

UNOFFICIAL COPY

7/13



Doc#: 0433702314  
Eugene "Gene" Moore Fee: \$58.00  
Cook County Recorder of Deeds  
Date: 12/02/2004 01:20 PM Pg: 1 of 18

THIS DOCUMENT PREPARED  
BY AND AFTER RECORDING  
RETURN TO:

MS  
D2  
8238949  
Proskauer Rose LLP  
1585 Broadway  
New York, New York 10036  
Attn: David J. Weinberger, Esq.

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE ONLY

OLIVER Mc MILLAN GLENVIEW RETAIL, LLC,  
as Borrower

to

BARCLAYS CAPITAL REAL ESTATE INC.,  
as Lender

MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS  
AND FIXTURE FILING

Dated: <sup>as of</sup> November 30, 2004

Box 400-CTCC

18/2

# UNOFFICIAL COPY

## MORTGAGE, ASSIGNMENT OF RENTS AND LEASES, SECURITY AGREEMENT AND FIXTURE FILING

THIS MORTGAGE, ASSIGNMENT OF RENTS AND LEASES, SECURITY AGREEMENT AND FIXTURE FILING (this "Security Instrument") is made as of this 30 day of November 2004, by OLIVERMcMILLAN GLENVIEW RETAIL, LLC, a Delaware limited liability company, as mortgagor ("Borrower"), to BARCLAYS CAPITAL REAL ESTATE INC., a Delaware corporation, as mortgagee (together with its successors and assigns, "Lender").

### BACKGROUND

Borrower and Lender are entering into a certain Loan Agreement of even date herewith ("Loan Agreement") pursuant to which Lender will make a loan ("Loan") to Borrower in the maximum principal amount of \$46,600,000.00, or so much thereof as may be advanced pursuant to the terms of the Loan Agreement. The Loan will also be evidenced by Borrower's promissory notes to Lender of even date herewith, including a promissory note in the original principal amount of \$36,000,000.00 ("Note A") and a promissory note in the original principal amount of \$10,600,000.00, or so much thereof as may be advanced pursuant to the terms of the Loan Agreement ("Note B", together with Note A referred to collectively herein as the "Note"). Borrower desires to secure payment and performance of Borrower's obligations in respect of the Loan by granting to Lender the security described in this Security Instrument.

Borrower, OliverMcMillan Glenview Residential, LLC, a Delaware limited liability company ("Residential"), and Lender are entering into a certain Cross-Collateralization Agreement of even date herewith (the "Cross-Collateralization Agreement"), intended to be recorded in the real estate records in the county in which the Land (hereinafter defined) is located, which cross-collateralizes and cross-defaults the Loan with a loan made by Lender to Residential in the maximum principal amount of 28,400,000.00 on the date hereof (the "Residential Loan").

NOW, THEREFORE, to induce Lender to make the Loan to Borrower, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, Borrower agrees as follows:

### ARTICLE I

#### DEFINED TERMS

Section 1.01 Defined Terms. Capitalized terms used in this Security Instrument and not specifically defined in this Security Instrument have the meaning provided in the Loan Agreement.

# UNOFFICIAL COPY

## ARTICLE II

### GRANT OF SECURITY

Section 2.01 Property Mortgaged. Borrower does hereby irrevocably deed, mortgage, grant, bargain, sell, assign, pledge, warrant, transfer and convey to Lender, and to its successors and assigns as Lender, as security for the Obligations, with power of sale, the following property, rights, interests and estates, now owned or hereafter acquired by Borrower (collectively, the "Property"):

(a) Land. The land described in Exhibit A attached hereto and made a part hereof, together with all estates and development rights now existing or hereafter acquired for use in connection therewith (the "Land");

(b) Additional Land. All land that, from time to time, by supplemental deed or otherwise, may be expressly made subject to this Security Instrument, and all estates and development rights hereafter acquired by Borrower for use in connection with such land (also, the "Land");

(c) Improvements. All buildings, structures, improvements and fixtures now or hereafter erected or located on the Land (the "Improvements");

(d) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, and all estates, rights, titles, interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in any way now or hereafter belonging, relating or pertaining to the Property and the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof, and all the estates, rights, titles, interests, dower and rights of dower, curtesy and rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Property and every part and parcel thereof, with all appurtenances thereto;

(e) Fixtures and Personal Property. All machinery, equipment, fixtures (including, without limitation, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures), furnishing, building supplies and materials, and all other personal property of every kind and nature whatsoever owned by Borrower (or in which Borrower has or hereafter acquires an interest) and now or hereafter located upon, or appurtenant to, the Property or used or useable in the present or future operation and occupancy of the Property, along with all accessions, replacements or substitutions of all or any portion thereof (collectively, the "Personal Property");

(f) Leases and Rents. All leases, subleases, licenses and other agreements granting others the right to use or occupy all or any part of the Property together with all restatements, renewals, extensions, amendments and supplements thereto (the "Leases"), now existing or hereafter entered into, and whether entered before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code, and all of Borrower's right, title

# UNOFFICIAL COPY

and interest in the Leases, including, without limitation (i) all guarantees, letters of credit and any other credit support given by any tenant or guarantor in connection therewith (the "Lease Guaranties"), (ii) all cash, notes, or security deposited thereunder to secure the performance by the tenants of their obligations thereunder (the "Tenant Security Deposits"), (iii) all claims and rights to the payment of damages and other claims arising from any rejection by a tenant of its Lease under the Bankruptcy Code ("Bankruptcy Claims"), (iv) all of the landlord's rights in casualty or condemnation proceeds of a tenant in respect of the leased premises ("Tenant Claims"), (v) all rents, ground rents, additional rents, revenues, termination and similar payments, issues and profits (including all oil and gas or other mineral royalties and bonuses) from the Property (collectively with the Lease Guaranties, Tenant Security Deposits, Bankruptcy Claims and Tenant Claims, the "Rents"), whether paid or accruing before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code, (vi) all proceeds or streams of payment from the sale or other disposition of the Leases or disposition of any Rents, and (vii) the right to receive and apply the Rents to the payment of the Debt and to do all other things which Borrower or a lessor is or may become entitled to do under the Leases or with respect to the Rents;

(g) Condemnation Awards. All awards or payments, including interest thereon, which may heretofore and hereafter be made with respect to the Property, whether from the exercise of the right of eminent domain (including, without limitation, any transfer made in lieu of or in anticipation of the exercise of the right), or for a change of grade, or for any other injury to or decrease in the value of the Property;

(h) Insurance Proceeds. All proceeds of, and any unearned premiums on, any insurance policies covering the Property, including, without limitation, the exclusive right to receive and apply the proceeds of any claim awards, judgments, or settlements made in lieu thereof, for damage to the Property;

(i) Tax Certiorari. All refunds, rebates or credits in connection with a reduction in Taxes, including, without limitation, rebates as a result of tax certiorari or any other applications or proceedings for reduction;

(j) Agreements. All agreements (including, without limitation, interest rate cap agreements, swaps or other interest hedging agreements), contracts (including, without limitation, service, supply and maintenance contracts), registrations, permits, licenses (including, without limitation, liquor licenses, if any, to the fullest extent assignable by Borrower), franchise, plans, specifications and other documents, now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Property, or respecting any business or activity conducted from the Property, and all right, title and interest of Borrower therein and thereunder, including, without limitation, the right, while an Event of Default remains uncured, to receive and collect any sums payable to Borrower thereunder (collectively, the "Operating Agreements");

(k) Intangibles. All accounts, escrows, chattel paper, claims, deposits, trade names, trademarks, service marks, logos, copyrights, goodwill, books and records and all other general intangibles relating to or used in connection with the operation of the Property;

# UNOFFICIAL COPY

(l) Accounts. All reserves, escrows and deposit accounts maintained by Borrower with respect to the Property (including, without limitation, all reserves, escrows, deposit accounts and lockbox accounts established pursuant to the Loan Agreement), together with all cash, checks, drafts, certificates, securities, investment property, financial assets, instruments and other property from time to time held therein, and all proceeds, products, distributions, dividends or substitutions thereon or thereof;

(m) Rights to Conduct Legal Actions. The right, in the name and on behalf of Borrower, to commence any action or proceeding to protect the interest of Lender in the Property and to appear in and defend any action or proceeding brought with respect to the Property;

(n) Proceeds. All proceeds and profits arising from the conversion, voluntary or involuntary, of any of the foregoing into cash (whether made in one payment or a stream of payments) and any liquidation claims applicable thereto;

(o) Condominium Documents. All rights, remedies and powers of Borrower under the Condominium Documents, including, without limitation, any rights to appoint any Voting Member (as defined in the Condominium Documents) or members of the Condominium Board and any rights to exercise voting rights or privileges; and

(p) Rights. Any and all other rights of Borrower in and to the items set forth in the foregoing subsections (a) through (c) inclusive, and in and to the Property.

TO HAVE AND TO HOLD the above granted and described Property unto Lender, and its successors and assigns, with power of sale in accordance with the terms and conditions hereof, forever; subject, however, to Section 2.05 below.

Section 2.02 Grant of Security Interest; Security Agreement. Borrower hereby grants to Lender, as security for the Obligations, a security interest in the Property to the fullest extent that the Property now or hereafter may be subject to a security interest under the UCC. Borrower intends for this Security Instrument to be a "security agreement" within the meaning of the UCC. Borrower hereby irrevocably authorizes Lender to prepare, execute and file all initial financing statements, and any restatements, extensions, continuations, renewals or amendments thereof, in such form as Lender may require to perfect or continue the perfection of this security interest or other statutory liens held by Lender. Unless prohibited by applicable law, Borrower agrees to pay all reasonable expenses incident to the preparation, execution, filing and/or recording of any of the foregoing. With respect to any of the Property in which a security interest is not perfected by the filing of a financing statement, Borrower consents and agrees to undertake, and to cooperate fully with Lender, to perfect the security interest hereby granted to Lender in the Property. Without limiting the foregoing, if and to the extent any of the Property is held by a bailee for the benefit of Borrower, Borrower shall promptly notify Lender thereof and, if required by Lender, promptly obtain an acknowledgment from such bailee that is satisfactory to Lender and confirms that such bailee holds the Property for the benefit of Lender as secured party and shall only act upon instructions from Lender with respect to the Property.

# UNOFFICIAL COPY

## Section 2.03 Assignment of Leases and Rents.

(a) Rights Granted to Lender. Borrower hereby absolutely and unconditionally assigns to Lender all of Borrower's right, title and interest in and to all current and future Leases and Rents. Borrower hereby declares its intention to establish a present, absolute and irrevocable transfer and assignment to Lender of all Rents and Leases and to authorize and empower Lender to collect and receive all Rents and exercise all of Borrower's rights under the Leases (including, without limitation, the right to modify, extend or terminate any Lease) without any further action by Borrower; it being intended that this assignment is effective immediately and not an assignment made for security only. For purposes of giving effect to this assignment of Rents and Leases and for no other purpose, Rents and Leases shall not be deemed to be part of the "Property" as that term is defined in Section 2.01 of this Security Instrument. If, however, this assignment of Rents and Leases is not enforceable by its terms under the laws of the State where the Property is located, then Rents and Leases shall be included as part of the Property and it is Borrower's intention that, in this circumstance, this Security Instrument creates and perfects a lien of the Rents and Leases in favor of Lender, which lien shall be effective as of the date of this Security Instrument.

(b) License to Borrower; Revocation. Nevertheless, subject to the terms of this Security Instrument, the Loan Agreement and the Lockbox Agreement, Lender grants to Borrower a revocable license (i) to manage the leasing activities of the Property as contemplated by the Loan Agreement, (ii) to exercise all of Borrower's rights under the Leases and (iii) to collect and receive the Rents in trust for Lender and to apply the Rents to discharge all current amounts due on the Debt and to pay the current costs of managing, operating and maintaining the Property. So long as no Event of Default exists and subject to the provisions of the Lockbox Agreement, the Rents remaining after application pursuant to the preceding sentence may be retained by Borrower free and clear of, and released from, Lender's rights with respect to Rents under this Security Instrument. Upon the occurrence and during the continuance of an Event of Default, and without the necessity of notice or prior demand or Lender's entering upon and taking and maintaining control of the Property (whether directly or through a receiver), the license granted to Borrower by this Section shall terminate automatically, and Lender shall be entitled to receive and collect the Rents as they become due and payable and exercise all of Borrower's rights or the rights of lessor under the Leases and with respect to the Rent. Lender's right to revoke the license granted to Borrower is in addition to all other rights and remedies available to Lender with respect to any Event of Default.

Section 2.04 Pledge of Monies Held. Borrower hereby pledges to Lender, as security for the Obligations, all money now or hereafter held by Lender in escrow or reserve or on deposit pursuant to the terms hereof or pursuant to the Loan Agreement or any other Loan Document, until expended or applied as provided in this Security Instrument or such other Loan Document.

Section 2.05 Release of Security. The grants, mortgage, liens, security interests, assignments, pledges and transfers by this Security Instrument are subject to the express condition that, if Borrower pays to Lender the Debt at the time and in the manner provided in the Loan Agreement and performs all Obligations when and as required by the Loan Agreement and each other Loan Document, Lender shall release the Property from the grants, mortgage, liens,

# UNOFFICIAL COPY

security interests, assignments, pledges and transfers created by this Security Instrument and reconvey the Property to Borrower. Lender shall prepare (at Borrower's expense) and deliver to Borrower such documents as are necessary to effect such release and reconveyance.

## ARTICLE III

### DEBT AND OBLIGATIONS SECURED

Section 3.01 Debt. This Security Instrument and the interests created in favor of Lender hereunder are given for the purpose of securing (a) payment of principal, interest and all other amounts due at anytime under the Loan Agreement, the Note and each of the other Loan Documents, including, without limitation, interest at the Default Rate, any late fee for delinquent payments, Prohibited Prepayment Fee, the Prepayment Fee and the Exit Fee (if any) provided in the Loan Agreement, and amounts advanced by Lender to protect and preserve the Property and the Liens hereby created for the benefit of Lender (collectively "Debt"), (b) performance of all obligations of Borrower contained in the Loan Agreement, the Note and each of the other Loan Documents (collectively with the Debt, the "Obligations"), (c) as long as, but only as long as, the Loan and the Residential Loan are cross-collateralized and cross-defaulted pursuant to the terms of the Cross-Collateralization Agreement, (x) payment of principal, interest and all other amounts due at anytime under the Residential Loan Agreement (as defined in the Cross-Collateralization Agreement), the Residential Note (as defined in the Cross-Collateralization Agreement) and each of the other Loan Documents (for purposes of this clause (c) only, as defined in the Residential Loan Agreement), including, without limitation, interest at the Default Rate (for purposes of this clause (c) only, as defined in the Residential Loan Agreement), any late fee for delinquent payments, Prohibited Prepayment Fee (for purposes of this clause (c) only, as defined in the Residential Loan Agreement), the Prepayment Fee (for purposes of this clause (c) only, as defined in the Residential Loan Agreement) and the Exit Fee (for purposes of this clause (c) only, as defined in the Residential Loan Agreement), if any, provided in the Residential Loan Agreement, and amounts advanced by Lender to protect and preserve the Property (for purposes of this clause (c) only, as defined in the Residential Loan Agreement) and the Liens created by the Residential Security Instrument (as defined in the Cross-Collateralization Agreement) for the benefit of Lender (collectively "Residential Debt"), and (y) performance of all obligations of Residential Borrower contained in the Residential Loan Agreement, the Residential Note and each of the other Loan Documents (for purposes of this clause (c) only, as defined in the Residential Loan Agreement) (collectively with the Residential Debt, the "Residential Obligations"). For as long as, but only as long as, the Loan and the Residential Loan are cross-collateralized and cross-defaulted pursuant to the terms of the Cross-Collateralization Agreement, (x) the term "Debt" as used herein shall be deemed to include the Debt and the Residential Debt, and (y) the term "Obligations" as used herein shall be deemed to include the Obligations and the Residential Obligations. Notwithstanding any provision of this Security Instrument to the contrary, (x) the obligations of Borrower and the other indemnitors under the Environmental Indemnity shall not be deemed secured by this Security Instrument unless and until Lender expressly declares in writing such obligations to be secured hereby, and (y) the obligations of Residential Borrower and the other indemnitors under the Environmental Indemnity (for purposes of this clause (y) only, as defined in the Residential Loan Agreement) shall not be deemed secured by this Security Instrument unless and until Lender expressly

# UNOFFICIAL COPY

declares in writing such obligations to be secured hereby and, in the case of this clause (y) only, then only as long as the Loan and the Residential Loan are cross-collateralized and cross-defaulted pursuant to the terms of the Cross-Collateralization Agreement.

## ARTICLE IV

### BORROWER COVENANTS

Section 4.01 Payment of Debt and Performance of Obligations. Borrower will pay the Debt at the time and in the manner provided in the Loan Documents and fully and punctually perform the Obligations when and as required by the Loan Documents. Borrower may not prepay the Debt except in strict accordance with the Loan Agreement.

Section 4.02 Compliance with Loan Agreement. Borrower shall comply with all covenants and agreements in the Loan Agreement, including, without limitation, all obligations regarding the ownership, operation, management and condition of the Property and the protection and perfection of the Liens hereby created in favor of Lender. Without limiting the foregoing, Borrower agrees:

(a) No Transfers of the Property or Interests in Borrower. Borrower shall not cause or permit any Transfer of the legal or beneficial ownership of the Property, Borrower or SPE Equity Owner in violation of the Loan Agreement.

(b) Payment of Taxes and Other Lienable Charges. Borrower shall pay all Taxes and Other Charges assessed or imposed against the Property when and as required by the Loan Agreement.

(c) Insurance. Borrower shall obtain and maintain, in full force and effect at all times, all insurance with respect to Borrower and the Property as required by the Loan Agreement.

(d) Obligations upon Condemnation or Casualty. Borrower shall comply with all obligations required under the Loan Agreement in the event the Property is damaged by a Casualty or becomes involved in any Condemnation. All proceeds or awards recovered or payable to Borrower as a result of a Casualty or Condemnation shall be paid to, and administered by Lender, in accordance with the Loan Agreement.

(e) Leases and Rents. Borrower shall not enter into any Leases for all or any portion of the Property unless in accordance with the Loan Agreement.

Section 4.03 Warranty of Title. Borrower has good, marketable and insurable fee simple title of record to the Property, free and clear of all liens, encumbrances and charges whatsoever except for the Permitted Encumbrances. Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Security Instrument and shall forever warrant and defend the same to Lender against the claims of all Persons whomsoever.



# UNOFFICIAL COPY

## ARTICLE V

### SUBROGATION

Section 5.01 Subrogation. If the Loan is used to pay, satisfy, discharge, extend or renew any indebtedness secured by a pre-existing mortgage, or other lien encumbering the Property (a "Prior Lien"), then to the extent of funds so used, Lender shall automatically, and without further action on its part, be subrogated to all rights, including lien priority, held by the holder of the indebtedness secured by the Prior Lien, whether or not the Prior Lien is released, and such former rights are not waived but rather are continued in full force and effect in favor of Lender and are merged with the lien and security interest created herein as cumulative security for payment of the Debt and performance of the Obligations.

## ARTICLE VI

### DEFAULT

Section 6.01 Events of Default. The occurrence of an "Event of Default" as that term is defined under the Loan Agreement shall constitute an "Event of Default" under this Security Instrument.

Section 6.02 Remedies. If an Event of Default occurs, Lender may, at its option, and without prior notice or demand, exercise and hereby is authorized and empowered by Borrower so to exercise, any or all of the remedies set forth in the Loan Agreement (including, without limitation, the right to accelerate the Loan) or otherwise permitted by law or in equity.

Section 6.03 Cumulative Remedies; No Waiver; Other Security. Lender's remedies under this Security Instrument are cumulative with the remedies provided in the other Loan Documents, by law or in equity and may be exercised independently, concurrently or successively in Lender's sole discretion and as often as occasion therefore shall arise. Lender's delay or failure to accelerate the Loan or exercise any other remedy upon the occurrence of an Event of Default shall not be deemed a waiver of such right as remedy. No partial exercise by Lender of any right or remedy will preclude further exercise thereof. Notice or demand given to Borrower in any instance will not entitle Borrower to notice or demand in similar or other circumstances nor constitute Lender's waiver of its right to take any future action in any circumstance without notice or demand (except where expressly required by this Security Instrument to be given). Lender may release other security for the Debt, may release any party liable for the Debt, may grant extensions, renewals or forbearances with respect thereto, may accept a partial or past due payment or grant other indulgences, or may apply any other security held by it to payment of the Debt, in each case without prejudice to its rights under this Security Instrument and without such action being deemed an accord and satisfaction or a reinstatement of the Debt. Lender will not be deemed as a consequence of its delay or failure to act, or any forbearances granted, to have waived or be estopped from exercising any of its rights or remedies.

Section 6.04 Enforcement Costs. Borrower shall pay, on written demand by Lender, all costs incurred by Lender in (a) collecting any amount payable under the Loan

# UNOFFICIAL COPY

Documents, or (b) enforcing its rights under the Loan Documents, in each case whether or not legal proceedings are commenced. Such fees and expenses include, without limitation, reasonable fees for attorneys, paralegals, law clerks and other hired professionals, a reasonable assessment of the cost of services performed by Lender's default management staff, court fees, costs incurred in connection with pre-trial, trial and appellate level proceedings, including discovery, and costs incurred in post-judgment collection efforts or in any bankruptcy proceeding. Amounts incurred by Lender shall be added to the Debt, shall be immediately due and payable, and shall bear interest at the Default Rate from the date of disbursement until paid in full, if not paid in full within five (5) days after Lender's written demand for payment.

Section 6.05 Application of Proceeds. The proceeds from disposition of the Property shall be applied by Lender to the fullest extent permitted by law to the payment of the Debt (including, without limitation, advances made by Lender and enforcement costs incurred by Lender) in such priority and proportion as Lender determines in its sole discretion.

Section 6.06 Continuing Lien; Right to Release Property. If less than all of the Property is, at any time, sold through foreclosure, power of sale, or otherwise, or if Lender releases any portion of the Property (for whatever consideration Lender deems appropriate), this Security Instrument shall continue as a lien and security interest on the remaining portion of the Property, unimpaired and without loss of priority.

Section 6.07 LIMITATION ON PERSONAL LIABILITY. NOTWITHSTANDING ANY PROVISION HEREOF TO THE CONTRARY, BORROWER'S PERSONAL LIABILITY FOR PAYMENT OF THE DEBT AND PERFORMANCE OF THE OBLIGATIONS IS LIMITED HEREUNDER IN THE SAME MANNER AND TO THE SAME EXTENT AS EXPRESSLY PROVIDED IN THE LOAN AGREEMENT.

## ARTICLE VII

### WAIVER OF RIGHT OF REDEMPTION AND OTHER RIGHTS

Section 7.01 Waiver of Rights of Redemption, Marshaling and Other Rights. Borrower hereby waives, to the fullest extent permitted by law, the benefit of all laws, now or hereafter in force, providing for (a) the valuation or appraisal of the Property, or any party thereof, prior to any sale or sales thereof pursuant to this Security Instrument or any decree, judgment or order of a court of competent jurisdiction; (b) the right to stay or extend any such proceeding, to have this Security Instrument reinstated or to redeem the Property or any portion thereof so sold (except as permitted pursuant to the last sentence of this Section 7.01); (c) rights of marshaling relating to any such sale or sales; (d) any right to require that the Property be sold as separate tracts or units in connection with enforcement of this Security Instrument; and (e) the benefit of any moratorium, exemption or homestead rights now or hereafter provided. Borrower makes such waivers on its own behalf and on behalf of all parties now or hereafter claiming or having an interest (direct or indirect) by, through or under Borrower. Notwithstanding anything contained in this Section 7.01 to the contrary, (i) to the extent permitted under and in compliance with applicable law, Borrower may terminate a foreclosure at any time by paying the outstanding Debt in full prior to the transfer of title to the Land and Improvements in connection with a foreclosure or any deed in lieu of foreclosure, and (ii) Borrower shall have the right to have this

# UNOFFICIAL COPY

Security Instrument reinstated in accordance with the terms of Section 5/15-1602 of the IMFL (hereinafter defined) as long as such reinstatement occurs prior to the earlier to occur of (x) the expiration of ninety (90) days from the date Borrower has been served with summons or by publication or has otherwise submitted to the jurisdiction of the applicable court and (y) entry of a judgment of foreclosure.

Section 7.02 Waiver of Counterclaim. Borrower hereby waives, to the fullest extent permitted by law, the right to assert a counterclaim, other than a mandatory or compulsory counterclaim, in any action or proceeding brought against it by Lender arising out of, or in any way connected with, the Obligations.

Section 7.03 Waiver of Foreclosure Defense. Borrower hereby waives, to the fullest extent permitted by law, any defense Borrower might have by reason of Lender's failure to make any tenant or tenant of the Property a party defendant in any foreclosure instituted by Lender.

Section 7.04 Waiver of Notices Generally. Borrower hereby waives, to the fullest extent permitted by law, its rights to notice from Lender except when this Security Instrument or the other Loan Documents expressly provides for Lender to give notice to Borrower.

Section 7.05 Waiver of Statute of Limitations and Laches. Borrower hereby waives, to the fullest extent permitted by law, the benefit of any statute of limitations or laches defense to payment of the Debt or performance of the Obligations.

Section 7.06 Waiver of Trial by Jury. **BORROWER WAIVES ITS RIGHT, TO THE FULLEST EXTENT PERMITTED BY LAW, AND AGREES NOT TO ELECT, A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS SECURITY INSTRUMENT OR THE RELATIONSHIP BETWEEN THE PARTIES AS BORROWER AND LENDER.**

Section 7.07 Governing Law. THIS SECURITY INSTRUMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND MADE BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW YORK, AND THE PROCEEDS OF THE NOTE SECURED HEREBY WERE DISBURSED FROM THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS SECURITY INSTRUMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES (I) THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS WITH RESPECT TO

# UNOFFICIAL COPY

THE PROPERTY (OTHER THAN THAT DESCRIBED IN CLAUSE (II) OF THIS SENTENCE) SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY AND FIXTURES ARE LOCATED AND (II) WITH RESPECT TO THE PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS IN PROPERTY WHOSE PERFECTION AND PRIORITY IS COVERED BY ARTICLE 9 OF THE UCC (INCLUDING, WITHOUT LIMITATION, THE LOCKBOX ACCOUNT, THE CASH MANAGEMENT ACCOUNT AND THE RESERVE ACCOUNTS), THE LAW OF THE JURISDICTION APPLICABLE IN ACCORDANCE WITH SECTIONS 9-301 THROUGH 9-307 OF THE UCC AS IN EFFECT IN THE STATE OF NEW YORK SHALL GOVERN. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS SECURITY INSTRUMENT AND THE NOTE, AND THIS SECURITY INSTRUMENT AND THE NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW EXCEPT AS SPECIFICALLY SET FORTH ABOVE.

Section 7.08 Consent to Jurisdiction. ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS SECURITY INSTRUMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT:

William P. Persky  
 OliverMcMillan  
 733 8th Avenue, 3rd Floor  
 San Diego, CA 92101

AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED PERSONAL SERVICE OF PROCESS MADE IN NEW YORK, NEW YORK, AND DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN SAN

# UNOFFICIAL COPY

DIEGO, CALIFORNIA, OR NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN SAN DIEGO, CALIFORNIA, OR NEW YORK, NEW YORK, OR (X) IS DISSOLVED WITHOUT LEAVING A SUCCESSOR OR (Y) DIES OR BECOMES LEGALLY INCAPACITATED, AS APPLICABLE.

## ARTICLE VIII

### MISCELLANEOUS PROVISIONS

Section 8.01 Incorporation from Loan Agreement. All provisions of Articles 17 and 18, inclusive, of the Loan Agreement are incorporated into this Security Instrument by this reference, as if fully reproduced herein.

Section 8.02 Further Acts. Borrower, at Borrower's expense, agrees to take such further actions and execute such further documents as Lender reasonably may request to carry out the intent of this Security Instrument or to establish and protect the rights and remedies created or intended to be created in favor of Lender hereunder or to protect the value of the Property and the Liens and security hereby created in favor of Lender. Borrower agrees to pay all filing, registration or recording fees or taxes, and all expenses incident to the preparation, execution, acknowledgement or filing/recording of this Security Instrument or any such instrument of further assurance, except where prohibited by law so to do.

Section 8.03 No Third Party Beneficiary. Notwithstanding any provision of this Security Instrument to the contrary, this Security Instrument is not intended by the parties to create, and shall not create, benefits on behalf of any tenant or other occupant of the Property or anyone claiming rights through any tenant or other occupant of the Property.

Section 8.04 No Agency or Partnership. Nothing contained in this Security Instrument shall constitute Lender as a joint venturer, partner or agent of Borrower, or render Lender liable for any debts, obligations, acts, omissions, representations, or contracts of Borrower.

## ARTICLE IX

### LOCAL LAW PROVISIONS

Section 9.01 Compliance with Illinois Foreclosure Law.

(a) If any provision in this Security Instrument is determined to be inconsistent with any provision of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 et seq. (1992 State Bar Edition)) (the "IMFL"), the provisions of the IMFL shall take precedence over the provisions of this Security Instrument, but shall not invalidate or render unenforceable any other provisions of this Security Instrument that can be construed in a manner consistent with the IMFL.

# UNOFFICIAL COPY

(b) Without limiting the generality of the foregoing, all expenses incurred by Lender to the extent reimbursable under Sections 15-1510 and 15-1512 of the IMFL, whether incurred before or after any decree or judgment of foreclosure, and whether enumerated in this Security Instrument, the Loan Agreement or the other Loan Document, shall be added to the Debt secured by this Security Instrument or by the judgment of foreclosure.

(d) Without limiting the generality of the foregoing, this Security Instrument also secures all future advances made pursuant to the terms of this Security Instrument, the Loan Agreement or the other Loan Documents made after this Security Instrument is recorded, including but not limited to all monies so advanced by Lender in accordance with the terms of this Security Instrument, the Loan Agreement or the other Loan Documents to (i) preserve or restore the Property, (ii) preserve the lien of this Security Instrument or the priority thereof or (iii) enforce this Security Instrument, and, to the full extent permitted by Subsection (b)(5) of Section 15-1302 of the IMFL or other law, shall be a lien from the time this Security Instrument is recorded.

Section 9.02 Waiver of Statutory Rights. BORROWER ACKNOWLEDGES THAT THE TRANSACTION OF WHICH THIS SECURITY INSTRUMENT IS A PART IS A TRANSACTION WHICH DOES NOT INCLUDE EITHER AGRICULTURAL REAL ESTATE (AS DEFINED IN SECTION 15-1201 OF THE IMFL), AND TO THE FULL EXTENT PERMITTED BY LAW VOLUNTARILY AND KNOWINGLY WAIVES BORROWER'S RIGHTS TO REINSTATEMENT AND REDEMPTION AS ALLOWED UNDER SECTION 15-1601(B) OF THE IMFL, AND TO THE FULL EXTENT PERMITTED BY LAW, THE BENEFITS OF ALL PRESENT AND FUTURE VALUATION, APPRAISEMENT, HOMESTEAD, EXEMPTION, STAY, REDEMPTION AND MORATORIUM LAWS UNDER ANY STATE OR FEDERAL LAW; PROVIDED, HOWEVER, NOTWITHSTANDING THE FOREGOING WAIVERS, (A) TO THE EXTENT PERMITTED UNDER AND IN COMPLIANCE WITH APPLICABLE LAW, BORROWER MAY TERMINATE A FORECLOSURE AT ANY TIME BY PAYING THE OUTSTANDING DEBT IN FULL PRIOR TO THE TRANSFER OF TITLE TO THE LAND AND IMPROVEMENTS IN CONNECTION WITH A FORECLOSURE OR ANY DEED IN LIEU OF FORECLOSURE, AND , AND (B) BORROWER SHALL HAVE THE RIGHT TO HAVE THIS SECURITY INSTRUMENT REINSTATED IN ACCORDANCE WITH THE TERMS OF SECTION 5/15-1602 OF THE IMFL AS LONG AS SUCH REINSTATEMENT OCCURS PRIOR TO THE EARLIER TO OCCUR OF (X) THE EXPIRATION OF NINETY (90) DAYS FROM THE DATE BORROWER HAS BEEN SERVED WITH SUMMONS OR BY PUBLICATION OR HAS OTHERWISE SUBMITTED TO THE JURISDICTION OF THE APPLICABLE COURT AND (Y) ENTRY OF A JUDGMENT OF FORECLOSURE. THE TERMS OF THIS SECTION 9.02 SHALL NOT BE CONSTRUED IN ANY MANNER TO LIMIT THE TERMS OF SECTION 6.07 HEREOF.

Section 9.03 Fixture Filing. THIS SECURITY INSTRUMENT 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 OR REGISTERED IN THE REAL ESTATE RECORDS OF THE COUNTY IN WHICH THE LAND IS LOCATED. THE ADDRESS OF LENDER [SECURED PARTY] AND THE

# UNOFFICIAL COPY

MAILING ADDRESS OF BORROWER [DEBTOR] ARE SET FORTH WITHIN. A PHOTOGRAPHIC OR OTHER REPRODUCTION OF THIS INSTRUMENT OR ANY FINANCING STATEMENT RELATING TO THIS INSTRUMENT SHALL BE SUFFICIENT AS A FINANCING STATEMENT.

Section 9.04 Maximum Amount Secured. Borrower and Lender intend that this Security Instrument shall secure not only sums advanced as of the date hereof but also all advances provided for in the Loan Documents; provided, however, that the maximum amount secured by this Security Instrument shall in no event exceed Ninety-Six Million and No/100 Dollars (\$96,000,000.00).

Section 9.05 Business Loan. Borrower represents and agrees that the obligations secured hereby constitute a business loan within the purview of such paragraph 1(c) of Section 4 of the Illinois Interest Act, 815 ILCS 205/1 et seq. (1992 State Bar Edition) (or any substitute, amended or replacement statutes) transacted solely for the purpose of carrying on or acquiring the business of Borrower, and also constitutes a loan secured by a mortgage which comes within the purview of subparagraph 1(l) of said Section.

Section 9.06 Maturity Date. The maturity date of the Loan is the first (1<sup>st</sup>) day of December 2015.

Section 9.07 Mortgagee-in-Possession. In addition to any provision of this Security Instrument authorizing Lender to take or be placed in possession of the Property, or for the appointment of a receiver, Lender shall have the right, in accordance with Sections 5/15-1701 and 5/15-1702 of the IMFL, to be placed in possession of the Property or at its request to have a receiver appointed, and such receiver, or Lender, if and when placed in possession, shall have, in addition to any other powers provided in this Security Instrument, the Loan Agreement and the other Loan Documents, all powers, immunities and duties as provided for in Sections 5/15-1701 and 5/15-1702 of the IMFL.

Section 9.08 Insurance. Notwithstanding the provisions of Section 4.02(c) hereof or Section 9.03 of the Loan Agreement, if Borrower fails to provide Lender evidence of the insurance coverages required pursuant to the provisions of this Security Instrument and the Loan Agreement, Lender may purchase such insurance at Borrower's expense to cover Lender's interest in the Property. The insurance may, but need not, protect Borrower's interest. The coverages that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the Property. Borrower may later cancel any insurance purchased by Lender but only after providing Lender with evidence that Borrower has obtained such insurance as required pursuant to Section 4.02(c) of this Security Instrument and Section 9.03 of the Loan Agreement. If Lender purchased insurance for the Property, Borrower will be responsible for the costs of such insurance, including, without limitation, interest and any other charges which Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation and the expiration of the insurance. The cost of the insurance may be added to the Debt. The cost of the insurance may be more than the cost of the insurance Borrower may be able to obtain on its own.

# UNOFFICIAL COPY

IN WITNESS WHEREOF, the undersigned hereby signs, seals and delivers this Security Instrument.

OLIVERMCMILLAN GLENVIEW RETAIL, LLC,  
a Delaware limited liability company

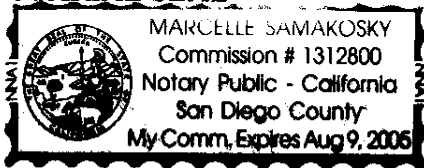
By: [Signature]  
 Name: JAMES L. MCMILLAN  
 Title: PRESIDENT

Property of Cook County Clerk's Office

STATE OF CALIFORNIA )  
 ) SS:  
 COUNTY OF SAN DIEGO )

The foregoing instrument was acknowledged before me this 23<sup>rd</sup> day of November 2004, by JAMES L. MCMILLAN, as PRESIDENT of OLIVERMcMILLAN GLENVIEW RETAIL, LLC, a Delaware limited liability company, who personally appeared before me and executed the foregoing instrument as his/her free and voluntary act and as the free and voluntary act of the limited partnership.

NOTARIAL SEAL



Marcelle Samakosky  
 Print Name: MARCELLE SAMAKOSKY  
 Notary Public State of: CALIFORNIA  
 Commission Number: 1312800

My Commission Expires: 8/9/05



# UNOFFICIAL COPY

## EXHIBIT A

### Legal Description of the Land

The following describes the Land:

Parcel 1: Lots 4, 6, 8, 10, 12, 13, 14, 15, 18 and 21 in Glen Town Center, a resubdivision of Lot 3 in GNAS mixed use retail center, in the West 1/2 of Section 27, Township 42 North, Range 12, East of the third principal meridian, according to the plat thereof recorded as document number 0020733381, in Cook County, Illinois.

Also

Proposed Unit P in the Glen Town Center- Retail A Condominium, as delineated on a survey of the following described tract of land:

Lot 2 in Glen Town Center, a resubdivision of Lot 3 in GNAS mixed use retail center, in the West 1/2 of Section 27, Township 42 North, Range 12, East of the third principal meridian, according to the plat thereof recorded as document 0020733381, which survey is attached as exhibit "B" to the Declaration of Condominium recorded as document number 0432244002 together with its undivided percentage interest in the common elements in Cook County Illinois.

Parcel 2: Easements for the benefit of Parcel 1 for parking, access, utility, and construction, as set forth in Declaration of Easements, Covenants, Conditions and Restrictions recorded July 2, 2002, as Document 0020733382 by the Village of Glenview and OliverMcMillan Glenview, LLC.

Parcel 3: Blanket Pedestrian Easement for the benefit of Parcel 1 and other property over and across Lot 1 in GNAS mixed use subdivision, as contained in plat recorded September 27, 2001 as Document 0010905146.

Parcel 4: Vehicular ingress and egress easement for the benefit of Parcel 1 over and across part of Lot 4 in GNAS mixed use subdivision, as contained in plat recorded September 27, 2001 as Document 0010905146.

Parcel 5: Easements for ingress and egress, structural support, use of facilities, residential building roof access, encroachments, common walls, ceilings and floors, utilities, HVAC equipment and facilities and mechanical rooms, over and across Lots 20 and 22 in Glen Town Center aforesaid, for the benefit of Lot 21 and part of Lot 12, in Parcel 1, as contained in Declaration of Covenants, Conditions, Restrictions and Easements dated as of November 2, 2004 by OliverMcMillan Glenview, LLC with respect to Glentown Center, Building D, Glenview, Illinois, to be recorded or intended to be recorded in the recorder's office of Cook County, Illinois, prior to the recording of this instrument.

Parcel 6: Easements for ingress and egress, structural support, use of facilities, residential building roof access, encroachments, common walls, ceilings and floors, utilities, HVAC

**UNOFFICIAL COPY**

equipment and facilities and mechanical rooms, over and across Lots 17 and 19 in Glen Town Center aforesaid, for the benefit of Lot 18, and part of Lot 15, in Parcel 1, as contained in Declaration of Covenants, Conditions, Restrictions and Easements dated as of November 22, 2004 by OliverMcMillan Glenview, LLC with respect to Glentown Center, Building E, Glenview, Illinois, to be recorded or intended to be recorded in the recorder's office of Cook County, Illinois, prior to the recording of this instrument.

*Tower Druml, Glenview IL*

*04-27-103-013-0000*

*04-27-103-015-0000*

*04-27-103-017-0000*

*04-27-103-019-0000*

*04-27-103-021-0000*

*04-27-103-023-0000*

*04-27-103-024-0000*

*04-27-103-025-0000*

*04-27-103-026-0000*

*04-27-103-029-0000*

*04-27-103-032-0000*