower to be observed and performed. If Borrower shall default in the performance of any of the terms, covenants, conditions, or obligations imposed upon Borrower by any such lease and such default would give the lessee the right to terminate or cancel said lease or make monetary advances and offset the same against future rentals, and such right in the Lessee to terminate or cancel or to make monetary advances or to offset against future rentals would, in Lender's reasonable judgment, materially affect the value of Lender's security, then, at the option of Lender, (1) the whole of the indebtedness secured by this mortgage, including all advances and payments by Lender hereunder, shall become immediately due and payable and collectible by foreclosure or otherwise without notice or demand,

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

and (2) Lender may take such action as Lender deems necessary or advisable to cure such default of Borrower.

(2) Borrower will upon request from Lender, from time to time (i) furnish to Lender a statement in such reasonable detail as Lender may request, certified by Borrower, of all leases and subleases relating to the Mortgaged Premises and (ii) furnish to Lender the original or duplicate original executed counterparts of any and all such leases and subleases.

(3) Borrower will not, without the prior written consent of Lender, lease all or any part of the said Mortgaged Premises except upon a form of lease approved by Lender, and no lease for more than three thousand (3,000) square feet of space in the Mortgaged Premises shall be entered into without Lender's prior approval.

(4) In order to further secure payment of the Note and the observance and performance of Borrower's obligations hereunder, Borrower hereby assigns, transfers, and sets over to Lender all of Borrower's right, title, and interest in, to, and under all of the leases now or hereafter affecting any part of the Mortgaged Premises and in and to all of the rents, issues, profits, and other benefits now or hereafter arising from any part of the Mortgaged Premises. Unless and until an Event of Default shall have occurred and shall have continued beyond applicable grace or cure periods, if any, contained herein, Borrower shall be entitled to collect the rents, issues, profits and other benefits of the Mortgaged Premises (except as otherwise provided in this mortgage) as and when they become payable. Borrower shall execute and deliver such further instruments evidencing the assignment of leases and rents, issues, profits and other benefits of the Mortgaged Premises as may reasonably be requested by Lender. Lender shall be liable to account only for rents, issues, profits, and other benefits of the Mortgaged Premises actually received by Lender pursuant to the provisions of this mortgage.

(5) In the event of default hereunder and subject to other applicable provisions of this Mortgage, Lender, at its option, is authorized to foreclose this mortgage subject to the rights of any lessees of the Mortgaged Premises, and the failure to make such lessees parties to any foreclosure proceedings and to foreclose such lessees' rights will not constitute, or be asserted by Borrower to constitute, a defense to any proceedings instituted by Lender to collect the sums secured hereby.

3.8 Books and Records; Financial Statements.

Borrower shall keep or cause to be kept proper books and records with respect to the Mortgaged Premises and operations thereof in accordance with generally accepted accounting princi-

3599429

ples consistently applied on a year-to-year basis. Lender shall have the right to examine and audit the books of account of Borrower and the statements furnished by Borrower pursuant to this Section 3.8 (which books, records and statements, and the data used as a basis for their preparation, shall be kept and preserved for at least 5 years, but in the event of any dispute, such records shall be retained until the final determination of such dispute) and to discuss the affairs, finances and accounts of Borrower and to be informed as to the same by Borrower's beneficiaries, all at such reasonable times and intervals (but not more than once in a calendar year, unless Lender has reasonable cause to think that such statements submitted by Borrower's beneficiaries are fraudulent) as Lender may desire. The cost of any such audit shall be paid by Lender unless the results of such audit result in a finding that Borrower's statements were in error to a degree of 3% or more. To facilitate such audit, Borrower shall keep and preserve its records within one hundred (100) miles of the Mortgaged Premises, and shall permit Lender or its representatives to make copies and excerpts therefrom and to do anything that may be reasonably necessary to enable Lender to make a full and complete audit with respect to the Mortgaged Premises and operations thereof. Borrower shall furnish to Lender within ninety (90) days following the end of each fiscal year of the Borrower a statement of annual income and expenses, in detail satisfactory to Lender, in connection with the Mortgaged Premises, together with a certified rent roll and other supporting data reasonably requested by Lender. Each such statement shall be reasonably detailed, and shall be certified by Salvatore J. DiMucci, Jr. Borrower's fiscal year currently ends on December 31 of each calendar year. Borrower shall promptly advise Lender of any change in Borrower's fiscal year.

3.9 Management and Use of Premises; Licenses; Compliance with Laws; Prohibition of Certain Liens.

(1) Use of Mortgaged Premises. Borrower shall at all times operate the Mortgaged Premises as a retail shopping center. Borrower represents and covenants that the shopping center located upon and forming part of the Mortgaged Premises is fully equipped in a manner appropriate for a retail shopping center, and Borrower shall, from time to time and as is necessary and appropriate, maintain, replace and repair such equipment as is necessary to operate a retail shopping center. Borrower shall not hereafter acquire any fixtures, equipment, furnishings or apparatus covered by this mortgage subject to any security interest or other charge or lien taking precedence over this mortgage without the prior written consent of Lender. At no time shall Borrower file a declaration of condominium affecting the Mortgaged Premises or take any other steps to convert the Mortgaged Premises or subject the Mortgaged Premises to the jurisdictions of the Illinois Condominium Act.

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

(2) Licenses and Compliance with Laws. Borrower shall at all times cause the Mortgaged Premises to be in compliance with the representations and covenants stated in Sections 2.5 and 2.6 hereof.

(3) Acquisition of Personalty. Borrower shall not make, suffer or permit, without the prior written consent of Lender any purchase, conditional sale, lease or agreement (except those made by a tenant) under which title is reserved in the vendor of any fixtures, apparatus, machinery, equipment, or personal property to be placed in or upon any of the buildings, structures or improvements on the Mortgaged Premises. Borrower shall execute and deliver, from time to time, such further instruments as may reasonably be requested by Lender to confirm the lien of this mortgage on any fixtures, machinery, apparatus and equipment described herein.

3.10 Taxes on Lender.

(1) In the event of the passage after the date of this mortgage of any law of the State of Illinois, the United States of America, or any other governmental authority deducting from the value of real estate for the purpose of taxation any lien thereon or changing in any way the laws for the taxation of mortgages or debts secured by mortgages or the manner of collection of any such taxation so as to affect the yield of the debt secured by this mortgage, the holder of this mortgage shall have the right to give sixty (60) days' written notice to Borrower requiring the payment of the debt secured hereby, and said debt shall become due and payable immediately upon the expiration of said sixty (60) days; provided, however, that such requirement of payment shall be ineffective if Borrower is permitted by law to pay the whole of such tax in addition to all other payments required hereunder, without any penalty thereby accruing to Lender and the indebtedness secured hereby, and if Borrower does pay such tax prior to the date upon which payment is required by such notice. No prepayment premium as provided in the Note shall be payable in the event of such acceleration.

(2) In the event it is hereafter claimed that any tax or other governmental charge or imposition is due, unpaid, or payable by Borrower or Lender upon the indebtedness (other than income tax on the interest or prepayment fee receivable by Lender with respect thereto), including any recording tax, documentary stamps or other tax or imposition on the Note or this mortgage, or any other instrument securing the indebtedness secured hereby, Borrower will forthwith pay such tax, charge or imposition and within a reasonable time thereafter deliver to Lender satisfactory proof of payment thereof.

3599429

3.11 Use of Loan Proceeds.

(1) Business Loan. Borrower covenants and agrees that all of the proceeds of the Note secured by this mortgage will be used solely for business purposes and in furtherance of the regular business affairs of the Borrower, and the entire principal obligation secured hereby constitutes a "business loan" as that term is defined in, and for all purposes of, Section 4(1)(c) of paragraph 6404, Chapter 17 of the Illinois Revised Statutes.

(2) Usury. All agreements between Borrower and Lender (including, without limitation, this mortgage, the Note, and any other Loan Documents) are expressly limited so that in no event whatsoever shall the amount paid or agreed to be paid to the Lender exceed the highest lawful rate of interest permissible under the laws of the State of Illinois. If, from any circumstances whatsoever, fulfillment of any provision hereof or of the Note or any other documents securing the indebtedness secured hereby, at the time performance of such provision shall be due, shall involve the payment of interest exceeding the highest rate of interest permitted by law which a court of competent jurisdiction may deem applicable hereto, then, ipso facto, the obligation to be fulfilled shall be reduced to the highest lawful rate of interest permissible under the laws of the State of Illinois; and if for any reason whatsoever, the Lender shall ever receive as interest an amount which would be deemed unlawful, such interest shall be applied to the payment of the last maturing installment or installments of the indebtedness secured hereby (whether or not then due and payable) and not to the payment of interest.

(3) Regulation G. Borrower covenants and agrees that it shall constitute a default hereunder if any of the proceeds of the loan for which the Note is given will be used, or were used, as the case may be, for the purpose (whether immediate, incidental, or ultimate) of "purchasing" or "carrying" any "margin security" as such terms are defined in Regulation G (12 CFR Part 207) of the Board of Governors of the Federal Reserve System or for the purpose of reducing or retiring any indebtedness which was originally incurred for any such purpose.

3.12 Evasion of Prepayment Premium. In the event that maturity of the indebtedness secured hereby is accelerated by Lender because of an Event of Default hereunder, and a tender of payment is made by or on behalf of Borrower in an amount necessary to satisfy such indebtedness at any time prior to judicial confirmation of a foreclosure sale, such tender shall constitute a prepayment under the Note and shall require payment of the Default Prepayment Premium provided for in the Note and shall be treated as a prepayment thereunder. The Default Prepayment Premium shall be payable at any time that the maturity of the indebtedness is accelerated by the holder hereof, regardless of

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

whether the undersigned has the right at such time to make a voluntary prepayment of the Indebtedness pursuant to the terms and provisions of the Note; provided, however, that no Default Prepayment Premium shall be payable in the event Lender shall exercise its right to apply the proceeds of a condemnation award, as referred to in Section 4 hereof, or the proceeds of insurance as referred to in Section 3.3 hereof, to the payment of the indebtedness secured hereby or in the event that Lender shall accelerate such indebtedness as provided in Section 3.10 hereof.

3.13 Recorded Instruments. Borrower shall promptly perform and observe, or cause to be performed and observed, all of the terms, covenants and conditions of all instruments of record affecting the Mortgaged Premises, non-compliance with which might affect the security of this mortgage or impose any duty or obligation upon Borrower or upon any owner, lessee or occupant of the Mortgaged Premises, or any part thereof, and Borrower shall do or cause to be done all things reasonably necessary to preserve intact and unimpaired any and all easements, appurtenances and other interests and rights in favor of or constituting any portion of the Mortgaged Premises.

3.14 Indemnity; Payment of Charges. Borrower shall promptly (a) pay and discharge any and all license fees or similar charges, with penalties and interest thereon, which may be imposed for the use of any ramps, vaults, chutes, areas and other space adjoining or near the Mortgaged Premises, and (b) cure any violation of law and comply with any order of any governmental authority, agency or instrumentality in respect of the repair, replacement or condition of the ramps, sidewalks, curbs or any vaults, chutes, areas or other space described in clause (a) above, adjoining or near said Mortgaged Premises. In the event of any default under either (a) or (b) of the preceding sentence, Lender may, but shall not be obligated to, pay any and all such fees or similar charges, with penalties and interest thereon, and the charges for such repair or replacement; and all monies expended by Lender in connection therewith (including, but not limited to, reasonable legal fees and costs), shall become immediately due and payable by Borrower with interest as described in Section 6.6 hereof until paid and shall be secured by this mortgage.

3.15 Estoppel Certificates. At any time upon not less than ten (10) business days prior written request by Lender, Borrower or any beneficiary of Borrower shall deliver to Lender, or to any person designated by Lender, a written statement executed and acknowledged in recordable form certifying: (1) that this mortgage, the Note, and the Loan Documents are in full force and effect (or, if there have been modifications, that this mortgage, the Note and the Loan Documents are in full force and effect as modified and stating the modifications); (2) the date to which

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

the indebtedness and all other charges secured hereby have been paid; (3) that neither Borrower nor Lender is in default under the mortgage, the Note, or the Loan Documents (or, if such a default exists, stating those claimed); (4) that there are no offsets or defenses to the payment of the sums secured hereby (or, if there are any such offsets or defenses, specifying such offsets or defenses); and (5) such other information as Lender may reasonably require.

3.16 Additional Acts, Etc. Borrower will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, conveyances, notes, mortgages, security agreements, financing statements and assurances as Lender shall reasonably require for accomplishing the purposes of this mortgage and the Borrower shall pay the costs of filing fees, recording fees, searches, reasonable attorneys' fees and other costs relating to the foregoing.

3.17 Subordination of Property Manager's Lien. Borrower shall exert its best efforts to include in any property management agreement for the Mortgaged Premises, whether now in effect or entered into hereafter by Borrower with a property manager, a "no lien" provision whereby the property manager waives and releases any and all mechanics' lien rights that he or anyone claiming through or under him may have pursuant to Ill. Rev. Stat. ch. 82, § 1. Such property management agreement containing such "no lien" provision or a short form thereof shall, at Lender's request, be recorded with the Recorder of Deeds of Cook County, Illinois. In addition, Borrower shall cause the property manager to enter into a subordination agreement with Lender, in recordable form, whereby the property manager subordinates his present and future lien rights and those of any party claiming by, through or under him, to the lien of this mortgage.

3.18 Lost Note. Borrower shall, if the Note is mutilated, destroyed, lost or stolen, and Lender delivers to Borrower an affidavit to such effect, deliver to Lender, in substitution therefor, a new promissory note containing the same terms and conditions as the Note with a notation thereon of the unpaid principal and accrued interest.

4. CONDEMNATION AND EMINENT DOMAIN.

4.1 If all or any substantial part of the Mortgaged Premises are damaged, taken, or acquired either temporarily or permanently as a result of any condemnation proceeding or by exercise of the power of eminent domain, or by the alteration of the grade of any street affecting the Mortgaged Premises, or by private agreement or sale in lieu of any of the foregoing, the entire indebtedness secured hereby shall, at Lender's option, become immediately due and payable. As additional security for the payment of the indebtedness secured by this mortgage, the

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

amount of any award or other payment for such taking or damages made in consideration thereof, to the extent of the full amount of the then remaining unpaid indebtedness secured hereby, is hereby assigned to Lender, who is empowered to collect and receive the same and to give proper receipts therefor in the name of Borrower, and the same shall be paid forthwith to Lender. Any award or payment so received by Lender may, at the option of Lender and after the payment of all its expenses in connection with the foregoing proceedings: (a) be retained and applied, in whole or in part, to the indebtedness secured hereby, in such manner as Lender may determine (in which event no prepayment premium as provided for in the Note shall be payable), or (b) be released, in whole or in part, and on such terms and conditions and according to such procedures as Lender may require, to Borrower for the purpose of altering, restoring, or rebuilding any part of the Mortgaged Premises which may have been altered, damaged, or destroyed as the result of such taking, alteration, or proceeding, provided, however, that Lender shall not be obligated to see to the application of any amounts so released. For the purposes of this Section 4.1, reference to a "substantial part" of the Mortgaged Premises means any portion of the land or building, the loss of which, in Lender's reasonable judgment, would materially adversely affect the value of the security granted to Lender hereby.

5. SECURITY AGREEMENT; FINANCING STATEMENT.

5.1 Security Agreement.

(1) Grant of Security Interest. In addition to and not in substitution for any other interest granted herein, Borrower hereby grants to Lender an express security interest in, and mortgages to the Lender, all goods, types and items of property owned by the Borrower which are described in subparagraph (2) below (hereinafter "the Equipment") whether now or hereafter erected on or placed in or upon the Mortgaged Premises or any part thereof, and all replacements thereof, additions and accretions thereto, and products and proceeds thereof, to further secure the payment of the Note, the payment of all other sums due from the Borrower to the Lender, and the performance by Borrower of all the covenants and agreements set forth herein. Borrower warrants and covenants that, except for the security interest granted hereby and other interests, if any, stated in Exhibit C attached hereto, Borrower is the owner of the Equipment free from any adverse lien, security interest or encumbrance and that Borrower has made payment in full for all such Equipment; and Borrower will defend and protect the Equipment against all claims and demands of all persons at any time claiming the Equipment or any interest therein. Borrower will upon request from Lender deliver to Lender such further security agreements, chattel mortgages, financing statements and evidence of ownership of such items as Lender may reasonably request.

3599129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

(2) Property Covered. The security interest hereby granted to Lender shall cover the following types or items of property now or hereafter owned by the Borrower and used in connection with, and located upon, the Mortgaged Premises: All property described in Exhibit B attached hereto. In addition, Borrower hereby grants to Lender an express security interest in all tenements, hereditaments, easements, appendages, licenses, privileges and appurtenances belonging or in any way appertaining to the Mortgaged Premises, and all interests in property, rights and franchises or any part thereof together with all the reversions and remainders, and to the extent permitted by law, all rents, tolls, issues and profits from the Mortgaged Premises, and all the estate, right, title, interest and claims whatsoever, at law and in equity which Borrower now has or may hereafter acquire with respect to the Mortgaged Premises and the Equipment.

(3) Additional Covenants. Borrower further covenants and agrees as follows:

(a) Transfer or pledge of the Equipment. Borrower will not sell, assign, pledge, lease, or otherwise transfer or encumber the Equipment or any interest therein without the prior written consent of Lender unless such Equipment is replaced with goods of equivalent value and stability; and Borrower will keep the Equipment free from any adverse lien, security interest, or encumbrance other than those stated in Exhibit C. Without limitation or qualification of the foregoing, Borrower shall immediately deliver to Lender all proceeds (cash or non-cash) resulting from any sale, assignment, pledge, lease, or other transfer of any part of the Equipment, unless, in respect to each such transfer, Lender shall have agreed otherwise in writing, or unless such proceeds are from the sale of Equipment which is being replaced by Borrower.

(b) Assembly of the Equipment. Upon default hereunder and acceleration of the indebtedness pursuant to the provisions hereof, Lender may at its discretion require Borrower to assemble the Equipment and make it available to Lender at a place designated by Lender which is reasonably convenient to both parties.

(c) Notice of sale. Lender shall give Borrower notice, by certified mail, postage prepaid, of the time and place of any public sale of any of the Equipment or of the time after which any private sale or other intended disposition thereof is to be made by sending notice to Borrower at least ten (10) days before the time of the sale or other disposition, which provisions for notice Borrower and Lender agree are reasonable; provided, however, that nothing herein shall preclude Lender from proceeding as to both real and personal property in accordance with Lender's rights and remedies in respect of the real property

3599-129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

as provided in Chapter 26, Section 9-501(4) of the Illinois Revised Statutes.

(d) Payment of Lender's expenses. Borrower shall reimburse Lender for all reasonable costs, charges and fees, including reasonable legal fees incurred by Lender in preparing and filing security agreements, extension agreements, financing statements, continuation statements, termination statements and chattel searches.

(e) Warranties and remedies. The Equipment described herein shall be considered for all purposes a part of the Mortgaged Premises as described herein; all warranties and covenants contained in this mortgage made by Borrower, including warranties of title, shall be deemed as having been made with reference to the Equipment; all agreements, undertakings and obligations of Borrower stated herein shall apply to the Equipment, including without limitation, obligations regarding insurance, freedom from adverse lien or encumbrance, repair and maintenance; and all remedies of the Lender in the event of any default by Borrower under the items of this mortgage or any other instrument evidencing or securing the indebtedness secured hereby shall be available to the Lender against the Equipment.

5.2 Financing Statement. This mortgage also constitutes a financing statement for the purpose of Section 9-402 of the Illinois Uniform Commercial Code, Illinois Revised Statutes, Chapter 26, and shall constitute a "fixture filing" under such statutes and shall be filed in the real estate records of Cook County, Illinois.

(1) Name of Debtor: Jerry H. Biederman, as
Trustee under Trust No. 11

Debtor's Mailing Address: 208 South LaSalle Street
Chicago, Illinois 60604

Address of Property: Golf Plaza II Shopping Center
Southwest corner of Golf and
Elmhurst Roads
Mount Prospect, Illinois

Name of Secured Party: Massachusetts Mutual Life
Insurance Company
1295 State Street
Springfield, Massachusetts 01111

(2) This financing statement covers the following types or items of property: the property described in Section 5.1 of this instrument; and all other items of personal property now or at

3599429

any time hereafter owned by Borrower or Borrower's beneficiary and used in connection with the Mortgaged Premises.

(3) Some of the above goods are or are to become fixtures on the real property described herein. Borrower is the record owner of the real property described herein upon which the foregoing fixtures and other items and types of property are located.

6. EVENTS OF DEFAULT; REMEDIES

6.1 Defaults. If any one or more of the following events of default (herein collectively called "Events of Default" and each separately called an "Event of Default") shall occur, all indebtedness secured hereby, including, without limitation, the whole of the principal sum remaining unpaid under the Note, together with all accrued but unpaid interest thereon, shall at the option of Lender become immediately due and payable without notice or demand, and may be recovered at once, by foreclosure or otherwise:

(1) Failure by Borrower to pay when the same shall be due and payable, any installment of principal or interest, or both of them, under the Note or this mortgage or any deposits required by Sections 3.2 and 3.3; or

(2) The failure of Borrower or Beneficiary to observe or perform any other term, condition, covenant, agreement, representation or warranty contained herein or in the Note, or the failure of any representation or warranty contained herein or in any of the other Loan Documents or in any instrument or certification delivered to Lender in connection with the making of the loan to be true and accurate in all material respects; or

(3) The occurrence of any default in the observance or performance of any non-monetary term, condition, covenant, or agreement in any assignment of lease, assignment of rents, any other Loan Document (excluding the Note and this mortgage), or any other agreement made as additional security for the performance of the Note and this mortgage; or

(4) The occurrence of any of the following events:

(a) Borrower or Borrower's beneficiary shall generally not pay its or their debts as they become due or shall admit in writing its or their inability to pay its or their debts, or shall make a general assignment for the benefit of creditors;

(b) Borrower or Borrower's beneficiary shall commence any case, proceeding or other action seeking reorganization, arrangement, adjustment, liquidation, dissolution or composition of it or its or their debts under any law relating to bankruptcy,

3599429

insolvency, reorganization or relief of debtor, or seeking appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its property;

(c) Borrower or Borrower's beneficiary shall take any action, including corporate or partnership action, to authorize any of the actions set forth in sub-paragraphs (a) and (b); or

(d) Any case, proceeding or other action in the nature of a bankruptcy or insolvency proceeding against Borrower or Borrower's beneficiary shall be commenced seeking to have an order for relief entered against it or them as debtor, or seeking reorganization, arrangement, adjustment, liquidation, dissolution or composition of it or its or their debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtor, or seeking appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its or their property, and such case, proceeding or other action (i) results in the entry for relief against it or them which is not fully stayed within thirty (30) business days after the entry thereof or (ii) remains undismissed for a period of ninety (90) days.

6.2 Remedies. Without limitation of the foregoing provisions of this Section 6 or any other provisions hereof, upon the occurrence of an Event of Default, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, at any time thereafter, at its option and without notice, but subject to the provisions of Section III.4.(i) of the Note, to exercise any or all of the following remedies:

(1) Acceleration. Lender may declare the principal balance remaining unpaid under the Note, together with all accrued interest thereon, immediately due and payable.

(2) Foreclosure. Lender may foreclose this mortgage by instituting a foreclosure suit in any court having jurisdiction. Lender shall have the right to purchase the Mortgaged Premises at any foreclosure sale.

(3) Offset Rights. Lender may apply in satisfaction of the indebtedness secured hereby or any amount at any time to become due or payable in connection with the ownership, occupancy, use, restoration or repair of the Mortgaged Premises, any deposits or other sums credited by or due from Lender to Borrower, including, without limitation, insurance proceeds, proceeds of condemnation, and funds held in escrow pursuant to Sections 3.2 and 3.3 hereof.

(4) Cure of Default. Without releasing Borrower from any obligation hereunder or under the Loan Documents, Lender shall

3599129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

have the right to cure any Event of Default after the expiration of applicable notice, grace or cure periods, if any. In connection therewith, Lender may enter upon the Mortgaged Premises and may do such acts and things as Lender deems necessary or desirable to protect the Mortgaged Premises or the leases thereof, including, without limitation:

(a) paying, purchasing, contesting or compromising any encumbrance, charge, lien, claim of lien, taxes or other charges or liabilities against the Mortgaged Premises;

(b) paying any insurance premiums; and

(c) employing counsel, accountants, contractors and other appropriate persons to assist Lender in the foregoing.

(5) Possession of Mortgaged Premises. Lender shall have the right to take physical possession of the Mortgaged Premises and of all books, records, documents and accounts relating thereto and exercise, without interference from Borrower, any and all rights which Borrower has with respect to the Mortgaged Premises, including, without limitation, the right at Borrower's expense, to rent and lease the same and to hire a professional property manager for the Mortgaged Premises. If necessary to obtain possession as provided for herein, Lender may, without exposure to liability from Borrower or other persons, invoke any and all legal remedies to dispossess Borrower, including, without limitation, one or more actions for forcible entry and detainer, trespass and restitution. In connection with any action taken by Lender pursuant to this subsection (5), Lender shall not be liable for any loss sustained by Borrower resulting from any failure to let the Mortgaged Premises or from any other act or omission of Lender in managing the Mortgaged Premises unless caused by the willful misconduct or bad faith of Lender, nor shall Lender be liable to Borrower for Lender's failure to perform or discharge any obligation, duty or liability under any lease or by reason of any Loan Document. Borrower hereby agrees to indemnify, hold harmless and defend Lender from and against any liability, loss or damage incurred by Lender under any lease or under the Loan Documents as a result of Lender's exercise of rights or remedies under any of the Loan Documents, unless such liability, loss or damage is incurred because of Lender's gross negligence or willful misconduct. Should Lender incur any such liability, the amount thereof shall be secured hereby and Borrower shall reimburse Lender therefor immediately upon demand. Lender shall have full power to make from time to time all alterations, renovations, repairs and replacements to the Mortgaged Premises as may be reasonably necessary.

(6) Appointment of a Receiver. Lender upon application to a court of competent jurisdiction, shall be entitled to the appointment of a receiver for the Mortgaged Premises, without

notice, without regard to the solvency or insolvency of the person or persons, if any, liable for the payment of the indebtedness secured hereby, and without regard to the then value of the Mortgaged Premises, whether the same shall be then occupied as a homestead or not, and Lender hereunder may be appointed as such receiver. Such receiver shall have power to collect the rents, issues, and profits of the Mortgaged Premises and all other powers which may be necessary or are usual in such cases for the protection, possession, control, management and operation of said Mortgaged Premises, to the fullest extent permitted by law. The court from time to time may authorize the receiver to apply the net income in his hands in payment in whole or in part of: (a) the indebtedness and other sums secured hereby or by any decree foreclosing this mortgage, or any tax, special assessment or other lien which may be or become superior to the lien hereof or of such decree, provided such application is made prior to the foreclosure sale; and (b) the deficiency in case of a sale and deficiency.

(7) Uniform Commercial Code Remedies. Lender may exercise any and all rights of a secured party with respect to the Equipment described in Section 5.1 hereof provided under the Illinois Uniform Commercial Code.

(8) Subrogation. Lender shall have and may exercise all rights and remedies of any person, entity or body politic to whom Lender renders payment or performance in connection with the exercise of its rights and remedies under the Loan Documents, including, without limitation, any rights or remedies under any mechanics' or vendor's lien or liens, superior titles, mortgages, deeds of trust, liens, encumbrances, rights, equities and charges of all kinds heretofore or hereafter existing on the Mortgaged Premises to the extent that the sums are paid or discharged from the proceeds of the Note whether or not released of record.

(9) Other. Lender may take such other actions or commence such other proceedings as Lender deems reasonably necessary or advisable to protect its interest in the Mortgaged Premises and its ability to collect the indebtedness secured hereby as are available under applicable laws, ordinances and rules of courts having jurisdiction.

(10) Mortgagee in Possession. Nothing herein contained shall be construed as constituting the Lender a mortgagee in possession in the absence of the actual taking of possession of the Mortgaged Premises by Lender.

6.3 Sums Received by Lender. All sums received by Lender under Section 6.2 above, less all costs and expenses incurred by Lender under Section 6.2, including, without limitation, reasonable attorneys' fees and disbursements, property management fees, costs of alterations, renovations, repairs and replacements made

3599429

or authorized by Lender and all expenses incident to Lender taking possession of the Mortgaged Premises, and such sums as Lender deems appropriate as a reserve to meet future expenses of the Mortgaged Premises, shall be applied to the indebtedness secured hereby in such order as Lender shall determine. Thereafter, any balance shall be paid to the person or persons legally entitled thereto.

6.4 Fees and Expenses; Distribution of Foreclosure Sale Proceeds. If Lender shall incur or expend any sums, including reasonable attorney's fees, whether or not in connection with any action or proceeding to sustain the lien of this mortgage or its priority, or to protect or enforce any of Lender's rights hereunder or to recover any indebtedness secured hereby, or on account of its being Lender hereunder or its making the loans evidenced by the Note, all such sums shall become immediately due and payable by Borrower with interest thereon as described in Section 6.6 hereof. All such sums shall be secured by this mortgage and be a lien on the Mortgaged Premises prior to any right, title, interest, or claim, in, to, or upon the Mortgaged Premises attaching or accruing subsequent to the lien of this mortgage. Without limitation of the generality of the foregoing, in any suit to foreclose the lien hereof, there shall be allowed and included as additional indebtedness secured hereby in the decree for sale all costs and expenses which may be paid or incurred by or on behalf of Lender or holders of the Note for reasonable attorneys' fees, appraisers' fees, receiver's costs and expenses, insurance, taxes, outlays for documentary and expert evidence, costs for preservation of the Mortgaged Premises, stenographer's charges, publication cost and costs of procuring all abstracts of title, title searches and examinations, guarantee policies, Certificates of Title issued by the Registrar of Titles (Torrens certificates), and similar data and assurances with respect to title as Lender or holders of the Note may deem to be reasonably necessary either to prosecute such suit or to evidence to bidders at any sale which may be had pursuant to such decree the true condition of the title to or value of the Mortgaged Premises or for any other reasonable purpose. The amount of any such costs and expenses which may be paid or incurred after the decree for sale is entered may be estimated and the amount of such estimate may be allowed and included as additional indebtedness secured hereby in the decree for sale.

6.5 Lender's Exercise of Rights.

(1) Effect of Modification. In the event Lender in one or more instances (i) grants any extension of time or forbearance with respect to the payment of any indebtedness secured by this mortgage; (ii) takes other or additional security for the payment thereof; (iii) waives or fails to exercise any right granted herein or under the Note or in any other instrument securing the Note; (iv) grants, with or without consideration, any release from the lien of this mortgage of the whole or any part of the

3599129

security held for the payment of indebtedness secured hereby (whether or not such security is the property of Borrower or others); (v) agrees to any amendment or modification of any of the terms and provisions hereof or of the Note or of any other instrument securing the Note; then and in any such event, such act or omission to act shall not release Borrower, or any co-makers, sureties, or guarantors of this mortgage or of the Note, from any covenant of this mortgage or the Note or any other Loan Document, nor preclude Lender from exercising any right, power, or privilege herein granted or intended to be granted upon the occurrence of any Event of Default or otherwise and shall not in any way impair or affect the lien or priority of this mortgage.

(2) Remedies Not Exclusive. No right or remedy of Lender under this mortgage, the Note or the other Loan Documents shall be exclusive of, but shall be in addition to, every other right or remedy under this mortgage and the Note and every other right or remedy, now or hereafter existing at law or in equity. Every such right or remedy may be exercised concurrently or independently, and when and as often as may be deemed expedient by Lender. No delay in exercising or omission to exercise any right or remedy accruing upon the occurrence of an Event of Default shall impair any such right or remedy or shall be construed to be a waiver of any such default or acquiescence therein, nor shall it affect any subsequent default of the same or a different nature. A waiver of any of the terms, covenants, conditions or provisions hereof, or of the Note, or any other instrument given by Borrower to secure the indebtedness secured hereby shall apply to the particular instance and at the particular time only, and no such waiver shall be deemed a continuing waiver, but all of the terms, covenants, conditions and other provisions of this mortgage, the Note, and of such other instruments shall survive and continue to remain in full force and effect.

6.6 Interest on Advances. In the event Lender makes any advances hereunder (exclusive of advances of principal evidenced by the Note), Lender will promptly notify Borrower of such advances and the amounts so advanced shall become immediately due and payable with interest at the rate per annum specified in Section I. 2. of the Note plus the difference between (a) the greater of (i) twelve and five-eighths percent (12-5/8%) per annum or (ii) the Prime Rate, as hereinafter defined, from time to time of Chemical Bank of New York, and (b) such rate specified in the Note. The term "Prime Rate as used herein means the rate of interest announced from time to time by Chemical Bank of New York as its prime lending rate, notwithstanding the fact that some borrowers may borrow at rates less than such announced prime rate. The failure of Lender to give the notice contemplated by this Section 6.6 shall not affect the securing by this mortgage of those amounts so advance.

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

6.7 Valuation and Appraisalment. Borrower shall not and will not apply for or avail itself of any appraisalment, valuation, stay, extension, or exemption laws, or any so-called "Moratorium Laws" now existing or hereafter enacted, in order to prevent or hinder the enforcement or foreclosure of this mortgage, and Borrower hereby waives the benefit of all such laws. Borrower for itself and all who may claim through or under it waives any and all right to have the property and estates comprising the mortgaged property marshalled upon any foreclosure of the lien hereof, and agrees that any court having jurisdiction to foreclose such lien may order the Mortgaged Premises sold in one parcel as an entirety or in such parcels, manner or order as the Lender in its sole discretion may elect.

6.8 Release and Waiver of Homestead and Equity of Redemption. To the extent allowed by applicable law, Borrower hereby releases and waives any and all rights under and by virtue of the homestead exemption laws of the State of Illinois, all rights to retain possession of the Mortgaged Premises after an Event of Default, and any and all rights of redemption from sale under any order or decree of foreclosure of this mortgage or under any sale or statute or order, decree, or judgment of any court relating to this mortgage, on behalf of itself and each and every person acquiring any interest in or title to any portion of the Mortgaged Premises, except decree and judgment creditors of Borrower, it being the intent hereof that any and all such rights of redemption of Borrower and of all other persons are and shall be deemed to be hereby waived to the full extent permitted by the provisions of Chapter 110, paragraph 12-125 of the Illinois Revised Statutes (1985) or other applicable law or replacement statutes.

7. GENERAL.

7.1 Modification. No change, amendment, modification, waiver, cancellation or discharge hereof, or any part hereof, shall be valid unless in writing and signed by all of the parties hereto or their respective successors and assigns.

7.2 Notices. All notices, demands and requests given or required or desired to be given hereunder by Borrower or Lender shall be in writing and shall be delivered in person or by overnight express service or by United States certified mail, return receipt requested, postage prepaid, as follows:

To Borrower: Jerry H. Biederman, as
Trustee under Trust No. 11
208 South LaSalle Street
Chicago, Illinois 60604

With a copy to: Salvatore DiMucci
SDM, Inc.
100 West Dundee Road
Palatine, Illinois 60067

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

To Lender: Massachusetts Mutual Life Insurance Company
1295 State Street
Springfield, Massachusetts 01111

Attention: Vice President, Asset Management
Department, Real Estate
Investment Division

With a copy to: Massachusetts Mutual Life Insurance Company
200 West Madison Street
Chicago, Illinois 60606
Attention: Regional Director

or to such other addresses as Borrower or Lender may from time to time designate by written notice given as herein required.

Notices, demands and requests given by mail in the manner aforesaid shall be deemed sufficiently served or given for all purposes hereunder three (3) business days after the time such notice, demand or request shall be deposited in the mails. Notices sent by overnight express service shall be deemed served on the first (1st) business day following the date on which the notice was sent. Personal service upon Massachusetts Mutual Life Insurance Company may be made only by delivering a copy of such notice to an officer of Massachusetts Mutual Life Insurance Company.

7.3 Definition of Terms. Whenever used in this instrument, unless the context shall otherwise clearly require, the term "Borrower" and the term "Lender" shall include their legal representatives, successors and assigns, as the case may be, of Borrower and Lender, and all persons claiming by, through, or under Borrower or Lender; the term "person" shall include any individual, partnership, corporation, trust, unincorporated association or government, or any agency or political subdivision thereof, or any two or more of the foregoing acting in concert; the singular shall include the plural, and the plural, the singular; and the gender used shall include the other genders.

7.4 Releases. The right is hereby reserved by Lender to make partial release or releases of the Mortgaged Premises or of any other security held by Lender with respect to all or any part of the indebtedness secured hereby, without notice to, or the consent, approval or agreement of, other parties in interest, including junior lienors, which partial release or releases shall not impair in any manner the validity of or priority of this mortgage on the portion of said Mortgaged Premises not so released.

7.5 Successors and Assigns. Subject to and without limiting the provisions herein restricting or limiting Borrower's

3599129

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

right of assignment and transfer, all of the terms, covenants, conditions, and agreements herein set forth shall be binding upon and inure to the benefit of the respective heirs, executors, administrators, legal representatives, successors and assigns, as the case may be, of the parties hereto.

7.6 No Merger. It being the desire and intention of the parties hereto that the mortgage and the lien thereof shall not merge in fee simple title to the Mortgaged Premises, it is hereby understood and agreed that should Lender acquire any additional or other interests in or to the Mortgaged Premises or the ownership thereof, then, unless a contrary intent is manifested by Lender as evidenced by an appropriate document duly recorded, this mortgage and the lien thereof shall not merge in the fee simple title, toward the end that this mortgage may be foreclosed as if owned by a stranger to the fee simple title.

7.7 Assignment by Lender. Lender may assign all or any portion of its interest hereunder and its rights granted herein and in the Note to any person, trust, financial institution or corporation as Lender may determine and upon such assignment, such assignee shall thereupon succeed to all the rights, interests and options of Lender herein and in the Note contained.

7.8 Applicable Law. This mortgage shall be governed by the laws of the State of Illinois, which laws shall also govern and control the construction, enforceability, validity and interpretation of this mortgage.

7.9 Severability. In the event that any provision of this Mortgage or the application thereof to any person or circumstance shall be invalid or unenforceable or contrary to law, the remaining provisions of this Mortgage and the application of such provision or provisions to other persons or circumstances shall not be affected thereby and shall be fully effective and enforceable to the extent permitted by law.

7.10 No Partnership. Borrower acknowledges and agrees that in no event shall Lender be deemed to be a partner or joint venturer with Borrower. Without limitation of the foregoing, Lender shall not be deemed to be such a partner or joint venturer on account of its becoming a Lender in possession or exercising any rights pursuant to this mortgage or pursuant to any other instrument or document securing any portion of the indebtedness secured hereby or otherwise.

7.11 Subrogation. In the event the proceeds of the loan made by Lender to Borrower, or any part thereof, or any amount paid out or advanced by Lender, shall be used directly or indirectly to pay off, discharge, or satisfy, in whole or in part, any prior lien or encumbrance upon the Mortgaged Premises or any part thereof, then the Lender shall be subrogated to such

3599429

other lien or encumbrance and to any additional security held by the holder thereof and shall have the benefit of the priority of all of same.

7.12 Headings. Paragraph and section headings contained herein are for convenience of reference only and are not intended to define, limit or describe the scope or intent of any provision of this instrument.

8. POSSESSION AND DEFEASANCE.

8.1 Possession. Until the occurrence of an Event of Default and except as otherwise expressly provided to the contrary, Borrower shall retain full possession of the Mortgaged Premises, subject, however, to all of the terms and provisions of the Loan Documents.

8.2 Defeasance. If all of the indebtedness secured hereby is paid as the same becomes due and payable and if all of the covenants, warranties, conditions, undertakings and agreements made in the Loan Documents are kept and performed, then in that event only, all rights under the Loan Documents shall terminate and the Mortgaged Premises shall become wholly clear of the liens, grants, security interests, conveyances and assignments evidenced hereby, and Lender shall release or cause to be released, such liens, grants, assignments, conveyances and security interests in due form at Borrower's cost, and this mortgage shall be void.

Recitals of any matters or facts in any instrument executed hereunder shall be conclusive proof of the truthfulness thereof. To the extent permitted by applicable law, such an instrument may describe the grantee as "the person or persons legally entitled thereto". Lender shall not have any duty to determine the rights of persons claiming to be rightful grantees of any of the Mortgaged Premises. When the Mortgaged Premises have been fully released, such release shall operate as a re-assignment of all future rents, issues and profits of the Mortgaged Premises to the person or persons legally entitled thereto, unless such release expressly provides to the contrary.

9. LIMITATIONS ON LIABILITY.

9.1 Nonrecourse. It is understood and agreed that in any action or proceeding brought with respect to this mortgage, the Note secured hereby or any other instrument securing the Note, in which a money judgment is sought, the Lender will look solely to the Mortgaged Premises and the rents and profits therefrom for payment and, specifically and without limitation, agrees to waive any right to seek or obtain a deficiency judgment against the Borrower. Notwithstanding any of the foregoing, nothing contained in this paragraph shall be deemed to prejudice the

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

rights of Lender: to proceed against any entity or person whatsoever, including Borrower, or any beneficiary of Borrower, (i) with respect to the enforcement of any guarantees or leases including, without limitation, any master lease given in connection with the making of the Loan, or similar rights to payment; or (ii) for fraud or material misrepresentation in connection with any warranty or representation given by Borrower or any beneficiary of Borrower in connection with the making of the loan secured by this mortgage; or (iii) to recover any condemnation or insurance proceeds or other similar funds or payments attributable to the Mortgaged Premises which under the terms of the mortgage should have been paid to Lender; or (iv) to recover any tenant security deposits, advance or prepaid rents or other similar sums paid to or held by Lender or any other entity or person in connection with the operation of the Mortgaged Premises; or (v) to recover any gross revenues from the Mortgaged Premises which have not been applied after default as follows: to pay any portion of the indebtedness secured by the mortgage, to pay operating and maintenance expenses of the Mortgaged Premises including, without limitation, real estate taxes and assessments and insurance premiums for the Mortgaged Premises, or to pay deposits into a reserve for taxes, insurance replacements or other sums required by the Loan Documents.

9.2 Limitation on Liability of Land Trustee. This instrument is executed by JERRY H. BIEDERMAN, as Trustee under a certain Trust Agreement dated as of August 1, 1986, and known as Trust No. 11 not personally, but as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in him as such Trustee (and said JERRY H. BIEDERMAN hereby warrants that he possesses full power and authority to execute this instrument), and it is expressly understood and agreed that nothing herein contained shall be construed as creating any liability on said JERRY H. BIEDERMAN personally to pay any indebtedness accruing hereunder, or to perform any covenant either express or implied herein contained (it being understood and agreed that each of the provisions hereof, except the warranty hereinabove contained, shall constitute a condition and not a covenant or agreement or representation or warranty, regardless of whether the same may be couched in language of a promise or covenant or agreement or representation or warranty), all such personal liability, if any, being expressly waived by the Lender and by every person now or hereafter claiming any right hereunder, and that so far as the said JERRY H. BIEDERMAN is concerned, the Lender shall look solely to the Mortgaged Premises hereby mortgaged or conveyed and to any other property secured by the Loan Documents for the payment thereof, or to recover any damages as a result of any breach of any representation, warranty or covenant herein contained (except in this Section 9.2), by the enforcement of the liens, charges and other rights created by said Loan Documents, in the manner herein and in said Loan Documents provided.

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

EXHIBITS

- A - Legal Description
- B - List of equipment and personalty
- C - Title exceptions

Property of Cook County Clerk's Office

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

EXHIBIT A

Legal Description

Lots 1, 2 and 3 in DiMucci's Resubdivision of Lots 3 through 7, both inclusive, in Juhnke's Subdivision of part of the Northeast 1/4 of Section 14, Township 41 North, Range 11, East of the Third Principal Meridian, according to the Plat thereof registered in the Office of the Registrar of Titles of Cook County, Illinois, on February 27, 1979, as document 3077963, in Cook County, Illinois.

BHO
for

Property of Cook County Clerk's Office

3599429

UNOFFICIAL COPY

0 3 5 9 9 4 2 9

EXHIBIT B

An express security interest is granted in the following:

All of Borrower's right, title and interest in chattels and personal property of any kind or nature whatsoever, whether tangible or intangible, which is used or will be used in the construction of, or is or will be placed in or upon, or is derived from or used in connection with, the maintenance, use, occupancy or enjoyment of the real property and the buildings and improvements constructed thereon located at Golf Plaza II Shopping Center, Southwest corner of Golf and Elmhurst Roads, Mount Prospect, Illinois.

Property of Cook County Clerk's Office

3599429

EXHIBIT "C"

Permitted Title Exceptions

1. General taxes for 1986 (second installment only) and subsequent years.
2. Restrictions set forth in document number 1399755.
3. 50-foot building lines as shown on Plat of Subdivision registered as document 3077983.
4. Rights of the public, the municipality and the State of Illinois in and to those parts of the land taken or used for highway purposes (affects Northeasterly corner of Lot 1, Condemnation Case 67L13163).
5. Reservation of easement to Commonwealth Edison Company, as set forth in documents 2008135 and 2198258.
6. Grant of easement to Commonwealth Edison Company as created in document LR3187356.
7. Lease agreements as evidenced by documents LR3208626, LR3208627, LR3208628, LR3301560 and 24628773.
8. Rights of tenants as tenants only under existing unrecorded leases.
9. Utility easements as created in Plat of Subdivision registered as document 3077983.
10. Annual Assessments for repair of Weller Creek Drainage District pursuant to Law Docket 40014.
11. Grant of easement in favor of Northern Illinois Gas Company as set forth in document LR2244722.
12. Easement for water main purposes shown on documents 3077983 and 19781300.
13. Utility easements and right of access thereto as shown on Plat of Survey prepared by D. Harker & Associates dated March 12, 1987.

3599429

UNOFFICIAL COPY

Property of Cook County Clerk's Office
DUPLICATE

6
1386944

3599429

624665E

1987 MAR 16 PM 8:26
HARRY JOSEPH BOGERT
REGISTRAR OF TITLE

Submitted by _____

Address _____

Promised _____

Deliver cert. to _____

Address _____

Deliver duplicate Trust

Deed to _____

Address _____

Notified _____

Write

LAND TITLE CO.
100 W. MONROE, 4th FLOOR
CHICAGO, ILLINOIS 60603
FILE # L-500101-155
Gr ed