

**MORTGAGE -CH45**

PLEASE RETURN TO  
Biltmore  
25 West 9th  
Indpls, IN 46204

THIS MORTGAGE is made as of December 1, 1998, between **BILTMORE HOMES, INC.**, an Indiana corporation (the "Mortgagor") whose address is 25 West 9th Street, Indianapolis, Indiana and **NBD BANK, N.A.**, a national banking association (the "Mortgagee"), whose address is One Indiana Square, Indianapolis, Indiana 46266.

The Mortgagor MORTGAGES AND WARRANTS to the Mortgagee real property and all the buildings, structures and improvements on it described the attached **Exhibit A** (the "Premises").

The land is located in the County of Lake, State of Indiana.

The Premises shall also include all of the Mortgagor's right, title and interest in and to the following:

- (1) All easements, rights-of-way, licenses, privileges and hereditaments.
- (2) Land lying in the bed of any road or the like, opened, proposed or vacated, or any strip or gore, adjoining the Premises;
- (3) All machinery, apparatus, equipment, fittings, fixtures, and articles of personal property of every kind and nature whatsoever, located now or in the future in or on the Premises and used or useable in connection with any present or future operation of the Premises (all of which is called "Equipment"). It is agreed that all Equipment is part of the Premises and appropriated to the use of the real estate and, whether affixed or annexed or not, shall for the purposes of this Mortgage unless the Mortgagee shall otherwise elect, be deemed conclusively to be real estate and mortgaged and warranted to the Mortgagee;
- (4) All mineral, oil, gas and water rights, royalties, water and water stock, if any.
- (5) All awards or payments including interest made as a result of the exercise of the right of eminent domain, the alteration of the grade of any street, any loss of or damage to any building or other improvement on the Premises, any other injury to or decrease in the value of the Premises, any refund due on account of the payment of real estate taxes, assessments or other charges levied against or imposed upon the Premises, and the reasonable attorney fees, costs and disbursements incurred by the Mortgagee in connection with the collection of any such award or payment.
- (6) All of the rents, issues, income and profits of the Premises under present or future leases, or otherwise.

The Premises are unencumbered except as follows: (i) the lien of current taxes, not delinquent, (the "Permitted Encumbrances"). If the Premises are encumbered by Permitted Encumbrances, the Mortgagor shall perform all obligations and make all payments as required by the Permitted Encumbrances. The Mortgagor shall provide copies of all writings pertaining to Permitted Encumbrances, and the Mortgagee is authorized to request and receive that information from any other person without the consent or knowledge of the Mortgagor.

This Mortgage secures the following:

- (i) the obligations of the Mortgagor under an Amended and Restated Credit Agreement dated June 2, 1998 and a related promissory note of the Mortgagor in favor of the Mortgagee in the principal amount of \$1,500,000.00, maturing on June 1, 1999; and
- (ii) any extensions, renewals, modifications and replacements, without limit as to number or frequency (the "Debt").

This Mortgage shall also secure the performance of the promises and agreements contained in this Mortgage.

The Mortgagor promises and agrees as follows:

1. **PAYMENT OF DEBT; PERFORMANCE OF OBLIGATIONS:** The Mortgagor shall promptly pay when due, whether by acceleration or otherwise, the Debt for which the Mortgagor is liable, and shall promptly perform all obligations to which the Mortgagor has agreed under the terms of this Mortgage and any loan documents evidencing the Debt.

2. **TAXES:** The Mortgagor shall pay when due, and before any interest, collection fees or penalties shall accrue, all taxes, assessments, fines, impositions, and other charges which may become a lien prior to this Mortgage. Should the Mortgagor fail to make such payments, the Mortgagee may, at its option and at the expense of the Mortgagor, pay the amounts due for the account of the Mortgagor. Upon the request of the Mortgagee, the Mortgagor shall immediately furnish to the Mortgagee all notices of amounts due and receipts evidencing payment. The Mortgagor shall promptly notify the Mortgagee of any lien on all or any part of the Premises, and shall promptly discharge any unpermitted lien or encumbrance.

3. **CHANGE IN TAXES:** In the event of the passage of any law or regulation, state, federal or municipal, subsequent to

COMMUNITY TITLE COMPANY  
FILE NO 876886 mji



1013  
454  
REC 1013  
DATE OF ENTRY  
LAKE COUNTY  
INDIANA

2/10/99  
COMPTON  
3382

the date of this Mortgage in any manner changing or modifying the laws now in force governing the taxation of mortgages or debts secured by mortgages, or the manner of collecting such taxes, the Debt shall become due and payable immediately at the option of the Mortgagee.

4. **INSURANCE:** Until the Debt is fully paid, the Mortgagor shall keep the Premises, and the present and future buildings and other improvements on the Premises constantly insured for the benefit of the Mortgagee at replacement cost, against fire and such other hazards and risks customarily covered by the standard form of extended coverage endorsement available in the State of Indiana, including risks of vandalism and malicious mischief, and shall further provide flood insurance (if the Premises are situated in an area designated as a flood risk area by the Director of the Federal Emergency Management Agency or as otherwise required by the Flood Disaster Protection Act of 1973 and regulations issued under it), and such other appropriate insurance as the Mortgagee may require from time to time. All insurance policies and renewals must be acceptable to Mortgagee, must provide for payment to the Mortgagee in the event of loss regardless of any act or omission of the Mortgagor, must require 30 days notice to the Mortgagee in the event of nonrenewal or cancellation, and must be delivered to the Mortgagee. Should the Mortgagor fail to insure or fail to pay the premiums on any insurance or fail to deliver the policies or certificates or renewals to the Mortgagee, then the Mortgagee at its option may have the insurance written or renewed and pay the premiums for the account of the Mortgagor. In the event of loss or damage, the proceeds of the insurance shall be paid to the Mortgagee alone. No loss or damage shall itself reduce the Debt. The Mortgagee is authorized to adjust and compromise a loss without the consent of the Mortgagor, to collect, receive and receipt for any proceeds in the name of the Mortgagor, and to endorse the Mortgagor's name upon any check in payment of proceeds. The proceeds shall be applied first toward reimbursement of all costs and expenses of the Mortgagee in collecting the proceeds, and then toward payment of all or any part of the Debt, whether or not then due or payable, or the Mortgagee at its option may apply all or any part of the proceeds to the repair or rebuilding of the Premises provided that Mortgagor is not then or at any time during the course of restoration of the Premises in default under this Mortgage, and has complied with all requirements for application of the proceeds to restoration of the Premises as the Mortgagee, in its sole discretion, may establish.

5. **RESERVES FOR TAXES AND INSURANCE:** The Mortgagor shall, if requested by the Mortgagee, pay to the Mortgagee, at the time of and in addition to the scheduled installments of principal or interest due under the Debt, a sum equal to (a) the amount estimated by the Mortgagee to be sufficient to enable it to pay (at least thirty (30) days before they become due and payable) all taxes, assessments and other similar charges levied against the Premises, plus (b) the amount of the premiums on any policies of insurance required to be carried by the Mortgagor, divided by (c) the number of scheduled installments per year. The Mortgagee shall apply the sums to pay the tax and insurance items. These sums may be commingled with the general funds of the Mortgagee, and no interest shall be payable on them nor shall these sums be deemed to be held in trust for the benefit of the Mortgagor. Upon notice at any time, the Mortgagor will, within ten (10) days, deposit such additional sum as may be required for the payment of increased taxes, assessments, charges or premiums. In the event of foreclosure of this Mortgage, any of the moneys then remaining on deposit with the Mortgagee or its agent shall be applied against the Debt prior to the commencement of foreclosure proceedings. The obligation of the Mortgagor to pay taxes, assessments, charges or insurance premiums is not affected or modified by the arrangements set out in this paragraph. Any default by the Mortgagor in the performance of the provisions of this paragraph shall constitute a default under this Mortgage. The Mortgagee shall not request the reserves provided for in this clause as long as there is no default by the Mortgagor under this Mortgage, and the Mortgagor retains title to the Premises.

6. **WASTE:** The Mortgagor shall keep the Premises in good repair, shall not commit or permit waste on the Premises nor do any other act causing the Premises to become less valuable. The Mortgagor consents to the appointment of a receiver under Indiana law should the Mortgagee elect to seek such relief. Should the Mortgagor fail to effect the necessary repairs, the Mortgagee may at its option and at the expense of the Mortgagor make the repairs for the account of the Mortgagor. The Mortgagor shall use and maintain the Premises in conformance with all applicable laws, ordinances and regulations. The Mortgagee or its authorized agent shall have the right to enter upon and inspect the Premises at all reasonable times.

7. **ALTERATIONS, REMOVAL:** No building, structure, improvement, fixture, personal property or Equipment constituting any part of the Premises shall be removed, demolished or substantially altered without the prior written consent of the Mortgagee.

8. **PAYMENT OF OTHER OBLIGATIONS:** The Mortgagor shall also pay all other obligations which may become liens or charges against the Premises for any present or future repairs or improvements made on the Premises, or for any other goods, services, or utilities furnished to the Premises, and shall not permit any lien or charge of any kind securing the repayment of borrowed funds (including the deferred purchase price for any property) to accrue and remain outstanding against the Premises.

9. **ASSIGNMENT OF LEASES AND RENTS:** As additional security for the Debt, the Mortgagor assigns to the

Mortgagee all oral or written leases, and the rent, issues, income and profits under all leases or licenses of the Premises, present and future. This assignment shall be operative in the event of default and during any foreclosure or other proceeding taken to enforce this Mortgage, and during any redemption period. The Mortgagor will comply with all terms of all leases.

10. **SECURITY AGREEMENT:** This Mortgage also constitutes a security agreement within the meaning of the Indiana Uniform Commercial Code ("UCC") and Mortgagor grants to Mortgagee a security interest in any Equipment and other personal property included within the definition of Premises. Accordingly, Mortgagee shall have all of the rights and remedies available to a secured party under the UCC. Upon the occurrence of an event of default under this Mortgage, the Mortgagee shall have in addition to the remedies provided by this Mortgage, the right to use any method of disposition of collateral authorized by the UCC with respect to any portion of the Premises subject to the UCC.

11. **REIMBURSEMENT OF ADVANCES:** If Mortgagor fails to perform any of its obligations under this Mortgage, or if any action or proceeding is commenced which materially affects Mortgagee's interest in the Premises (including but not limited to a lien priority dispute, eminent domain, code enforcement, insolvency, bankruptcy or probate proceedings), then Mortgagee at its sole option may make appearances, disburse sums and take any action it deems necessary to protect its interest (including but not limited to disbursement of reasonable attorney's fees and entry upon the Premises to make repairs). Any amounts disbursed shall become additional Debt, shall be immediately due and payable upon notice from the Mortgagee to the Mortgagor, and shall bear interest at the highest rate payable on the Debt.

12. **DUE ON TRANSFER:** If all or any part of the Premises or any interest in the Premises is transferred without Mortgagee's prior written consent, Mortgagee may, at its sole option, declare the Debt to be immediately due and payable.

13. **NO ADDITIONAL LIEN:** Mortgagor covenants not to execute any mortgage, security agreement, assignment of leases and rentals or other agreement granting a lien against the interest of Mortgagor in the Premises without the prior written consent of Mortgagee, and then only when the document granting that lien expressly provides that it shall be subject to the lien of this Mortgage for the full amount secured by this Mortgage, and shall also be subject and subordinate to any then existing or future leases affecting the Premises.

14. **EMINENT DOMAIN:** Notwithstanding any taking under the power of eminent domain, alteration of the grade of any road, alley, or the like, or other injury or damage to or decrease in value of the Premises by any public or quasi-public authority or corporation, the Mortgagor shall continue to pay the Debt in accordance with the terms of the underlying loan documents until any award or payment shall have been actually received by Mortgagee. By executing this Mortgage, the Mortgagor assigns the entire proceeds of any award or payment and any interest to the Mortgagee. The proceeds shall be applied first toward reimbursement of all costs and expenses of the Mortgagee, including reasonable attorney's fees of the Mortgagee in collecting the proceeds and then toward payment of the Debt whether or not then due or payable, or the Mortgagee at its option may apply the proceeds, or any part to the alteration, restoration or rebuilding of the Premises.

15. **REMEDIES UPON DEFAULT:** Upon the occurrence of any of the events of default set forth in any instrument or agreement secured by this Mortgage, the Mortgagee is authorized to commence foreclosure proceedings against the Premises through judicial proceedings, and in addition or alternatively to take any other actions permitted under applicable law. The Premises may be sold in one parcel as an entirety or in such parcels, manner and order as Indiana law allows. The proceeds of such sale shall be retained by the Mortgagee up to the amounts due it, including costs of the sale, any environmental investigation and remediation paid for by the Mortgagee, and reasonable attorney's fees. By executing this Mortgage, the Mortgagor waives, in the event of foreclosure of this Mortgage or the enforcement by the Mortgagee of any other rights and remedies in this Mortgage, any right otherwise available in respect to marshalling of assets which secure the Debt or to require the Mortgagee to pursue its remedies against any other such assets.

16. **REPRESENTATIONS:** Mortgagor represents that it is a corporation duly organized, existing and in good standing under the laws of its state of incorporation, and that the execution and delivery of this Mortgage and the performance of the obligations it imposes are within its corporate powers, have been duly authorized by all necessary action of its board of directors, and do not contravene the terms of its articles of incorporation or by-laws. The Mortgagor represents that the execution and delivery of this Mortgage and the performance of the obligations it imposes do not violate any law, do not conflict with any agreement by which it is bound, do not require the consent or approval of any governmental authority or any third party, and that this Mortgage is a valid and binding agreement, enforceable in accordance with its terms. The Mortgagor further represents that all balance sheets, profit and loss statements, and other financial statements, if any, furnished to the Mortgagee are accurate and fairly reflect the financial condition of the organizations and persons to which they apply on their effective dates, including contingent liabilities of every type, which financial condition has not changed materially and adversely since those dates.

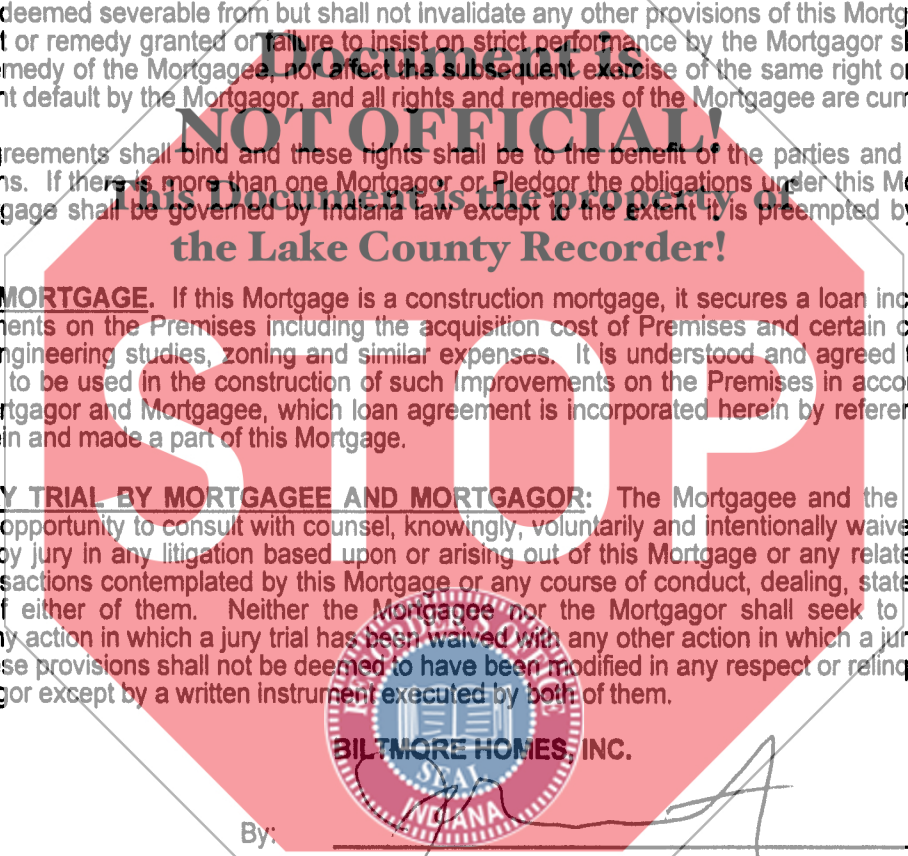
17. **NOTICES:** Notice from one party to another relating to this Mortgage shall be deemed effective if made in writing (including telecommunications) and delivered to the recipient's address, telex number or facsimile number set forth above by any of the following means: (a) hand delivery, (b) registered or certified mail, postage prepaid, with return receipt requested, (c) first class or express mail, postage prepaid, (d) Federal Express, Purolator Courier or like overnight courier service, or (e) facsimile, telex or other wire transmission with request for assurance of receipt in a manner typical with respect to communication of that type. Notice made in accordance with this paragraph shall be deemed delivered upon receipt if delivered by hand or wire transmission, 3 business days after mailing if mailed by first class, registered or certified mail, or one business day after mailing or deposit with an overnight courier service if delivered by express mail or overnight courier. This notice provision shall be inapplicable to any judicial or non-judicial proceeding where Indiana law governs the manner and timing of notices in foreclosure or receivership proceedings.

18. **MISCELLANEOUS:** If any provision of this Mortgage is in conflict with any statute or rule of law or is otherwise unenforceable for any reason whatsoever, then the provision shall be deemed null and void to the extent of such conflict or unenforceability and shall be deemed severable from but shall not invalidate any other provisions of this Mortgage. No waiver by the Mortgagee of any right or remedy granted or failure to insist on strict performance by the Mortgagor shall affect or act as a waiver of any right or remedy of the Mortgagee, nor affect the subsequent exercise of the same right or remedy by the Mortgagee for any subsequent default by the Mortgagor, and all rights and remedies of the Mortgagee are cumulative.

These promises and agreements shall bind and these rights shall be to the benefit of the parties and their respective heirs, successors, and assigns. If there is more than one Mortgagor or Pledgor the obligations under this Mortgage shall be joint and several. This Mortgage shall be governed by Indiana law except to the extent it is preempted by federal law or regulation.

19. **CONSTRUCTION MORTGAGE.** If this Mortgage is a construction mortgage, it secures a loan incurred to finance the construction of improvements on the Premises including the acquisition cost of Premises and certain costs incurred in planning, architectural and engineering studies, zoning and similar expenses. It is understood and agreed that funds to be advanced upon the Debt are to be used in the construction of such improvements on the Premises in accordance with any loan agreement between Mortgagor and Mortgagee, which loan agreement is incorporated herein by reference to the same extent as if fully set forth herein and made a part of this Mortgage.

20. **WAIVER OF JURY TRIAL BY MORTGAGEE AND MORTGAGOR:** The Mortgagee and the Mortgagor after consulting or having had the opportunity to consult with counsel, knowingly, voluntarily and intentionally waive any right either of them may have to a trial by jury in any litigation based upon or arising out of this Mortgage or any related instrument or agreement or any of the transactions contemplated by this Mortgage or any course of conduct, dealing, statements, whether oral or written or actions of either of them. Neither the Mortgagee nor the Mortgagor shall seek to consolidate, by counterclaim or otherwise, any action in which a jury trial has been waived with any other action in which a jury trial cannot be or has not been waived. These provisions shall not be deemed to have been modified in any respect or relinquished by either the Mortgagee or the Mortgagor except by a written instrument executed by both of them.



BILTMORE HOMES, INC.

By:

John F. Swinehart      President  
Printed Name      -      Title

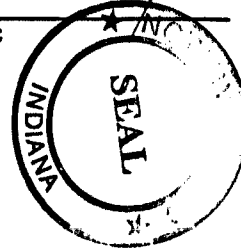
STATE OF INDIANA      }  
COUNTY OF MARION      }

Before me, a Notary Public in and for said County and State, personally appeared John Swinehart, the President of BILTMORE HOMES, INC. and acknowledged the execution of the foregoing Mortgage as the authorized voluntary act and deed of said corporation.

Witness my hand and Notarial Seal this 1<sup>st</sup> day of December, 19 98.

Fonda E. Crandall  
Signature - Notary Public

Fonda E. Crandall  
Printed Name - Notary Public



My County of Residence: Marion

My Commission Expires: August 3, 2006

This instrument was prepared by:  
Ramona M. Tester  
NBD Bank, N.A.  
One Indiana Square, MS 7025  
Indianapolis, IN 46266

When recorded return to Ramona M. Tester



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**EXHIBIT A**  
**Legal Description**

Lot 45 of Burnside's Chapel Hill Farms, Phase 1, an addition to the Town of Merrillville,  
as shown in plat book 72, page 23, in the office of the Recorder of Lake County, Indiana.



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