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Doc#: 0522444008 Fee: \$62.50  
Eugene "Gene" Moore RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 08/12/2005 12:48 PM Pg: 1 of 20

**RHSP**  
\$10.00 Fee

## FOR RECORDER'S USE ONLY

### MORTGAGE

THIS MORTGAGE (hereinafter referred to as the "Mortgage") is made the tenth day of August, 2005 by Brian S. Fernald and Rachel B. Fernald (hereinafter referred to as "Mortgagor") to Myron W. Lustig, Trustee of the Lustig-Koester Family Trust dated 09/17/2003, who is located at 18946 Tuba St., Northridge, CA 91324 (hereinafter referred to as "Mortgagee") to secure an Indebtedness in the original principal amount of \$150,000.00 (the "Original Principal Amount").

### WITNESSETH

WHEREAS, Mortgagor has concurrently herewith executed and delivered a certain promissory note (the "Note") of even date herewith, payable to the order of Mortgagee, for the Original Principal Amount, bearing interest as provided therein;

NOW, THEREFORE, in consideration of the Mortgagee's advancement to Mortgagor of the Original Principal Amount (less any fees, expenses and/or other amounts which Mortgagee has been authorized by Mortgagor to retain) and in consideration of the covenants and undertakings herein set forth and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

In order to secure the due and punctual payment in full by Mortgagor of the Original Principal Amount, interest thereon and all other amounts due or to become due under or in connection with this Mortgage and/or the Note, or any extensions, renewals, or replacements of the Note, (this Mortgage and the Note and/or any extensions, renewals, or replacements of the Note are hereinafter collectively referred to as the "Loan Documents") and any and all reasonable expenses paid or incurred by Mortgagee under or in connection with the perfection or enforcement of the Loan

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Documents and the performance of all other obligations and liabilities of Mortgagor under or in connection with the Loan Documents (all of the aforesaid are hereinafter collectively called the "Indebtedness"), Mortgagor does hereby MORTGAGE, WARRANT, GRANT, ASSIGN, TRANSFER, SET OVER, DELIVER AND CONVEY unto Mortgagee upon the terms and conditions of this Mortgage, the real property located in Cook County, Illinois, commonly known as 1133 S. State St. #701, Chicago, IL 60605 and legally described in EXHIBIT A (the "Real Estate"), together with all rights, title and interests of Mortgagor in and to: (i) All rights, privileges, interests, tenements, hereditaments, easements and appurtenances in any way now or hereafter pertaining to the Real Estate ("Easements"); (ii) all buildings and other improvements of every kind and description now or hereafter placed on the Real Estate, together with all fixtures, machinery and other articles of personal property now or hereafter attached to or regularly used in connection with the Real Estate, and all replacements thereof ("Improvements"); (iii) all extensions, improvements, betterments, substitutes, replacements, renewals, additions and appurtenances of or to the Easements or Improvements ("Additions"); (iv) All rents, issues, proceeds, income and profits of the Real Estate, Easements, Improvements and Additions, including all payments made in connection with leases, subleases and other agreements affecting the Real Estate, Easements, Improvements or Additions ("Rents"); and (v) All awards, payments or proceeds of conversion, whether voluntary or involuntary, of any of the foregoing, including, without limitation, all insurance, condemnation and tort claims ("Proceeds"). (Hereinafter, the Real Estate, Easements, Improvements and Additions are referred to collectively as the "Premises" and the Premises together with the Rents and Proceeds are referred to collectively as the "Mortgaged Property").

SUBJECT, HOWEVER TO THE FOLLOWING ENCUMBRANCES AND OTHER MATTERS (hereinafter referred to collectively as "Permitted Exceptions"):

THIS MORTGAGE IS SUBORDINATE TO A FIRST MORTGAGE OF APPROXIMATELY \$400,000 OWED BY BRIAN S. FERNALD AND RACHEL B. FERNALD TO FIRST PLACE BANK (ACCOUNT NUMBER: 00-4680033950). THE FIRST MORTGAGE SHALL BE PAID IN FULL BEFORE THIS SECOND MORTGAGE SHALL BE SATISFIED.

To HAVE AND TO HOLD the above granted and described Mortgaged Property for the use and benefit of Mortgagee, and the successors and assigns of Mortgagee, forever, subject to the provisions hereof.

## ARTICLE I

### Representations and Warranties of Mortgagor

SECTION 1.01. Mortgagor represents and warrants that (i) Mortgagor has good, marketable and insurable fee simple title to the Real Estate and the Improvements, free and clear of all liens, charges and encumbrances of every kind and character except for Permitted Exceptions; (ii) Mortgagor has full power and lawful authority to encumber and convey the Mortgaged Property as provided herein; (iii) all Improvements now or hereafter comprising part of the Mortgaged Property are free and clear of all liens, charges and encumbrances of every kind and character, except for Permitted Exceptions; (iv) this Mortgage is and will remain a valid and enforceable first lien on and

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security interest in the Mortgaged Property subject only to Permitted Exceptions; and (v) Mortgagor will forever defend such title and the validity, enforceability and priority of the lien and security interest hereof against the claims of all persons and parties whomsoever subject only to the Permitted Exceptions.

## SECTION 1.02. Hazardous Substances.

(a) Mortgagor represents and warrants that Mortgagor shall not, nor shall Mortgagor permit any other person or entity to, place, hold, locate or dispose of any Hazardous Substances on, under or at the Premises or any part thereof in contravention of law. Mortgagor shall comply with and shall ensure compliance by all tenants, subtenants, licensees and users (if any are hereafter permitted) of the Premises with all applicable federal, state and local laws, ordinances, rules and regulations.

(b) Mortgagor hereby agrees to indemnify and hold Mortgagee harmless from and against any and all losses, liabilities (including strict liability), damages, injuries, penalties, expenses and costs of whatever kind or nature, known or unknown, contingent or otherwise, including, without limitation, reasonable attorneys' fees, incurred or suffered by, or asserted against, Mortgagee by any person or entity or governmental agency, for or with respect to a breach or violation of the covenant or warranty set forth in Section 1.02(a) above. The provisions of this Section 1.02 shall survive defeasance and/or foreclosure or termination of this Mortgage.

(c) For purposes of this Mortgage, the term "Hazardous Substances" shall mean and include those elements or compounds which are contained in the list of hazardous substances adopted by the United States Environmental Protection Agency ("EPA") and the list of toxic pollutants designated by Congress or the EPA or defined by any other Federal, state or local statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to, or imposing liability (including strict liability) or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereinafter in effect. Hazardous Substances shall include, but shall not necessarily be limited to, any substance giving rise to liability under: the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. Section 6901 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9601 et seq.; or any other applicable environmental statute, law, regulation or ordinance imposing or authorizing the imposition of liability upon the transferee or mortgagee of real estate in the event of a violation thereof.

## SECTION 1.03. Miscellaneous Representations.

The Mortgagor represents and warrants as follows:

(a) The Mortgagor has full power to carry on its business as presently conducted, including the power to execute, deliver and perform its obligations under the Loan Documents and to own the Mortgaged Property.

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(b) This Mortgage and the Note secured hereby have been duly executed and delivered by the Mortgagor, and each such document constitutes the legal, valid and binding obligation and agreement of the Mortgagor, enforceable in accordance with their respective terms.

(c) Neither the execution and delivery by the Mortgagor of the Loan Documents, nor the performance and observance by the Mortgagor of the terms of the Loan Documents contravene any provision of existing law or regulation and the Loan Documents do not and will not conflict with or result in any breach of or constitute a default under any instrument binding upon the Mortgagor nor any order, writ, injunction, decree or demand of any court or any governmental authority affecting the Mortgagor or the Mortgaged Property.

(d) There are no pending or threatened bankruptcy or like proceedings against or involving the Mortgagor under the Bankruptcy Code of the United States or any chapter thereof or any like statute, state or Federal.

(e) This Mortgage and the Note secured hereby have been executed by the Mortgagor for a valid "business purpose" and not as part of any "consumer" transaction.

## ARTICLE II

### Covenants of Mortgagor

#### SECTION 2.01. General Covenants:

(a) Payment of Obligations. Mortgagor will punctually pay or cause to be paid when due the Indebtedness and will perform and observe all of its obligations under the Loan Documents all without relief from valuation and appraisal laws.

(b) Defense of Title Litigation. If the lien, security interest, validity or priority of this Mortgage (except with respect to the Permitted Exceptions) shall be endangered or legally challenged, or if any action or proceeding is instituted against Mortgagor or Mortgagee with respect thereto, Mortgagor will promptly notify Mortgagee thereof and will diligently endeavor to cure any defect on which such challenge, action or proceeding is based. If Mortgagor shall fail to comply with its obligations under this Section 2.01, Mortgagee is authorized (but shall not be obligated) to take such steps as Mortgagee may reasonably deem necessary or proper for the defense of any such action or proceeding or the protection of the lien, security interest, validity or priority of this Mortgage. Mortgagor shall, within five (5) days after demand, reimburse Mortgagee for all reasonable expenses (including reasonable attorneys' fees and disbursements) incurred by Mortgagee in connection with the foregoing matters. All such costs and expenses of Mortgagee, until reimbursed by Mortgagor, shall be part of the Indebtedness and shall be deemed to be secured by this Mortgage.

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## SECTION 2.02. Operation and Maintenance.

(a) Care and Condition of Mortgaged Property. Mortgagor shall (a) promptly repair, restore or rebuild the Premises or any portion thereof which is damaged or destroyed; (b) keep the Premises in good condition and repair, without waste, and free from encroachments and from mechanic's or materialman's lien or claims for lien not expressly subordinated to this Mortgage; (c) pay when due any indebtedness which may be secured by a lien or charge on the Mortgaged Property, whether or not superior to the lien of this Mortgage; (d) comply with all requirements of law and covenants and restrictions of record applicable to the Premises or its use; and (e) permit no change in or alteration of the design, structural character or general nature of the Real Estate and the Improvements (once constructed) without Mortgagee's prior written consent (which consent shall not be withheld unreasonably).

(b) Loyalty of Use. Mortgagor will not use or occupy, or permit the Premises to be used or occupied, in any manner which violates any applicable law or which constitutes a public or private nuisance or which makes void, voidable or cancelable any insurance then in force with respect thereto.

## SECTION 2.03. Insurance.

(a) Required Insurance: Mortgagor will keep the Premises insured against loss by fire, extended casualty, vandalism, malicious mischief and such other hazards as reasonably may be required from time to time by Mortgagee for the benefit and protection of Mortgagee, including comprehensive and contractual liability insurance and general public liability insurance (including dram shop liability, if applicable) with single combined limits of coverage for bodily injury of not less than \$1,000,000.00 per claim/per occurrence and for damage to property of not less than \$300,000 per claim/per occurrence (together, the "Required Insurance"). The Required Insurance shall be written in forms, amounts, and by companies reasonably satisfactory to Mortgagee, and losses thereunder shall be payable to Mortgagee pursuant to standard non-contributing mortgage endorsements in favor of Mortgagee. Unless otherwise agreed by Mortgagee, all policies of Required Insurance, including additional and renewal policies, shall be deposited with and held by Mortgagee. Any monies received as payment for any loss for damage to the Premises under any of the Required Insurance shall be paid over to Mortgagee and may be applied, at the option of Mortgagee, either to prepayment of any portion of the Indebtedness as Mortgagee may select or to the reimbursement of Mortgagor for expenses incurred by Mortgagor in the restoration or repair of the Premises. Proceeds paid or payable to Mortgagor in consequence of damage or loss to the Premises shall be deemed held in trust by Mortgagor for the benefit of Mortgagee and shall be applied to restoration of the Premises or, at the election of Mortgagee, in such other fashion as Mortgagee reasonably may require. The Required Insurance must include an endorsement that the same may not be cancelled for any reason without at least thirty (30) days prior written notice to the Mortgagee.

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(b) Collateral Protection Act Disclosure: **Mortgagor acknowledges that Mortgagor has read the following disclosure required by the Illinois Collateral Protection Act:**

"Unless you (the Mortgagor) provide us (the Mortgagee) with evidence of the insurance coverage required by your agreement with us (as set forth in Section 2.03(a), above), we may purchase insurance at your expense to protect our interests in your collateral (the Premises). This insurance may, but need not, protect your interests. The coverage that we purchase may not pay any claim that you make or any claim that is made against you in connection with the collateral (the Premises). You may later cancel any insurance purchased by us, but only after providing us with evidence that you have obtained insurance as required by our agreement. If we purchase insurance for the collateral (the Premises), you will be responsible for the costs of that insurance, including interest and other charges we may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to your total outstanding balance or obligation. The costs of the insurance may be more than the cost of insurance you are able to obtain on your own."

SECTION 2.04. Condemnation. If all or any part of the Mortgaged Property is taken or damaged pursuant to an exercise, or threat of exercise, of the power of eminent domain, the entire Proceeds payable in respect of the part so taken or damaged are hereby assigned to and shall be paid directly to Mortgagee. All such Proceeds actually received by Mortgagee, after deduction therefrom of all costs and expenses (including reasonable attorneys' fees) incurred by Mortgagee in connection with the taking, shall be applied, in part or entirely, without premium, to payment of the Indebtedness or to restoration of the Premises, as Mortgagee may in its sole discretion elect.

SECTION 2.05. Taxes. Mortgagor will pay and discharge or cause to be paid and discharged when due, and before any penalty attaches, all taxes (including real and personal property taxes), general and special assessments, water and sewer rents or assessments, and all other governmental and municipal charges and impositions of any kind imposed upon or assessed against Mortgagor or the Mortgaged Property, or any part thereof, or arising in respect of the occupancy, use or possession thereof. Upon written notice to Mortgagor, Mortgagee may elect (but shall not be obligated to so elect) to require Mortgagee to pay into escrow with Mortgagee, on a monthly basis or otherwise, an amount reasonably calculated to provide sufficient funds to timely pay estimated annual real estate taxes and special assessments assessed against the Premises as they become due. Such funds shall be held without interest and may be commingled with other funds of the Mortgagee. If the escrowed funds shall be insufficient to timely pay the actual amount of real estate taxes and special assessments (if any) as the same become due, Mortgagor shall promptly cure such deficiency to enable timely full payment. The Mortgagee shall have the right, but not the obligation, to utilize the escrowed funds, as aforesaid, to pay real estate taxes and special assessments assessed against the Premises; but Mortgagor shall at all times remain primarily responsible for making all such payments.

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SECTION 2.06. Protection of Security by Mortgagee. Mortgagee may, at Mortgagee's option, but without any duty or obligation of any sort to do so and without in any way waiving or relieving any default by Mortgagor, make any payment and perform any act required of Mortgagor by this Mortgage, including but not limited to, payment of insurance premiums, taxes, assessments, repair expenses and prior liens and encumbrances. All such payments so incurred, including reasonable attorneys' fees and any other reasonable expenses incurred by Mortgagee, to protect the Mortgaged Property shall constitute advancements immediately due and payable by Mortgagor and shall be deemed to be secured by this Mortgage.

SECTION 2.07. Inspection. Mortgagor shall permit Mortgagee and/or Mortgagee's authorized representatives, upon reasonable advance notice, to enter upon and inspect the Premises during normal business hours.

SECTION 2.08. Records and Reports. Mortgagor shall keep and maintain complete and accurate books and records in accordance with sound and generally accepted accounting principles with respect to all operations of or transactions involving the Mortgaged Property. Copies of said books and records shall be made available by Mortgagor for inspection by Mortgagee, upon request of Mortgagee.

SECTION 2.09. Certificates. Mortgagor and Mortgagee, within fourteen (14) days after written request from the other (which request shall make specific reference to this Section of this Mortgage), shall furnish to such requesting party a written statement, duly acknowledged, certifying to such party (and/or, any proposed assignee of this Mortgage) as to: (a) the amount of the Indebtedness then owing under this Mortgage, (b) whether the Loan Documents have been modified (and, if modified, specifying such modification); (c) whether, to the best knowledge of the certifying party, there are any defaults existing or claimed to exist under the Loan Documents (and, if so, specifying such defaults), (d) the terms of payment and maturity date of the Indebtedness, (e) the date to which interest has been paid under the Note and this Mortgage, (f) if the certifying party is the Mortgagor, the name and address of all lessees and occupants of the Premises, and a current rent roll detailing the expiration date of all outstanding leases and tenancies, periodic rental amounts, the date to which rents have been paid and other pertinent information reasonably specified by Mortgagee, and (g) whether, to the best knowledge of the certifying party, any offsets or defenses exist against the Indebtedness (and, if any are alleged to exist, a detailed description thereof).

SECTION 2.10. Contracts and Leases Relating to the Premises. Mortgagor shall not execute any declaration of covenants, conditions or restrictions or other instrument or agreement affecting the Mortgaged Property or any part thereof, or any amendment or modification with respect to any of the foregoing (including without limitation any reciprocal easement agreement), without the prior approval of Mortgagee. Notwithstanding the foregoing, Mortgagor may, without the prior approval of Mortgagee, execute one or more lease(s) affecting part or all of the Premises provided such lease (the "Permitted Lease"): (a) is subordinate to the lien of this Mortgage; (b) provides for payment of reasonable rental; (c) is not for an illegal purpose or other purpose which may damage the reputation or value of the Premises; and (d) is executed at a time when no Event of Default has occurred and is continuing under this Mortgage. All Rents and other Proceeds payable with respect to any Permitted

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Lease (as well as any other lease, whether or not permitted) are hereby assigned by Mortgagor to Mortgagee as additional security for the Indebtedness and such assignment is deemed to be a present, absolute, and irrevocable assignment thereof so long as this Mortgage shall remain in effect; provided, Mortgagor is hereby granted the right to continue to collect such Rents and other Proceeds for periods not exceeding forty-five (45) days advance payment, and to use and apply the same as Mortgagee deems appropriate, until such time as Mortgagee may serve written notice upon Mortgagor and any lessee or occupant (whether pursuant to a Permitted Lease or otherwise) that an Event of Default (as defined in Section 5.02 hereof) has occurred. Upon Mortgagee serving such notice of an Event of Default, Mortgagor shall have no further right to collect and receive such Rents and Proceeds and, in the event any such sums shall be received and/or collected by Mortgagor after such notice, Mortgagor shall hold the same in trust for the exclusive benefit of Mortgagee and shall promptly deliver the same to Mortgagee, or as Mortgagee may otherwise direct in writing, upon demand.

## ARTICLE III

### Additional Advances; Expenses; Indemnity

SECTION 3.01. Additional Advances and Disbursements. Mortgagor agrees that, if an Event of Default (as defined in Section 5.02 hereof) shall occur and be continuing or if a default has occurred which, through the lapse of time and/or inaction of the Mortgagor may ripen into an Event of Default, Mortgagee shall have the right, but not the obligation, in Mortgagor's name or in Mortgagee's own name, with or without notice to Mortgagor, to advance all or any part of such amounts or to perform any or all such actions as may be necessary, appropriate or expedient to cure such default or Event of Default or to prevent the occurrence of an Event of Default, and, for such purpose, Mortgagor expressly grants to Mortgagee the right (but not the obligation), in addition and without prejudice to any other rights or remedies hereunder, to enter upon and take possession of the Premises to such extent and as often as Mortgagee may deem necessary, desirable or expedient. As between Mortgagor and Mortgagee, no such advance or performance by Mortgagee shall be deemed to have cured any such default or Event of Default by Mortgagor. All sums advanced and all expenses incurred by Mortgagee in connection with such advances or actions and all other sums advanced or expenses incurred by Mortgagee hereunder or under applicable law (whether required or optional and whether indemnified hereunder or not) shall be deemed obligations owing by Mortgagor to Mortgagee and shall bear interest, from the date paid or incurred by Mortgagee until reimbursed, at an interest rate equal to the Default Rate (as defined in Section 5.09 hereof). All such amounts advanced or incurred, and all such interest thereon, shall be part of the Indebtedness and shall be secured by this Mortgage. Mortgagee, upon making any such advance, shall, additionally, be subrogated to all of the rights of the person receiving such advance.

### SECTION 3.02. Indemnity.

(a) Mortgagor agrees to indemnify and hold Mortgagee harmless from and against any and all losses, liabilities, suits, obligations, fines, damages, judgments, penalties, claims, charges, costs and expenses (including reasonable attorneys' fees and disbursements) which may be imposed on, incurred by or asserted against Mortgagee by reason or on account of, or in connection with: (i)



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any default or Event of Default by Mortgagor hereunder or under the Note; (ii) Mortgagee's exercise of any of its rights and remedies hereunder or under the Note; (iii) construction, reconstruction or alteration of the Improvements; (iv) any negligence or willful misconduct of Mortgagor, any lessee or occupant of the Premises, or any of their respective agents, contractors, subcontractors, servants, employees, licensees or invitees; (v) any accident, injury, death or damage to any person or property occurring in, on or about the Premises or any street, drive, sidewalk, curb or passageway adjacent thereto; and/or (vi) any other occurrence arising out of or in any way connected with the Premises, except if caused by the act or omission of the Mortgagee. Any amount payable to Mortgagee under this Section 3.02 shall be payable within five (5) days after Mortgagee's demand therefore, shall be deemed part of the Indebtedness and shall be secured by this Mortgage.

(b) Mortgagor's obligations under this Article III shall not be affected by the absence or unavailability of insurance covering the same or by the failure or refusal by any insurance carrier to perform any obligation on its part under any such policy of insurance.

## ARTICLE IV

### Transfer of Mortgaged Property

SECTION 4.01. Mortgagor shall not, without the prior written consent of Mortgagee (which consent may not be unreasonably withheld) lease (except for a "Permitted Lease" as defined in Section 2.10 hereof), transfer, sell, contract to sell or in any way further encumber all or any part of the Mortgaged Property, or any interest therein, unless concurrently therewith the Indebtedness secured by this Mortgage shall be paid in full.

## ARTICLE V

### Defaults and Remedies

SECTION 5.01. Default and Acceleration. Time is of the essence with respect to Mortgagor's performance of its obligations arising under this Mortgage. Upon the occurrence of any "Event of Default" (as defined in Section 5.02), and at any time thereafter, then, in any and every such case, the entire Indebtedness shall, at the option of Mortgagee, become immediately due and payable without notice, presentment, demand, protest, notice of protest, or other notice of dishonor or demand of any kind, all of which are hereby expressly waived by Mortgagor, and Mortgagee shall have the right immediately or at different times as Mortgagee may choose (without constituting a binding election of remedies): (i) to foreclose the mortgage lien created by this Mortgage against part or all of the Mortgaged Property and sell such Mortgaged Property to satisfy, in whole or in part, the Indebtedness; (ii) to enforce every other security interest created by this Mortgage; (iii) to enforce its rights under the Note; (iv) to enforce its rights under any guarantee of part or all of the Indebtedness and/or any other guaranteed obligations arising hereunder; and (v) to institute any action, suit or other proceeding which Mortgagee may deem necessary or proper for the protection of its interests.

SECTION 5.02. Events of Default. The following shall each constitute an "Event of Default" for the purposes of this Mortgage:

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- (a) If any representation or warranty made by Mortgagor in this Mortgage shall prove to have been false or misleading in any material respect when made or delivered and the damage sustained by Mortgagee by reason of such misrepresentation or breach of warranty is not cured to Mortgagee's satisfaction within five (5) days after Mortgagee gives Mortgagor written notice thereof;
- (b) Non-payment when due (whether, in either case, the same becomes due at maturity or by acceleration or otherwise) of: (i) any installment of the principal or interest payable under the Note; (ii) any fee or other amount (including, without limitation, any late payment penalty, Rents or Proceeds) payable under this Mortgage or the Note; and the failure to cure such non-payment within ten (10) days after Mortgagee's notice to Mortgagor that payment has not been received; provided, however, Mortgagee shall not be required to provide Mortgagor with a notice of non-payment and/or opportunity cure as a condition precedent to Mortgagee declaring the occurrence of an Event of Default if, during the preceding twelve (12) month period, a notice of non-payment of a similar nature was previously required to be given on at least two (2) occasions.
- (c) Any default in the due observance or performance of any covenant or undertaking required to be performed by Mortgagor pursuant to this Mortgage other than as specified in Section 5.02(b), and the continuation of such default for a period of thirty (30) days after written notice from Mortgagee to Mortgagor specifying such default; provided, if such default shall be non-fiscal in nature and shall be of such type or nature which cannot reasonably be cured within thirty (30) days, an Event of Default shall not be deemed to have occurred if, within such thirty (30) day period, Mortgagor shall take substantial steps to commence curing such default and shall thereafter diligently pursue such efforts to cure to completion.
- (d) If Mortgagor shall: (i) voluntarily commence any case or proceeding under any Federal or state bankruptcy, insolvency or similar law; (ii) consent to the institution of, or fail to controvert in a timely and appropriate manner, any such case or proceeding; (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator or similar official for Mortgagor, or for a substantial part of its property; (iv) file an answer admitting the material allegations of a complaint filed against it in any such case or proceeding; (v) make a general assignment for the benefit of creditors; (vi) become unable to pay or admit in writing the inability, or fail generally, to pay its debts as they become due; or (vii) take any action for the purpose of effecting any of the foregoing.
- (e) If an involuntary case or proceeding shall be commenced seeking: (i) relief in respect of Mortgagor under any Federal or state bankruptcy, insolvency or similar law; (ii) the appointment of a receiver, trustee, custodian, sequestrator or similar official for Mortgagor or the Premises; (iii) the winding-up or liquidation of a Mortgagor; or (iv) a levy, attachment, forfeiture or seizure of part or all of the Mortgaged Property; which in any such case shall not be dismissed within thirty (30) days after the same shall have been commenced.
- (f) Any material default by Mortgagor under or with respect to: (i) any other mortgage or other security document encumbering part or all of the Mortgaged Property; or (ii) any other

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instrument which constitutes or evidences a Permitted Exception; which default is not cured within the time periods provided in such document.

(g) The abandonment by Mortgagor of the Premises.

SECTION 5.03. Enforcement Expenses. All expenses which may be paid or incurred by or on behalf of Mortgagee in connection with: (a) an Event of Default; (b) a default or other occurrence which, through the passage of time would, if not cured, result in an Event of Default; (c) collection of the Indebtedness; and/or (d) the foreclosure of this Mortgage; for reasonable attorneys' fees, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs and cost of procuring all title searches, policies and examinations and similar data and assurances with respect to title as Mortgagee may reasonably deem necessary with respect to the foregoing, shall constitute a part of the Indebtedness, shall be immediately due and payable by Mortgagor with interest thereon at the Default Rate (as defined in Section 5.09), and shall be allowed and included as Indebtedness in any judgment for sale.

SECTION 5.04. Foreclosure Proceedings and Receiver. Upon the commencement of any proceedings to foreclose this Mortgage, Mortgagee shall be entitled forthwith to the appointment of a receiver or receivers, as a matter of right, without the giving of notice to any other party, without regard to the adequacy or inadequacy of any security for the Indebtedness and without the requirement of any bond. Mortgagee shall be entitled to recover judgment either before or after or during the pendency of any proceedings for the enforcement of this Mortgage. The right of Mortgagee to recover such judgment shall not be affected by the exercise of any other right, power or remedy for the enforcement of this Mortgage or the foreclosure of the lien of this Mortgage.

SECTION 5.05. No Exclusive Remedy. Each and every right, power and remedy conferred upon or reserved to Mortgagee in this Mortgage is cumulative and shall be in addition to every other right, power and remedy given in this Mortgage or now or hereafter existing at law or in equity. No delay or omission of Mortgagee in the exercise of any right, power or remedy shall be construed to be a waiver of any Event of Default or any acquiescence therein.

SECTION 5.06. Application of Proceeds. Except as herein expressly provided otherwise, the proceeds and avails of any sale referred to in Section 5.01, together with any other sums which may be held or received by Mortgagee hereunder, whether under the provisions of this Article V or otherwise, shall be applied as follows:

FIRST: To the payment of the costs, and expenses of any such sale, including attorneys' fees and disbursements, and of any judicial proceeding wherein the same may be made, and of all expenses, liabilities and Advancements made or incurred by Mortgagee hereunder, together with interest thereon at the Default Rate (as defined in Section 5.09), and all taxes, assessments and other charges, except any taxes, assessments or other charges subject to which the Premises shall have been sold.

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SECOND: To the payment in full of the Indebtedness (including principal, interest, premium, penalty and fees) in such order as Mortgagee may elect.

THIRD: To the extent permitted by applicable law, to be set aside by Mortgagee as adequate security in its reasonable judgment for the payment of sums which would have been paid to Mortgagee under clauses FIRST and SECOND above, but which sums are not yet due and payable or liquidated.

FOURTH: To the payment of the balance, if any, to whomsoever may be lawfully entitled to receive the same.

## SECTION 5.07. Additional Provisions as to Remedies.

(a) To the extent permitted by applicable law, no right or remedy herein conferred upon or reserved to Mortgagee is intended to be exclusive of any other right or remedy, and each and every such right or remedy shall be cumulative and continuing, shall be in addition to every other right or remedy given hereunder, or under the Note or now or hereafter existing at law or in equity, and may be exercised from time to time and as often as may be deemed expedient by Mortgagee.

(b) No delay or omission by Mortgagee in exercising any right or remedy hereunder during the continuance of an Event of Default shall impair such exercise or be construed to be a waiver of any such Event of Default or an acquiescence therein.

(c) The failure, refusal or waiver by Mortgagee of its right to assert any right or remedy hereunder during the continuance of an Event of Default or other occurrence shall not be construed as waiving such right or remedy upon any other or subsequent Event of Default or other occurrence.

(d) Mortgagee shall not have any obligation to pursue any rights or remedies it may have under any other agreement prior to pursuing its rights or remedies hereunder or under the Note.

(e) No recovery of any judgment by Mortgagee and no levy or an execution upon part or all of the Mortgaged Property or any other property of Mortgagor shall affect, in any manner or to any extent, the lien of this Mortgage upon the Premises nor any liens, rights, powers or remedies of Mortgagee hereunder, and such liens, rights, powers and remedies shall continue unimpaired as before until such time as the entire Indebtedness shall be satisfied by payment in full thereof to the Mortgagee.

(f) Mortgagee may resort to any security given by this Mortgage or any other security now given or hereafter existing to secure the Indebtedness, in whole or in part, in such portions and in such order as Mortgagee may deem advisable, and no such action shall be construed as a waiver of any of the liens, rights or benefits granted hereunder.

(g) Acceptance of any payment after the occurrence of an Event of Default shall not be deemed a waiver or a cure of such Event of Default and acceptance of any payment less than any amount then due shall be deemed an acceptance on account only.

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(h) Nothing in this Mortgage or the Note shall affect the obligations of Mortgagor to pay the Indebtedness in the manner and at the time and place herein or therein respectively expressed.

(i) In the event that Mortgagee shall have proceeded to enforce any right or remedy hereunder by foreclosure, entry or otherwise, and such proceeding shall be discontinued, abandoned or determined adversely for any reason, then Mortgagor and Mortgagee shall be restored to their former positions and rights hereunder with respect to the Mortgaged Property, subject to the lien hereof.

SECTION 5.08. Waiver of Rights and Defenses. To the fullest extent Mortgagor may lawfully do so, Mortgagor agrees with Mortgagee as follows:

(a) Mortgagor will not at any time insist on, plead, claim or take the benefit or advantage of any statute or rule of law now or hereafter in force providing for any appraisalment, valuation, extension, moratorium or redemption at or after sale.

(b) Mortgagor, for itself and its heirs, devisees, representatives, successors and assigns, and for any and all persons ever claiming an interest in part or all of the Mortgaged Property (other than Mortgagee), **hereby waives and releases all rights of redemption** at or after sale, valuation, appraisalment, homestead, notice of intention to mature or declare due the whole of the Indebtedness, and all rights to a marshalling of the assets of Mortgagor, including part or all of the Mortgaged Property, and all rights to a sale in inverse order of alienation in the event of foreclosure of the liens and security interests created hereunder.

(c) Mortgagor shall not have or assert any right under any statute or rule of law pertaining to any of the matters set forth in subsection (a), subsection (b) or subsection (g) of this Section, whether pertaining to the administration of estates of decedents or to any other matters whatsoever, to defeat, reduce or affect any of the rights or remedies of Mortgagee hereunder, including the rights of Mortgagee to the payment of the Indebtedness out of the proceeds of sale of the Premises or other Mortgaged Property in preference to any other person. To the extent permitted by law, **all rights and benefits under or by virtue of any homestead exemption laws of the State in which the Premises are located, and of any other applicable jurisdiction, are hereby released and waived.**

(d) If any statute or rule of law referred to in this Section and now in force, of which Mortgagor or any of its representatives, successors or assigns and such other persons claiming any interest in the Mortgaged Property might take advantage despite this Section, shall hereafter be repealed or cease to be in force, such statute or rule of law shall not thereafter be deemed to preclude the application of this Section.

(e) Mortgagor shall not be relieved of its obligation to pay the Indebtedness at the time and in the manner provided herein and in the Note, nor shall the lien or priority of this Mortgage be impaired by any of the following actions, non-actions or indulgences by Mortgagee:

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(i) any failure or refusal by Mortgagee to comply with any request by Mortgagor: (A) to consent to any action by Mortgagor; or (B) to take any action to foreclose this Mortgage or otherwise enforce any of the provisions of any Loan Document;

(ii) any release, regardless of consideration, of the whole or any part of the Mortgaged Property or any other security for the Indebtedness, or any person liable for payment of the Indebtedness;

(iii) any waiver by Mortgagee of compliance by Mortgagor with any provision of any Loan Document, or consent by Mortgagee to the performance by Mortgagor of any action which would otherwise be prohibited hereunder or thereunder, or to the failure by Mortgagor to take any action which would otherwise be required hereunder or thereunder; and

(iv) any agreement or stipulation between Mortgagee and Mortgagor renewing, extending or modifying the time of payment or the terms of this Mortgage or the Note (including a modification of any interest rate), and in any such event Mortgagor shall continue to be obligated to pay the Indebtedness at the time and in the manner provided herein and in the Note, as so renewed, extended or modified, unless expressly in writing released and discharged by Mortgagee.

(f) Regardless of consideration, and without the necessity for any notice to or consent by the holder of any subordinate lien, encumbrance, right, title or interest in or to the Mortgaged Property, Mortgagee may release any person at any time liable for the payment of the Indebtedness or any portion thereof or any part of the security held for the Indebtedness and may extend the time of payment or otherwise modify the terms of this Mortgage and/or Note. Mortgagee may resort for the payment of the Indebtedness to any other security held by Mortgagee in such order and manner as Mortgagee, in its sole and absolute discretion, may elect.

(g) If at any time while this Mortgage remains in effect any part or all of the Mortgaged Property shall: (i) be used, occupied, or possessed in whole or in part as a place of residence by a husband and wife; or (ii) be owned, held, used, occupied or otherwise possessed by persons claiming a right of ownership as tenants by the entireties; all rights arising by reason thereof, or derived or flowing therefrom (including, without limitation, all exemptions from attachment or levy) shall be deemed subject to and subordinate to the rights of the Mortgagee hereunder and lien of this Mortgage; it being the intention of the Mortgagor and any successor to the interest of the Mortgagor in the Mortgaged Property (whether or not such successor in interest has joined in execution of this Mortgage) that every right and interest in the Mortgaged Property now existing or hereafter coming into being during the existence of this Mortgage shall be subject and subordinate to and bound by the terms and provisions of this Mortgage.

SECTION 5.09. Default Rate. As used herein the term "Default Rate" shall mean a rate of interest equal to the higher of: (i) the Default Rate specified in the Note; or (ii) three (3%)

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percent per annum plus the "Prime Rate" (sometime also referred to as the "commercial base lending rate"; which is not necessarily the lowest available rate) of interests from time to time announced as being in effect.

## ARTICLE VI

### Defeasance

SECTION 6.01. If Mortgagor shall pay in its entirety all of the Indebtedness at the time or times and in the manner the same becomes due and payable, then all rights and obligations hereunder (except for the rights and obligations set forth in Section 1.02) shall terminate. In such event, Mortgagee shall deliver to Mortgagor, in recordable form, a release of this Mortgage.

## ARTICLE VII

### Security Agreement

SECTION 7.01. Grant of Security Interest. This Mortgage shall be deemed to constitute a "security agreement" within the meaning of the Uniform Commercial Code of the State in which the Premises are located with respect to all fixtures, equipment and personal property constituting part of the Mortgaged Property and all leases, contracts and agreements and general intangibles pertaining to the Mortgaged Property as to which the creation and perfection of a security interest therein are subject to such Uniform Commercial Code (the "Collateral") and is also a mortgage as to those portions of the Mortgaged Property that are classified as real property. Mortgagor hereby grants to Mortgagee a security interest in and to the Collateral to secure the payment of the Note. Any completely executed counterpart of this instrument (or photocopy thereof if permitted by law) may be filed as a mortgage on real property or fixtures or as a security agreement or financing statement or as both. The address of Mortgagor, as debtor, and the address of Mortgagee, as secured party, are set forth in Section 8.04 of this Mortgage.

SECTION 7.02. Financing Statements. Mortgagor shall cause all financing and continuation statements and other instruments with respect to the Collateral at all times to be kept recorded, filed or registered in such manner and in such places as may be required by law fully to evidence, perfect and secure the interests of Mortgagee in the Collateral, and shall pay all filing fees in connection therewith. Mortgagor hereby appoints Mortgagee as Mortgagor's attorney-in-fact for the purpose of complying with this Section 7.02 with full power of attorney (which power of attorney shall be deemed to be coupled with an interest and irrevocable) to execute and file financing statements and to take such other actions and execute such other documents which may be necessary to fully give effect to the Mortgagor's obligations under this Section 7.02.

SECTION 7.03. Expenses of Disposition of Collateral. Mortgagor shall reimburse Mortgagee, on demand, for all reasonable expenses of retaking, holding, preparing for sale, lease or other use or disposition, selling, leasing or otherwise using or disposing of the Collateral and the other Mortgaged Property which are incurred or paid by Mortgagee, including, without limitation, all reasonable attorneys' fees, expenses and costs, and all such amounts shall be added to the Indebtedness and shall be deemed secured hereby.

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## ARTICLE VIII Additional Provisions

### SECTION 8.01. Provisions as to Payments.

(a) All payments of the Indebtedness shall be paid in lawful money of the United States of America and shall be made in the manner expressly designated therefore or, if no such designation is made, at the address of Mortgagee indicated in Section 8.04 or at such other place as Mortgagee may designate from time to time upon not less than ten (10) days prior notice.

(b) If any part of the Indebtedness cannot lawfully be secured by this Mortgage or if any part of the Mortgaged Property cannot lawfully be subject to the lien and security interest hereof, to the full extent of said Indebtedness, then all payments made thereon shall be applied first in discharge of that portion of the Indebtedness which is unsecured by this Mortgage.

(c) To the extent that any part of the Indebtedness is used to pay an indebtedness secured by any Permitted Encumbrance or other outstanding lien, security interest, charge or encumbrance against part or all of the Mortgaged Property, Mortgagee shall be subrogated to any and all rights, security interests and liens held by any owner or holder of the same, whether or not the same are released. In consideration of such payment by Mortgagee, Mortgagor hereby waives and releases all demands, defenses and causes of action for offsets and payments with respect to same.

SECTION 8.02. Usury Savings Clause. All agreements in this Mortgage, the Note and any other document securing or evidencing part or all of the Indebtedness in favor of Mortgagee are expressly hereby limited so that in no contingency or event whatsoever, whether by reason of advancement or acceleration of maturity of the Indebtedness or otherwise, shall the amount paid or agreed to be paid hereunder for the use, forbearance or detention of money exceed the highest lawful rate permitted under applicable usury law, if any.

SECTION 8.03. Severability. If any one or more of the provisions of this Mortgage, the Note or any other document evidencing or securing the Indebtedness shall be held to be invalid, illegal or unenforceable in any respect then such invalidity, illegality or unenforceability shall not affect any other provision hereof or thereof and such provision shall be limited and construed as if such invalid, illegal or unenforceable provision were not contained herein or therein.

SECTION 8.04. Notice to Parties. Any and all notices required or permitted to be given hereunder may be served by a party or such party's attorneys, shall be in writing and shall be deemed served, if by personal delivery, on the date the same is actually received by the addressee thereof; or, if by mail, on the next business day after the same is deposited with the United States Postal Service (or its successor) for mailing by Certified Mail, Return Receipt Requested, postage fully prepaid, addressed as hereinafter set forth; or, if by overnight messenger service (i.e. Federal Express) on the date of delivery by such overnight messenger service to the address as hereinafter set forth. Notices by mail and by overnight messenger service shall be addressed as follows or to such other address as



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the party entitled to receive such notice may, from time to time hereafter, designate in writing by giving written notice pursuant hereto:

If to Mortgagee:

Myron W. Lustig  
18946 Tuba St.  
Northridge, CA 91324



If to Mortgagor:

Brian S. Fernald and Rachel B. Fernald  
1133 S. State Street, #701  
Chicago, IL 60605

SECTION 8.05. No Merger. In the event that Mortgagee acquires an additional interest in or to any part or all of the Mortgaged Property, this Mortgage and the lien hereof shall not merge in the fee simple title thereto.

SECTION 8.06. Applicable Law. This Mortgage shall be governed by and construed and enforced in accordance with the laws (except laws pertaining to "choice of laws") of the State in which the Premises is located.

SECTION 8.07. Provisions as to Covenants and Agreements. All of Mortgagor's covenants and agreements hereunder shall run with the land.

SECTION 8.08. Matters to be in Writing. This Mortgage cannot be altered, amended, modified, terminated or discharged except in a writing signed by Mortgagor and Mortgagee.

SECTION 8.09. Construction of Provisions. The following rules of construction shall be applicable for all purposes of this Mortgage and all documents or instruments supplemental hereto unless the context clearly and unequivocally requires otherwise:

(a) No inference in favor of any party shall be drawn from the fact that such party has not drafted any portion hereof.

(b) The term "Mortgagor" shall mean the person executing this Mortgage and his or its heirs, devisees, successors, legal representatives and permitted assigns.

(c) The term "Mortgagee" shall mean Myron W. Lustig and his successors, assigns and the lawful holder or holders, from time to time, of the Note or any part or all of the Indebtedness.

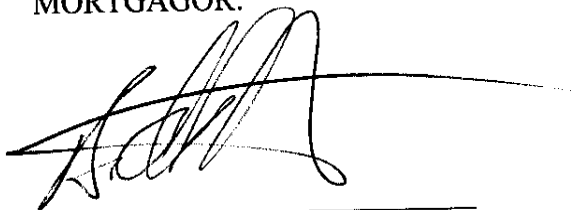
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(d) Any reference to one gender used herein, whether masculine, feminine or neuter, shall be deemed to be a reference to any other gender as may be appropriate under the circumstances; further, the singular shall include the plural and the plural the singular.

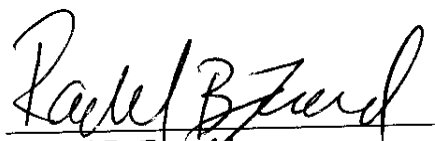
**SECTION 8.10. Trustee's Exculpation IF THIS INSTRUMENT IS EXECUTED BY A TRUSTEE**, it is expressly understood and agreed by and between the parties hereto, anything herein to the contrary notwithstanding, that each and all of the warranties, indemnities, representations, covenants, undertakings and agreements herein made on the part of the Trustee while in form purporting to be the warranties, indemnities, representations, covenants, undertakings and agreements of said Trustee are nevertheless each and every one of them, made and intended not as personal warranties, indemnities, representations, covenants, undertakings and agreements by the Trustee or for the purpose or with the intention of binding said Trustee personally but are made and intended for the purpose of binding only that portion of the trust property specifically described herein, and this instrument is executed and delivered by said Trustee not in its own right, but solely in the exercise of the powers conferred upon it as such Trustee; and that no personal liability or personal responsibility is assumed by nor shall at any time be asserted or enforceable against the person, firm or entity executing this Mortgage in a capacity of Trustee, on account of this instrument nor on account of any warranty, indemnity, representation, covenant, undertaking or agreement of the said Trustee in this instrument contained, either expressed or implied; all such personal liability, if any, being expressly waived, released and disclaimed. The representations and warranties of the Mortgagor express herein, while in form purporting to be made by the Trustee, are made by such Trustee in strict reliance upon a written direction to execute this Mortgage received from the beneficiaries or other party having the power of direction under the Trust pursuant to which Trustee serves as Trustee in executing this instrument. **If it is the intention of the Mortgagee or holder of the Note to rely upon the representations, warranties, indemnifications, covenants, undertakings or agreements expressed herein for the purpose of enabling imposition of liability beyond the trust property referred to herein, the Mortgagee must obtain a guaranty, joinder or other undertaking executed by the party or parties sought to be charged with such intended liability.**

IN WITNESS WHEREOF, Mortgagor has executed and sealed this Mortgage as its free, voluntary and duly authorized act as of the day and year first above written.

MORTGAGOR:



Brian S. Fernald



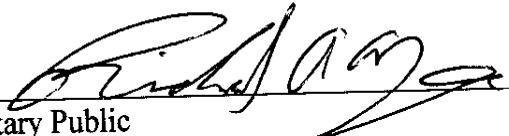
Rachel B. Fernald

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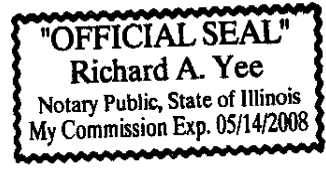
## ACKNOWLEDGMENT

STATE OF ILLINOIS       )  
  ) SS  
COUNTY OF COOK        )

The foregoing instrument was acknowledged before me this   2   day of   AUGUST    
by   Brian S. Fernald and Rachel B. Fernald.  

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

My Commission Expires:   05/14/2008  



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## Exhibit A

### Parcel A:

Unit B-701 and Parking Space ~~200~~<sup>p-76</sup> in the State Place Condominium, as delineated on a survey of part of the following described real estate:

### Parcel 1:

Sublots 1 and 2 of Lot 2, Sublots 1 and 2 of Lot 3, Sublots 1 and 2 of Lot 6, Sublots 1 and 2 of Lot 7 and Sublots 1 and 2 of Lot 10, all in block 22 in Canal Trustees' Subdivision of Fractional Section 15 Addition to Chicago, according to the Plat thereof filed September 1, 1848 as document number 20751 and re-recorded September 24, 1877 as document number 151610 (Except the West 27 Feet of said Sublots taken for widening State Street); and also, Lots 1, 2, 3, 4, 5, 6, 7, and 8 in Jackson's Subdivision of Lots 11 and 14 in Block 22, in Fractional Section 15 Addition to Chicago, according to the Plat thereof filed for record May 5, 1877 as document number 133390 (Except the West 27 feet of said Lots 1 through 7 taken for widening State Street), all in Section 15 Township 39 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

### Parcel 2:

That part of vacated South State Street lying West of the East line of the West 27.0 feet of lots 2, 3, 6, 7, and 10 in block 22 in Canal Trustee's Subdivision, aforesaid, and lying West of Lots 1 through 7 both inclusive, in Jackson's Subdivision, aforesaid, and lying East of a line 1.50 feet West of and parallel with the East line of the West 27.0 feet of Lots 2, 3, 6, 7, and 10 in Canal Trustee's Subdivision, aforesaid, as extended Southerly to the North line of E. Roosevelt Road, lying Southerly of the South line of E. 11th Street, and North of the North line of E. Roosevelt Road, pursuant to that certain vacation Ordinance recorded August 29, 2003 as document number 03241197.

Which survey is attached as Exhibit B to the Declaration of Condominium recorded December 9, 2004 as document number 0434410057, as amended from time to time, together with its undivided percentage interest in the common elements, in Cook County, Illinois.

### Parcel B:

Easements for the benefit of Parcel A as created by Declaration of Covenants, Conditions, Restrictions and Easements recorded December 9, 2004 as document number 0434410056 made by State Street Associates, LLC, an Illinois limited liability company, as Declarant, for ingress and egress, structural support, maintenance, encroachments and use of common walls, ceilings and floors over and across the retail property as more fully described therein and according to the terms set forth therein.