

# UNOFFICIAL COPY



Doc#: 0525948127 Fee: \$108.00  
Eugene "Gene" Moore  
Cook County Recorder of Deeds  
Date: 09/16/2005 01:23 PM Pg: 1 of 43

NGP REALTY SUB, L.P., as mortgagor  
(Borrower)

to

GERMAN AMERICAN CAPITAL CORPORATION, as mortgagee  
(Lender)

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

Dated: June 30, 2005  
Location: 1 Pete Dye Dr  
Lemont, IL 60439  
County: Cook

PREPARED BY AND UPON  
RECORDATION ~~RETURN TO:~~

Cadwalader, Wickersham & Taft LLP  
One World Financial Center  
New York, New York 10281  
Attention: William P. McInerney, Esq.

Return Documents to:  
Ellie Campbell - 05259481-5  
Law Title - National Div.  
2000 W. Galena Blvd. #200  
Aurora, IL 60506

1 of 5

# UNOFFICIAL COPY

## TABLE OF CONTENTS

	<u>Page</u>
<b>ARTICLE I</b>	
<b>GRANTS OF SECURITY</b>	
Section 1.1	Property Mortgaged. .... 1
Section 1.2	Assignment of Leases and Rents. .... 4
Section 1.3	Security Agreement. .... 4
Section 1.4	Pledge of Monies Held. .... 4
Section 1.5	General Definitions. .... 4
<b>ARTICLE II</b>	
<b>DEBT AND OBLIGATIONS SECURED</b>	
Section 2.1	Debt. .... 5
Section 2.2	Other Obligations. .... 5
<b>ARTICLE III</b>	
<b>BORROWER COVENANTS</b>	
Section 3.1	Incorporation by Reference. .... 6
Section 3.2	Condemnation. .... 6
Section 3.3	Casualty or Condemnation. .... 6
Section 3.4	Access to Property. .... 10
<b>ARTICLE IV</b>	
<b>REPRESENTATIONS AND WARRANTIES</b>	
Section 4.1	Warranty of Title. .... 10
<b>ARTICLE V</b>	
<b>FURTHER ASSURANCES</b>	
Section 5.1	Recording of Security Instrument, Etc. .... 12
Section 5.2	Further Acts, Etc. .... 12
Section 5.3	Changes in Tax, Debt Credit and Documentary Stamp Laws. .... 12
Section 5.4	Mortgage and/or Intangible Tax. .... 13
Section 5.5	Splitting of Security Instrument. .... 13
<b>ARTICLE VI</b>	
<b>DUE ON SALE/ENCUMBRANCE - REGARDING PROPERTY</b>	
Section 6.1	No Property Transfer/Encumbrance of a Property. .... 13
Section 6.2	Permitted Property Transfer of the Property and the Other Properties. .... 14

# UNOFFICIAL COPY

Section 6.3	Permitted Property Transfer of the Property.....	15
-------------	--	----

## ARTICLE VII

### DUE ON SALE/ENCUMBRANCE - REGARDING EQUITY INTERESTS

Section 7.1	Prohibited Changes of Ownership.....	17
Section 7.2	Intentionally Omitted.....	19
Section 7.3	Lender's Rights.....	19

## ARTICLE VIII

### DEFAULT

Section 8.1	Events of Default.....	20
Section 8.2	Continued Lien Priority.....	22
Section 8.3	Adjournment.....	23
Section 8.4	Lender Bid.....	23
Section 8.5	Application of Proceeds.....	23
Section 8.6	Right to Cure Defaults.....	23
Section 8.7	Actions and Proceedings.....	23
Section 8.8	Recovery of Sums Required to Be Paid.....	23
Section 8.9	Examination of Books and Records.....	24
Section 8.10	Other Rights, Etc.....	24
Section 8.11	Right to Release Any Portion of the Property.....	24
Section 8.12	Violation of Laws.....	25
Section 8.13	Right of Entry.....	25
Section 8.14	Subrogation.....	25
Section 8.15	Cross-Collateralization.....	25

## ARTICLE IX

### WAIVERS

Section 9.1	Waiver of Counterclaim.....	25
Section 9.2	Marshalling and Other Matters.....	26
Section 9.3	Waiver of Notice.....	26
Section 9.4	Waiver of Statute of Limitations.....	26
Section 9.5	Sole Discretion of Lender.....	26
Section 9.6	Waiver of Trial by Jury.....	26
Section 9.7	Appraisement.....	27

## ARTICLE X

### EXCULPATION

Section 10.1	Exculpation.....	27
--------------	------------------	----

# UNOFFICIAL COPY

## ARTICLE XI MISCELLANEOUS PROVISIONS

Section 11.1	Notices.....	27
Section 11.2	Choice of Law.....	27
Section 11.3	Headings, Etc.....	27
Section 11.4	Inapplicable Provision.....	27
Section 11.5	No Oral Change.....	27
Section 11.6	Liability.....	27
Section 11.7	Duplicate Originals; Counterparts.....	28
Section 11.8	Number and Gender.....	28
Section 11.9	Entire Agreement.....	28
Section 11.10	Capitalized Terms.....	28

## ARTICLE XII LOCAL LAW PROVISIONS

See Exhibit B

### EXHIBITS:

- Exhibit A - Description of Land
- Exhibit B - Local Law Provisions
- Exhibit C - Allocated Loan Amounts

### SCHEDULES:

- Schedule I - List of Properties

# UNOFFICIAL COPY

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

THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, FIXTURE FILING AND SECURITY AGREEMENT (this "**Security Instrument**") is made as of the 30<sup>th</sup> day of June, 2005, by **NGP REALTY SUB, L.P.**, a Delaware limited partnership, having an address at 2951 28<sup>th</sup> Street, Suite 3000, Santa Monica, California 90405, as mortgagor ("**Borrower**"), to **GERMAN AMERICAN CAPITAL CORPORATION**, a Maryland corporation, having an address at 60 Wall Street, 10<sup>th</sup> Floor, New York, New York 10005, as mortgagee (together with its successors and assigns, "**Lender**").

### RECITALS:

Borrower and Lender have entered into that certain Loan Agreement of even date herewith (as the same may be amended, restated, replaced, supplemented or otherwise modified, from time to time, the "**Loan Agreement**") pursuant to which Lender agreed to make a Loan (the "**Loan**") to Borrower in the maximum principal amount of FOUR HUNDRED TWENTY FIVE MILLION DOLLARS (\$425,000,000.00). Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Loan Agreement.

Borrower desires to secure the payment of the Debt (as defined below) and the performance of all of its obligations under the Note and the Other Obligations (as defined below) by executing this Security Instrument and the other Security Instruments which cover the properties described therein (the "**Other Properties**"), which Other Properties, together with the property described herein are listed on Schedule I, which is attached hereto and by this reference incorporated herein.

## ARTICLE I GRANTS OF SECURITY

### Section 1.1 Property Mortgaged.

Borrower does hereby irrevocably: (i) mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey to Lender and to its successors and assigns with power of sale in accordance with the terms and conditions hereof; and (ii) grant a security interest to Lender and to its successors and assigns with power of sale, in accordance with the terms and conditions hereof, for the use and benefit of Lender, in the following property, rights, interests and estates now owned, or hereafter acquired by Borrower (collectively, the "**Property**"):

(a) Land. The real property described in Exhibit A attached hereto and made a part hereof (the "**Land**");

(b) Additional Land. All additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the Land and the development of the Land that may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

# UNOFFICIAL COPY

(c) Improvements. The buildings, structures, fixtures, additions, enlargements, alleyways and connecting tunnels, sidewalks, utility pipes, conduits and lines, parking areas, roadways, cart paths, bridges, lakes, irrigation systems and course markers presently situated upon the Land, extensions, modifications, repairs, replacements and improvements now or hereafter erected or located on the Land and the golf courses, driving ranges, tennis courts, putting greens and any other income producing Land now or hereafter improved (collectively, 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 Land and the Improvements 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 Land and the Improvements and every part and parcel thereof, with the appurtenances thereto;

(e) Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to all heating, air conditioning, plumbing, lighting, communications and elevator fixtures) furniture, furnishings inventory, phone systems, computers and trade fixtures, kitchen fixtures, bar equipment, lawn mowers and other gardening tools, tractors and other motorized vehicles, golf carts and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land or the Improvements, or appurtenant thereto, and used in connection with the present or future operation and occupancy of the Land and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, or used in connection with the present or future operation and occupancy of the Land and the Improvements (collectively, the "Personal Property"), and the right, title and interest of Borrower in and to any of the Personal Property which may be subject to any security interests, as defined in the Uniform Commercial Code, as adopted and enacted by the state or states where any of the Property is located (the "Uniform Commercial Code"), superior in lien to the lien of this Security Instrument and all proceeds and products of the above;

(f) Leases and Rents. All leases, subleases and other agreements affecting the use, enjoyment or occupancy of all or any part of the Land or the Improvements (including, without limitation, any Operating Leases, any and all parking leases, or such other economic interests and collateral benefits of income derived from such leases) heretofore or hereafter entered into whether before or after the filing by or against Borrower of any petition for relief under 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), as the same may be amended from time to time (collectively, the "Leases") and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, all guarantees, letters of credit and any other credit support given by any guarantor in connection therewith, cash or securities

# UNOFFICIAL COPY

deposited under the Leases to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, rent termination payments, revenues, issues and profits (including all oil and gas or other mineral royalties and bonuses and including revenue from memberships initiation fees, green fees, fees to reserve a tee-time, golf-related guest fees or golf cart rentals, and surcharges, fees or other charges paid by sponsors of golf tournaments) from the Land and the Improvements and the operation thereof whether paid or accruing before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code (collectively, the "**Rents**") and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Obligations (as defined below);

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

(h) 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, but not limited to 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;

(i) Tax Certiorari. All refunds, rebates or credits in connection with a reduction in real estate taxes and assessments charged against the Property as a result of tax certiorari or any applications or proceedings for reduction;

(j) Conversion. All proceeds of the conversion, voluntary or involuntary, of any of the Property including, without limitation, proceeds of insurance and awards, into cash or liquidation claims;

(k) Actions or Proceedings. 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 while an Event of Default (as defined in the Loan Agreement) remains uncured, to appear in and defend any action or proceeding brought with respect to the Property;

(l) Other Agreements. To the extent assignable under Applicable Laws, all agreements, contracts (including, without limitation, any and all interest rate cap agreements, swaps or other interest hedging agreements procured for the benefit of Lender to the extent of Borrower's interest therein (any and all such agreements, collectively, the "**Interest Rate Cap Agreement**")), certificates, instruments, franchises, permits, licenses, 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 Land or the Improvements and any part thereof or respecting any business or activity conducted on the Land or in the Improvements and any part thereof and all right, title and interest of Borrower therein and thereunder, including, without limitation, the right, upon the occurrence and during the continuation of an Event of Default, to receive and collect any sums payable to Borrower thereunder;

# UNOFFICIAL COPY

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

(n) Other Rights. Any and all other rights of Borrower in and to the Property.

**Section 1.2 Assignment of Leases and Rents**. 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; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of this Section 1.2 and Sections 5.4 and 5.14 of the Loan Agreement, as well as the Assignment of Leases and Rents, Lender grants to Borrower a revocable license to collect and receive the Rents. Borrower shall hold the Rents, or a portion thereof, sufficient to discharge all current sums due on the Debt, for use in the payment of such sums; provided, however, Borrower shall be permitted, after making any and all current payments required under this Security Instrument to make distributions of any excess sums to its partners so long as such distribution is in accordance with the Security Documents and is not in violation of the Delaware Revised Uniform Limited Partnership Act or applicable statutes governing fraudulent conveyances.

**Section 1.3 Security Agreement**. This Security Instrument is both a real property mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security Instrument, Borrower hereby grants to Lender, as security for the Obligations (as defined below), a security interest in the Property to the full extent that, under Applicable Laws, the Property may be subject to the Uniform Commercial Code (said portion of the Property so subject to the Uniform Commercial Code, the "UCC Collateral").

**Section 1.4 Pledge of Monies Held**. Borrower hereby pledges to Lender, and grants to Lender a security interest in, any and all monies now or hereafter held by Lender, including, without limitation, any sums deposited in the Escrow Funds and the Net Proceeds (as defined below) and Awards (as defined below) as additional security for the Obligations until expended or applied as provided in this Security Instrument.

**Section 1.5 General Definitions**. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Security Instrument may be used interchangeably in singular or plural form and the word "Borrower" shall mean "Borrower and any subsequent owner or owners of the Property or any part thereof or any interest therein," the word "Lender" shall mean "Lender and any subsequent permitted holder of the Note," the word "person" shall include an individual, corporation, limited liability company, partnership, trust, unincorporated association, government, governmental authority, and any other entity, the word "Property" shall include any portion of the Property and any interest therein, and the phrase "legal fees" shall include any and all reasonable attorneys', paralegal and law clerk fees and disbursements, including, but not limited to fees and disbursements at the pre-trial, trial and appellate levels incurred or paid by Lender in protecting



# UNOFFICIAL COPY

its interest in the Property, the Leases and the Rents and enforcing its rights under this Security Instrument.

## CONDITIONS TO GRANT

TO HAVE AND TO HOLD the above granted and described Property unto the Lender and its successors and assigns, with power of sale in accordance with the terms and conditions hereof, forever; provided, however, these presents are upon the express condition that, if Borrower shall well and truly pay to Lender the Debt at the time and in the manner provided in the Note and this Security Instrument, shall well and truly perform the Other Obligations as set forth in this Security Instrument and shall well and truly abide by and comply with each and every covenant and condition set forth herein and in the Note, these presents and the estate hereby granted shall cease, terminate and be void.

## ARTICLE II DEBT AND OBLIGATIONS SECURED

**Section 2.1 Debt.** This Security Instrument and the grants, assignments and transfers made in Article I are given for the purpose of securing the following, in such order of priority as Lender may determine in its sole discretion (collectively, the "**Debt**"): (a) the indebtedness evidenced by the Note payable in lawful money of the United States of America; (b) interest, default interest, late charges and other sums, as provided in the Note or the other Security Documents; (c) all other monies agreed or provided to be paid by Borrower in the Note or the other Security Documents; (d) all sums advanced pursuant to this Security Instrument to protect and preserve the Property and the lien and the security interest created hereby; and (e) all sums advanced and costs and expenses incurred by Lender in connection with the Debt or any part thereof, any renewal, extension, modification, consolidation, change, substitution, replacement, restatement or increase of the Debt or any part thereof, or the acquisition or perfection of the security therefor, whether made or incurred at the request of Borrower or Lender.

**Section 2.2 Other Obligations.** This Security Instrument and the grants, assignments and transfers made in Article I are also given for the purpose of securing the following (the "**Other Obligations**"): (a) the performance of all other obligations of Borrower contained herein; (b) the performance of each obligation of Borrower contained in the Note and in the other Security Documents; and (c) the performance of each obligation of Borrower contained in any renewal, extension, modification, consolidation, change, substitution, replacement for, restatement or increase of all or any part of the Note or the other Security Documents. Borrower's obligations for the payment of the Debt and the performance of the **Other Obligations** shall be collectively referred to in this Security Instrument as the "**Obligations.**"

## ARTICLE III BORROWER COVENANTS

Borrower covenants and agrees with Lender that:

# UNOFFICIAL COPY

**Section 3.1 Incorporation by Reference.** All the covenants, conditions and agreements contained in all of the Security Documents are hereby made a part of this Security Instrument to the same extent and with the same force as if fully set forth herein.

**Section 3.2 Condemnation.** Borrower shall promptly give, and cause Operating Lessee to give, Lender notice of the actual or threatened commencement of any condemnation or eminent domain proceeding and shall deliver, and cause Operating Lessee to deliver, to Lender copies of any and all papers served in connection with such proceedings. Lender may participate in any such proceedings to the extent permitted by law. Upon an Event of Default, Borrower shall deliver, and cause Operating Lessee to deliver, to Lender all instruments requested by it to permit such participation. Borrower shall, at its expense, diligently prosecute, or cause Operating Lessee to prosecute, any such proceedings, and shall consult with Lender, its attorneys and experts, and cooperate with them in the carrying on or defense of any such proceedings. Borrower shall not, and shall not permit Operating Lessee to, make any agreement in lieu of condemnation of the Property or any portion thereof without the prior written consent of Lender in each instance, which consent shall not be unreasonably withheld or delayed in the case of a taking of an insubstantial portion of the Property. Notwithstanding any taking by any public or quasi-public authority through eminent domain or otherwise (including, but not limited to any transfer made in lieu of or in anticipation of the exercise of such taking), and whether or not any award or payment made in any condemnation or eminent domain proceeding (an "**Award**") is made available to Borrower or Operating Lessee for Restoration (as defined herein) in accordance with Section 3.3, Borrower shall continue to pay the Debt at the time and in the manner provided for its payment in the Note, in this Security Instrument and/or in the other Security Documents, and the Debt shall not be reduced until any Award shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of the Debt. Lender shall not be limited to the interest paid on the Award but shall be entitled to receive out of the Award interest at the rate or rates provided herein or in the Note. If the Property or any portion thereof is taken by the power of eminent domain, Borrower shall promptly commence and diligently prosecute, or cause Operating Lessee to promptly commence and diligently prosecute, the Restoration of the Property and otherwise comply with the provisions of Section 3.3 of this Security Instrument. If the Property is sold, through foreclosure or otherwise, prior to the receipt by Lender of the Award, Lender shall have the right, whether or not a deficiency judgment on the Note shall have been sought, recovered or denied, to receive the Award, or a portion thereof sufficient to pay the Debt.

**Section 3.3 Casualty or Condemnation.** In the event of a casualty or a taking by eminent domain, the following provisions shall apply in connection with the Restoration of the Property:

(a) If (i) the Net Proceeds do not exceed Two Hundred Fifty Thousand Dollars (\$250,000) (the "**Casualty Amount**"); (ii) the costs of completing the Restoration as reasonably estimated by Borrower shall be less than or equal to the Casualty Amount; (iii) no Event of Default shall have occurred and be continuing under the Loan Agreement; (iv) the Property and the use thereof after the Restoration will be in compliance with, and permitted under, all applicable zoning laws, ordinances, rules and regulations (including, without limitation, all applicable Environmental Laws); and (v) such fire or other casualty or taking, as

# UNOFFICIAL COPY

applicable, does not materially impair access to the Property or the Improvements, then the Net Proceeds will be disbursed directly to Borrower and Borrower shall commence and diligently prosecute to completion, or cause Operating Lessee to commence and diligently prosecute, subject to Force Majeure, the restoration or repair of the Property to as nearly as possible the condition it was in immediately prior to such fire or other casualty or to such taking (a "**Restoration**"). Except upon the occurrence and continuance of an Event of Default, Borrower shall settle, or permit Operating Lessee to settle, any insurance claims with respect to the Net Proceeds which in the aggregate are less than or equal to the Casualty Amount. Lender shall have the right to participate in and reasonably approve any settlement for insurance claims with respect to the Net Proceeds which in the aggregate are greater than the Casualty Amount. If an Event of Default shall have occurred and be continuing, Borrower hereby irrevocably empowers Lender, in the name of Borrower as its true and lawful attorney-in-fact, to file and prosecute such claim and to collect and to make receipt for any such payment. If the Net Proceeds are received by Borrower, such Net Proceeds shall, until the completion of the related work, be held in trust for Lender and shall be segregated from other funds of Borrower to be used to pay for the cost of the Restoration in accordance with the terms hereof.

(b) If the Net Proceeds are greater than the Casualty Amount, such Net Proceeds shall be forthwith paid to Lender to be held by Lender in a segregated account to be made available to Borrower for the Restoration in accordance with the provisions of this Section 3.3. Borrower shall commence and diligently prosecute, or cause Operating Lessee to commence and diligently prosecute, to completion, subject to Force Majeure, the Restoration (in the case of a taking, to the extent such Property is capable of being restored). The term "**Net Proceeds**" for purposes of this Section 3.3 shall mean: (i) the net amount of all insurance proceeds received by Lender under the Policies required pursuant to Sections 5.1(a)(i), (iv), (v), (vi), (vii), (viii) and (ix) of the Loan Agreement as a result of such damage or destruction, after deduction of its reasonable costs and expenses (including, but not limited to reasonable legal fees), if any, in collecting the same, or (ii) the net amount of all awards and payments received by Lender with respect to a taking referenced in Section 3.2 of this Security Instrument, after deduction of its reasonable costs and expenses (including, but not limited to reasonable legal fees), if any, in collecting the same, whichever the case may be. The term "**Force Majeure**" for the purpose of this Section 3.3 shall have the following meaning: Borrower shall be excused for the period of any delay in the performance of any obligations hereunder when prevented from so doing by cause or causes beyond Borrower's control such as, without limitation, all labor disputes, civil commotion, war, war-like operations, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fire or other casualty, inability to obtain any materials or services, and acts of God.

(c) If the Net Proceeds are greater than the Casualty Amount, the Net Proceeds shall be made available to Borrower for payment of, or reimbursement of Borrower's expenses in connection with, the Restoration, subject to the following conditions:

(i) no Event of Default shall have occurred and be continuing under the Loan Agreement;

(ii) Lender shall, within a reasonable period of time prior to request for initial disbursement, be furnished with an estimate of the cost of the Restoration accompanied

# UNOFFICIAL COPY

by an independent architect's certification as to such costs and appropriate plans and specifications for the Restoration;

(iii) the Net Proceeds, together with any cash or cash equivalent deposited by Borrower with Lender, are sufficient to cover the cost of the Restoration as such costs are certified by the independent architect;

(iv) either (A) in the event that the Net Proceeds are insurance proceeds, less than fifty percent (50%) of the total floor area of the Improvements has been damaged or destroyed, or rendered unusable as a result of such fire or other casualty; or (B) in the event that the Net Proceeds are an Award, less than fifty percent (50%) of the Land constituting the Property is taken, such Land that is taken is located along the perimeter or periphery of the Property and no portion of the Improvements is located on such Land;

(v) Lender shall be reasonably satisfied that any operating deficits, including all scheduled payments of principal and interest under the Note which will be incurred with respect to the Property as a result of the occurrence of any such fire or other casualty or taking, whichever the case may be, will be covered out of (A) the Net Proceeds, or (B) other funds of Borrower;

(vi) Lender shall be reasonably satisfied that, upon the completion of the Restoration and related lease-up, if applicable, the Property, together with the Other Properties, will be able to operate at a Debt Service Coverage Ratio of not less than the greater of: (A) 1.20:1.00; and (B) the average of the Debt Service Coverage Ratios for the Property and the Other Properties for each of the six (6) consecutive three (3) month periods, the last of which ends on the last day of the month before the casualty or taking occurs;

(vii) the Restoration can reasonably be completed on or before the earliest to occur of (A) six (6) months prior to the Maturity Date, the First Extended Maturity Date or the Second Extended Maturity Date or the Third Extended Maturity Date (as such terms are defined in the Note), as appropriate, (B) the expiration of the insurance coverage under the Policy described in Section 5.1(a)(iv) of the Loan Agreement, and (C) such time by which any Applicable Laws require the Restoration to be complete if the failure to observe such Applicable Laws would be reasonably likely to produce a Material Adverse Effect;

(viii) the Property and the use thereof after the Restoration will be in compliance with, and permitted under, all applicable zoning laws, ordinances, rules and regulations (including, without limitation, all applicable Environmental Laws); and

(ix) such fire or other casualty or taking, as applicable, does not materially impair access to the Property or the Improvements.

(d) If the Net Proceeds are greater than the Casualty Amount, the Net Proceeds shall be held by Lender and, until disbursed in accordance with the provisions of this Section 3.3, shall constitute additional security for the Obligations. The Net Proceeds other than the Net Proceeds paid under the Policy described in Section 5.1(a)(iv) of the Loan Agreement

# UNOFFICIAL COPY

shall be disbursed by Lender to, or as directed by, Borrower from time to time during the course of the Restoration, upon receipt of evidence satisfactory to Lender that (A) all materials installed and work and labor performed (except to the extent that they are to be paid for out of the requested disbursement) in connection with the Restoration have been paid for in full, and (B) there exist no notices of pendency, stop orders, mechanic's or materialman's liens or notices of intention to file same, or any other liens or encumbrances of any nature whatsoever on the Property arising out of the Restoration which have not either been fully bonded and discharged of record or in the alternative fully insured to the satisfaction of Lender by the title insurer.

(e) Lender shall have the use of the plans and specifications and all permits, licenses and approvals required or obtained in connection with the Restoration. The identity of the contractors, subcontractors and materialmen engaged in the Restoration, as well as the contracts under which they have been engaged, shall be subject to prior review and acceptance by Lender and an independent consulting engineer selected by Lender (the "**Casualty Consultant**"), such acceptance not to be unreasonably withheld or delayed. All costs and expenses incurred by Lender in connection with making the Net Proceeds available for the Restoration including, without limitation, reasonable legal fees and disbursements and the Casualty Consultant's fees, shall be paid by Borrower.

(f) In no event shall Lender be obligated to make disbursements of the Net Proceeds in excess of an amount equal to the costs actually incurred from time to time for work in place as part of the Restoration, as certified by the Casualty Consultant, minus the Casualty Retainage. The term "**Casualty Retainage**" as used in this Section 3.3 shall mean an amount equal to ten percent (10%) of the costs actually incurred for work in place as part of the Restoration, as certified by the Casualty Consultant until such time as the Casualty Consultant certifies to Lender that fifty percent (50%) of the required Restoration has been completed. There shall be no Casualty Retainage with respect to costs actually incurred by Borrower for work in place in completing the last fifty percent (50%) of the required Restoration. The Casualty Retainage shall in no event, and notwithstanding anything to the contrary set forth above in this Section 3.3, be less than the amount actually held back by Borrower or Operating Lessee from contractors, subcontractors and materialmen engaged in the Restoration. The Casualty Retainage shall not be released until the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 3.3 and that all approvals necessary for the re-occupancy and use of the Property have been obtained from all appropriate governmental and quasi-governmental authorities, and Lender receives evidence satisfactory to Lender that the costs of the Restoration have been paid in full or will be paid in full out of the Casualty Retainage; provided, however, that Lender will release the portion of the Casualty Retainage being held with respect to any contractor, subcontractor or materialman engaged in the Restoration as of the date upon which the Casualty Consultant certifies to Lender that the contractor, subcontractor or materialman has satisfactorily completed all work and has supplied all materials in accordance with the provisions of the contractor's, subcontractor's or materialman's contract, and the contractor, subcontractor or materialman delivers the lien waivers and/or releases and such other evidence of payment in full of all sums due to the contractor, subcontractor or materialman as may be reasonably requested by Lender or by the title insurer. If required by Lender, the release of any such portion of the Casualty Retainage shall be approved by the surety company, if any, which has issued a payment or performance bond with respect to the contractor, subcontractor or materialman.

# UNOFFICIAL COPY

(g) Lender shall not be obligated to make disbursements of the Net Proceeds more frequently than once every calendar month.

(h) If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the reasonable opinion of Lender, be sufficient to pay in full the balance of the costs which are estimated by the Casualty Consultant to be incurred in connection with the completion of the Restoration, Borrower shall deposit the deficiency (the "**Net Proceeds Deficiency**") with Lender before any further disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Lender shall be held by Lender and shall be disbursed for costs actually incurred in connection with the Restoration on the same conditions applicable to the disbursement of the Net Proceeds, and until so disbursed pursuant to this Section 3.3 shall constitute additional security for the Obligations.

(i) The excess, if any, of the Net Proceeds and the remaining balance, if any, of the Net Proceeds Deficiency deposited with Lender after the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 3.3, and the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with the Restoration have been paid in full, shall be remitted by Lender to Borrower, provided no Event of Default shall have occurred and shall be continuing under any of the Security Documents.

(j) All Net Proceeds not required (i) to be made available for the Restoration or (ii) to be returned to Borrower as excess Net Proceeds pursuant to Section 3.3(i) shall be retained and applied by Lender toward the payment of the Debt whether or not then due and payable in such order, priority and proportions as Lender in its discretion shall deem proper or, at the discretion of Lender, the same shall be paid, either in whole or in part, to Borrower. If Lender shall receive and retain Net Proceeds, the lien of this Security Instrument shall be reduced only by the amount received and retained by Lender and actually applied by Lender in reduction of the Debt.

**Section 3.4 Access to Property.** Borrower shall, and shall cause Operating Lessee to, permit agents, representatives and employees of Lender to inspect the Property or any part thereof at reasonable hours upon reasonable advance notice.

## ARTICLE IV REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants to Lender that:

### **Section 4.1 Warranty of Title.**

(a) Borrower has good and marketable title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same and that Borrower possesses an unencumbered fee simple absolute estate in the Land and the Improvements and that it owns or leases the Property free and clear of all liens, encumbrances and charges whatsoever except for the Permitted Exceptions (as defined below). The Permitted Exceptions do not materially interfere with the security intended to be provided by this Security

# UNOFFICIAL COPY

Instrument, Borrower's ability to pay principal and interest under the Note, or the use and operations of the Property. 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, subject only to the Permitted Exceptions. Upon the recordation of this Security Instrument and the filing of a UCC Financing Statement with attached real estate addendum in the real property records of the county where the Property is located and the filing of a UCC Financing Statement in the appropriate filing office for the state where the Property is located, if required by Applicable Laws, and in the state of Borrower's organization, Lender will have a first priority perfected security interest in all Personal Property, to the extent such a security interest is subject to the Uniform Commercial Code.

(b) For purposes of this Security Instrument and the other Security Documents, the term "**Permitted Exceptions**" shall mean: (i) the lien of the mortgage created by this Security Instrument; (ii) all liens and other matters specifically disclosed on Schedule B of the Title Policy issued in connection with this Security Instrument; (iii) liens, if any, for taxes and other governmental and quasi-governmental impositions that (A) are not due and payable, or (B) are being diligently contested in good faith by Borrower or Operating Lessee in accordance with Section 5.2(b) of the Loan Agreement and if, in Lender's reasonable judgment, the failure to pay such amounts does not materially and adversely affect Lender's security interest in the Property or Lender's ability to promptly exercise its rights or remedies under this Security Instrument; (iv) mechanics', materialmen's or similar liens arising in the ordinary course of business with respect to obligations that (A) are not due or which are being diligently contested in good faith in accordance with Section 5.2(b) of the Loan Agreement, (B) which do not arise in connection with the borrowing of money or the obtaining of advances of credit and which, in Lender's reasonable judgment, do not in the aggregate materially detract from the value of Borrower's assets or materially impair Borrower's ability to use its assets, and (C) Borrower has posted a bond with Lender, or with the applicable governmental authority, if required by such authority as a condition of such contest, in an amount equal to one hundred twenty-five percent (125%) of the amount of such liens; (v) rights of existing and future tenants as tenants only pursuant to written Leases; (vi) zoning restrictions, easements, rights of way, restrictions on use of real property and other similar encumbrances existing and reflected on the Title Policy as of the date of this Security Instrument; (vii) cash deposits made in the ordinary course of business to secure the performance of leases, statutory obligations (including under workers' compensation, unemployment insurance, social security and other similar laws), surety, appeal, and performance bonds, or similar obligations not incurred in connection with borrowing money or obtaining advances or credit; (viii) other liens consented to by Lender in writing; and (ix) liens incurred in connection with purchases or capital leases of equipment in the ordinary course of Borrower's business, provided the Lien is treated as a "purchase money security interest" under Section 9-107 of the Uniform Commercial Code, and provided that the lien does not encumber any property other than the equipment in question.

# UNOFFICIAL COPY

## ARTICLE V FURTHER ASSURANCES

**Section 5.1 Recording of Security Instrument, Etc.** Borrower forthwith upon the execution and delivery of this Security Instrument and thereafter, from time to time, will cause this Security Instrument and any of the other Security Documents creating a lien or security interest or evidencing the lien hereof upon the Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect and perfect the lien or security interest hereof upon, and the interest of Lender in, the Property. Borrower will pay all taxes, filing, registration or recording fees, and all expenses incident to the preparation, execution, acknowledgment and/or recording of the Note, this Security Instrument, the other Security Documents, any note or mortgage supplemental hereto, any security instrument with respect to the Property and any instrument of further assurance, and any modification or amendment of the foregoing documents, and all federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Security Instrument, any mortgage supplemental hereto, any security instrument with respect to the Property or any instrument of further assurance, and any modification or amendment of the foregoing documents, except where prohibited by law so to do.

**Section 5.2 Further Acts, Etc.** Borrower will, at the cost of Borrower, and without expense to Lender, do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, notices of assignments, transfers and assurances as Lender shall, from time to time, reasonably require, for the better assuring, conveying, assigning, transferring, and confirming unto Lender, the property and rights hereby mortgaged, granted, bargained, sold, conveyed, confirmed, pledged, assigned, warranted and transferred or intended now or hereafter so to be, or which Borrower may be or may hereafter become bound to convey or assign to Lender, or for carrying out the intention or facilitating the performance of the terms of this Security Instrument or for filing, registering or recording this Security Instrument, or for complying with all Applicable Laws. Borrower, on demand, will execute and deliver and hereby authorizes Lender to execute in the name of Borrower, or without the signature of Borrower to the extent Lender may lawfully do so, chattel mortgages or other instruments, to evidence or perfect more effectively the security interest of Lender in the Property. Borrower grants to Lender an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies, after an Event of Default, available to Lender pursuant to this Section 5.2.

**Section 5.3 Changes in Tax, Debt Credit and Documentary Stamp Laws.**

(a) If any law is enacted or adopted or amended after the date of this Security Instrument which deducts the Debt from the value of the Property for the purpose of taxation or which imposes a tax, either directly or indirectly, on the Debt or Lender's interest in the Property, Borrower will pay the tax, with interest and penalties thereon, if any.

(b) If Lender is advised by counsel chosen by it that the payment of tax by Borrower would be unlawful or taxable to Lender or unenforceable or provide the basis for a



# UNOFFICIAL COPY

defense of usury, then Lender shall have the option by written notice of not less than ninety (90) days to declare the Debt immediately due and payable.

(c) Borrower will not claim or demand or be entitled to any credit or credits on account of the Debt for any part of the Taxes or Other Charges assessed against the Property, or any part thereof, and no deduction shall otherwise be made or claimed from the assessed value of the Property, or any part thereof, for real estate tax purposes by reason of this Security Instrument or the Debt. If such claim, credit or deduction shall be required by law, Lender shall have the option, by written notice of not less than ninety (90) days, to declare the Debt immediately due and payable.

(d) If at any time the United States of America, any State thereof or any subdivision of any such State shall require revenue or other stamps to be affixed to the Note, this Security Instrument, or any of the other Security Documents or impose any other tax or charge on the same, Borrower will pay for the same, with interest and penalties thereon, if any.

**Section 5.4 Mortgage and/or Intangible Tax.** Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all excise, recordation or similar taxes and all recording fees and similar costs imposed upon or incurred by or asserted against any Indemnified Parties as it relates, directly or indirectly, to the recording of the Security Instruments or any of the other Security Documents.

**Section 5.5 Splitting of Security Instrument.** Subject to the terms of the Cooperation Agreement, this Security Instrument and the Note may, at any time until the same shall be fully paid and satisfied, at the sole election of Lender, be split or divided into two or more notes and two or more security instruments, each of which shall cover all or a portion of the Property to be more particularly described therein. Lender shall also have the right to allocate the Property and the Other Properties among two (2) or more pools and/or to release any cross-default and/or cross-collateralization provisions, in Lender's sole discretion, to accommodate a Transfer or a Securitization; provided, that in no event will Borrower be required to transfer the Property or to acquire any of the Other Properties unless Lender pays all costs of Borrower in connection therewith. To that end, Borrower, upon written request of Lender, shall execute, acknowledge and deliver to Lender and/or its designee or designees substitute notes and security instruments in such principal amounts, aggregating not more than the then unpaid principal amount secured by this Security Instrument, and containing terms, provisions and clauses (i) no less favorable to Borrower than those contained herein and in the Note, and (ii) which do not increase Borrower's obligations hereunder or decrease Borrower's rights hereunder or under the other Security Documents, and such other documents and instruments as may be required by Lender to effect the splitting of the Note and this Security Instrument.

## ARTICLE VI DUE ON SALE/ENCUMBRANCE - REGARDING PROPERTY

**Section 6.1 No Property Transfer/Encumbrance of a Property.** Borrower agrees that Borrower shall not, without the prior written consent of Lender or as otherwise permitted by this Security Instrument, sell, convey, mortgage, grant, bargain, encumber, pledge,

# UNOFFICIAL COPY

assign, or otherwise transfer the Property or any part thereof or permit the Property or any part thereof to be sold, conveyed, mortgaged, granted, bargained, encumbered, pledged, assigned, or otherwise transferred (the "**Property Transfer**"). For purposes of this Section 6.1, a Property Transfer shall exclude any Permitted Exceptions, the Operating Leases existing as of the Closing Date and dispositions of equipment and fixtures in the ordinary course of Borrower's business. For purposes of this Section 6.1, a Property Transfer shall include, without limitation: (a) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; and (b) an agreement by Borrower leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any Rents.

**Section 6.2 Permitted Property Transfer of the Property and the Other Properties.** At any time during the term of the Loan, Lender shall consent to one (1) Property Transfer that Borrower may request (including upon a sale of Borrower alone or concurrently with a sale of Borrower and Operating Lessee), if it relates to a simultaneous (or substantially simultaneous) Property Transfer of all of the Properties and assumption of the Loan, provided that the following terms and condition are satisfied:

- (a) No payment default and no Event of Default has occurred and is continuing hereunder or under the Loan Agreement.
- (b) Borrower provides Lender with a written request of its proposed Property Transfer, which written request shall include the terms of the prospective Property Transfer, at least sixty (60) days before the date on which Borrower would like to close such Property Transfer.
- (c) Such Property Transfer is in conjunction with an overall transaction involving the sale of all (but not less than all of) the Other Properties and the Leased Properties (as defined in that certain Pledge and Security Agreement, dated the date hereof, from Sponsor, et. al., in favor of Lender).
- (d) A transfer fee equal to one-half of one percent (.5%) of the Debt shall be paid by Borrower to Lender (in addition to any reasonable out-of-pocket costs and expenses incurred by Lender in conjunction with such Property Transfer, including reasonable legal fees, but excluding any internal costs of Lender) upon notice being given to Borrower of approval of the proposed Property Transfer.
- (e) Lender's receipt, review and approval of the proposed transferee's (the "**Property Transferee**") financial creditworthiness and management experience for comparable properties, which receipt, review and approval shall be in Lender's sole discretion.
- (f) The Property Transferee assumes, in writing, all obligations of Borrower hereunder and under all of the Security Documents, which assumption shall be in form and substance satisfactory to Lender.

# UNOFFICIAL COPY

(g) Lender's receipt, review and approval of the proposed guarantor's (the "**Guarantor Transferee**") financial creditworthiness, which receipt, review and approval shall be in Lender's sole discretion.

(h) The Guarantor Transferee assumes, in writing, all obligations of Sponsor under all of the Security Documents, which assumption shall be in form and substance satisfactory to Lender, in which case Sponsor shall be released from its obligations under the Security Documents for such Property.

(i) The Property Transferee shall be a Single Purpose Entity and, if required by the Rating Agencies, Borrower shall deliver to Lender a non-consolidation opinion, which opinion shall be in form and substance satisfactory to Lender.

(j) After a Securitization, Lender shall have received (and Lender shall cooperate with Borrower to receive) (i) written confirmation from the applicable Rating Agencies that such Property Transfer will not cause any Rating Agency to withdraw, qualify or downgrade the then-applicable rating on any security issued in connection with any Securitization, and (ii) an opinion of Borrower's counsel in form and substance satisfactory to the Rating Agencies stating that the Property Transfer is not a "significant modification" of the Loan as defined in Treasury Regulation Section 1.860 G-2(b)(2) and the transfer will not adversely affect the status of any REMIC election in connection with a Securitization.

(k) Prior to a Securitization, Borrower shall obtain Lender's consent, which consent shall not be unreasonably withheld or delayed.

(l) Borrower and Property Transferee shall execute and deliver to Lender such other documents and agreements as Lender shall reasonably require in connection with the Property Transfer, all in form and substance satisfactory to Lender.

**Section 6.3 Permitted Property Transfer of the Property.** Borrower shall have the right to conduct a Property Transfer of a Property and obtain a release of such Property, in its entirety, from the lien of this Security Instrument (a "**Partial Release**") and retain any Excess Sale Proceeds upon (a) payment of an amount equal to the Release Price, and (b) satisfaction of the following terms and conditions:

(a) No Event of Default has occurred and is continuing hereunder or under the Security Documents, unless Borrower is conducting the Property Transfer pursuant to Borrower's Special Cure Right under Section 7.1 of the Loan Agreement.

(b) **Intentionally Omitted.**

(c) Borrower gives Lender a written request for such Partial Release at least thirty (30) days before the proposed date for such Partial Release.

(d) Borrower shall have executed and delivered amendments to any and all of the Security Documents as reasonably requested by Lender reflecting the Partial Release, which amendments shall be in form and substance reasonably satisfactory to Lender. Moreover,

# UNOFFICIAL COPY

Borrower shall deliver to Lender for execution by Lender a release of the Property from the lien of this Security Instrument in a form appropriate for recordation.

(e) Such Partial Release shall not in any way impair or affect the lien or priority of the remaining Security Instruments, or improve the position of any subordinate lienholder, if any, with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the Release Price received by Lender for such Partial Release. The remaining Security Instruments shall continue as a lien and security interest in the Other Properties.

(f) Borrower shall simultaneously with such Partial Release transfer title to such Property to a person(s), party(ies) or entity(ies) other than Borrower or any person, party or entity owned or controlled by Borrower.

(g) Borrower shall have paid (or agreed to pay at closing of the Partial Release) any and all reasonable costs of Lender (including, without limitation, reasonable attorneys' fees) incurred in connection with such Partial Release.

(h) For purposes of this Section 6.3, the following terms shall have the following meanings:

(i) The "**Allocated Loan Amount**" for the Property shall mean the amount set forth on Exhibit C attached hereto and by this reference incorporated herein, less an amount, if any, equal to the sum of (A) any Net Proceeds with respect to the Property that are applied to prepay the outstanding principal amount of the Loan pursuant to Section 2.5(b) of the Note; (B) the Property's proportionate share (based upon the relative amounts set forth on the Exhibits C attached to any Security Instruments which have not been released and on Exhibit A of the Pledge Agreement for which a Credit Event (as defined in the Note) has not occurred ("**Proportionate Share**") of the amount of any voluntary prepayments made pursuant to Section 2.5(a) of the Note, excluding amounts paid as a Release Price for any Property that is subject to a Partial Release or a Special Cure Right; and (C) the Property's Proportionate Share of any Net Proceeds with respect to any Other Property in excess of the Release Price for such Other Property that are applied to prepay the outstanding principal amount of the Loan pursuant to Section 2.5(b) of the Note.

(ii) "**Excess Sale Proceeds**" shall mean an amount equal to one hundred percent (100%) of the net sale proceeds from a Property Transfer in excess of the Release Price.

(iii) "**Release Price**" shall mean the lesser of (a) one hundred twenty-five percent (125%) of the Allocated Loan Amount and (b) one hundred percent (100%) of the net sale proceeds from a Property Transfer in connection with a bona-fide third party sale; provided, however, without the consent of Lender, in no event shall the Release Price be less than the Allocated Loan Amount (unless after giving effect to the Partial Release the Debt Service Coverage Ratio is greater than or equal to the Minimum DSCR); and, provided, further, such amount shall be reduced to one hundred percent

# UNOFFICIAL COPY

(100%) of the Allocated Loan Amount if the applicable Partial Release is for a Property that has been the subject of a casualty arising or related to terrorism or a terrorist act and Borrower has elected to obtain a Partial Release with respect to such Property instead of completing the Restoration of such Property.

(i) Borrower shall deposit all Excess Sale Proceeds into the Cash Management Account. Such Excess Sale Proceeds may be used by Borrower to prepay the Loan in accordance with the provisions of Section 2.5 of the Note. Notwithstanding the foregoing, if the aggregate Debt Service Coverage Ratio after giving effect to a bona-fide third party sale described in Section 6.3(h)(iii) above is less than the aggregate Debt Service Coverage Ratio immediately prior to such sale (the "**Benchmark DSCR**"), then Borrower shall be obligated to prepay the Loan by one hundred percent (100%) of the net sale proceeds received from future bona-fide third party sales until such time that the aggregate Debt Service Coverage Ratio is greater than or equal to the Benchmark DSCR.

(j) Notwithstanding anything contained herein to the contrary, Borrower shall not be entitled to release the Property from the lien of this Security Instrument unless such release is in compliance with Section 2.5 of the Note, except that no Prepayment Premium shall be due in connection with the first Fifty Million Dollars (\$50,000,000.00) of proceeds from Property Transfers used to prepay the Loan, and (B) the Mezzanine Lender shall simultaneously receive the Mezzanine Loan Release Price.

## ARTICLE VII

### DUE ON SALE/ENCUMBRANCE - REGARDING EQUITY INTERESTS

**Section 7.1 Prohibited Changes of Ownership.** A conveyance of any direct or indirect equity interest (or a change of ownership through any merger, consolidation or issuance of new stock, partnership units or membership units having the effect of a change of ownership) in Borrower or Borrower's SPE Component Entities, (which includes, without limitation, a pledge or creation of a security interest in any such ownership interest and, separately, the exercise of remedies under any pledge or security interest therein) (each, an "**Equity Transfer**") shall be prohibited unless expressly permitted by this Section 7.1 or pursuant to Section 3.9 of the Loan Agreement; provided, however, notwithstanding anything to the contrary herein, Equity Transfer shall not be deemed to include any conveyance or pledge of, or creation of security interest in, the direct or indirect equity interest or beneficial interest in Belcrest, Belair, GS Employee, GS Holdings, GS Offshore, GS Fund, Whitehall Street, Whitehall Parallel, Whitehall Employee, NewPrice, Starwood VI-A, Starwood VI-B, Starwood VI-D and Starwood/Golf Targeted Fund I, L.P.

(a) Any Equity Transfer with respect to any direct or indirect equity interest in Borrower will be permitted without the prior express written consent of Lender as long as each of the following requirements are satisfied:

(i) Any Sponsor or combination of Sponsors and their Affiliates shall own, directly or indirectly, in the aggregate at least fifty-one percent (51%) of Borrower.

# UNOFFICIAL COPY

- (ii) Whitehall and/or its Affiliates shall own, directly or indirectly, an interest in Borrower equal to at least the lesser of (A) twenty-five percent (25%) and (B) one-third (1/3) of the aggregate interests of Borrower held, directly or indirectly, by Sponsors and their Affiliates; provided, however, the requirements of this Section 7.1(a)(ii) shall not be required to be satisfied if Starwood Fund and/or its Affiliates shall have exercised their right to purchase the interests of Whitehall and the GS Fund pursuant to Section 9.7 of the Amended and Restated Limited Liability Company Agreement of National Golf Properties LLC (the "**Buy/Sell Option**") so long as the Starwood Fund has a Net Worth equal to or greater than \$65,000,000.00.
- (iii) Borrower shall continue to be a Sponsor Controlled Party.
- (iv) Borrower shall not merge with or into any other entity and shall not consolidate with any other entity.
- (v) Borrower shall not issue any partnership, membership or other equity interests except in compliance with Section 5.12 of the Loan Agreement.
- (vi) Borrower shall not issue any securities that are convertible or exchangeable into partnership or other equity interests in Borrower, unless, after giving effect to the conversion or exchange of such securities, the requirements set forth above in this Section 7.1(a)(i) through (ii) are satisfied.
- (vii) Borrower shall not suffer to occur any pledge, hypothecation, encumbrance or other collateral assignment by Sponsors or any other Person, direct or indirectly, of its partnership, membership or other equity interests in Borrower.
- (viii) No payment default and no Event of Default has occurred and is continuing hereunder or under the other Security Documents.
- (ix) Borrower executes such documents and agreements as Lender shall reasonably require in connection with the Equity Transfer, all in form and substance satisfactory to Lender.
- (x) Lender shall have received written notice of such Equity Transfer, together with documentation evidencing such transfer, within thirty (30) days prior to such Equity Transfer.
- (xi) If a Securitization has occurred, and if taking into account the particulars of the Equity Transfer, the criteria of the applicable Rating Agencies require, Borrower shall, prior to any such Equity Transfer, arrange to deliver to Lender a new substantive non-consolidation opinion (or an appropriate updating of the opinion delivered in conjunction with the closing of this Loan) in form and substance reasonably satisfactory to Lender regarding the reconstituted Borrower.
- (xii) Borrower shall pay all of Lender's and the Rating Agencies, if applicable, reasonable fees, costs and expenses (including, without limitation, legal fees) incurred in

# UNOFFICIAL COPY

conjunction with any transaction referenced under Section 7.1(a) in which Lender's consent is solicited or required.

(b) For purposes of this Security Instrument:

(i) A partnership, corporation, limited liability company, business trust or other business entity is a "**Sponsor Controlled Party**" as long as any Sponsor, or combination of Sponsors and their Affiliates, has Control of such partnership, corporation, limited liability company, business trust or other business entity.

(ii) The term "**Affiliate**" for the purpose of this Article VII shall be limited to, with respect to Whitehall, only Whitehall Employee, with respect to GS Fund, only GS Offshore, GS Holdings and GS Employee and with respect to the Starwood Fund, only Starwood Golf Targeted Fund I, L.P.

(iii) "**Control**" of one entity (the "**controlled entity**") by another (the "**controlling entity**") means the controlling entity has the power, directly or indirectly, to direct or cause the direction of the management and policies of the controlled entity, whether through the ownership of voting securities, by contract, or otherwise.

(iv) "**Net Worth**" shall be calculated on a combined basis and shall be defined as (i) the amount of capital contributions that may be called from the equity owners of each Sponsor pursuant to the terms of such Sponsor's organizational agreement as of the date of calculation, plus, (ii) the total book equity of each Sponsor (i.e., partner's capital or member's capital) as shown in the most recent quarterly financial statements of each Sponsor, minus (iii) the positive or negative cumulative net change in unrealized appreciation from investments as shown in the footnotes to the most recent quarterly financial statements of each Sponsor (it being understood that the subtraction of such item (A) which is a negative number will result in an increase in Net Worth and (B) will not result in the valuation of an investment or asset exceeding the lower of cost or market (as reflected in the owning entity's financial statements) for such investment or asset); provided, however, if Starwood Fund exercises its right to purchase the interests of Whitehall and GS Fund pursuant to the Buy/Sell Option, then Sponsor for the purposes of this definition shall mean only Starwood Fund, and if Whitehall and GS Fund shall exercise their right to purchase the interests of the Starwood Fund pursuant to the Buy/Sell Option, then Sponsor for the purposes of this definition shall mean only Whitehall and GS Fund.

(v) The term "**suffer to occur**" as used in Section 7.1(a)(vii) is intended to mean that, if any of the events or circumstances referred to in that section occur, Borrower will be deemed to have suffered those events or circumstances to occur, even if Borrower was powerless to prevent those events or circumstances.

**Section 7.2 Intentionally Omitted.**

**Section 7.3 Lender's Rights.**

# UNOFFICIAL COPY

(a) In the case of any (i) Property Transfer under Section 6.1 or Section 6.2, or (ii) Equity Transfer that does not meet the conditions of Section 7.1(a), or Partial Release that does not meet the conditions of Section 6.3, Lender reserves the right to condition its consent required under Article VI and Article VII, to the extent such consent is required thereunder, upon a modification of the terms hereof and upon the assumption of the Note, this Security Instrument and the other Security Documents as so modified by the proposed transferee and guarantor, payment of a transfer fee of a minimum of one-half of one percent (.5%) of the Debt and all of Lender's expenses incurred in connection with such transaction, or such other conditions as Lender shall determine in its sole discretion to be in the interest of Lender (including the delivery of substantive non-consolidation opinions, if required by the Rating Agencies). Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon any Property Transfer or Equity Transfer that is not permitted by Article VI and Article VII and not consented to by Lender. This provision shall apply to every Property Transfer or Equity Transfer regardless of whether voluntary or not, or whether or not Lender has consented to any previous Property Transfer or Equity Transfer.

(b) In the case of any (i) Property Transfer under Section 6.1 or Section 6.2, (ii) Equity Transfer that does not meet the conditions of Section 7.1(a), or Partial Release that does not meet the conditions of Section 6.3, or (iii) Equity Transfer referenced in clauses (v) and (vi) of Section 7.1(a), whether or not Lender's consent is solicited or required, Borrower shall, prior to any such transaction, arrange to obtain confirmation from the applicable Rating Agencies that such transfer shall not result in a downgrade, qualification or withdrawal of the then current ratings of the securities or any proposed security which may include the Loan.

## ARTICLE VIII DEFAULT

**Section 8.1 Events of Default.** Upon the occurrence of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce the rights of Lender against Borrower and in and to the Property, including, but not limited to the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

- (a) declare the entire unpaid Debt to be immediately due and payable;
- (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument or any of the other Security Instruments under any Applicable Laws in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (c) with or without entry, to the extent permitted and pursuant to the procedures provided by Applicable Laws, institute proceedings for the partial foreclosure of this Security Instrument or the other Security Instruments for the portion of the Debt then due and payable, subject to the continuing lien and security interest of this Security Instrument and the



# UNOFFICIAL COPY

other Security Instruments for the balance of the Debt not then due, unimpaired and without loss of priority;

(d) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, as an entity or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by Applicable Laws;

(e) subject to the provisions of Article VIII of the Loan Agreement, institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note or in the other Security Documents;

(f) subject to the provisions of Article VIII of the Loan Agreement, recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the other Security Documents;

(g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any Sponsor, Indemnitor or of any person, firm or other entity liable for the payment of the Debt;

(h) subject to any Applicable Laws, the license granted to Borrower under Section 1.2 hereof and the Assignments of Leases and Rents shall automatically be revoked and Lender may enter into or upon any Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all books, records, accounts, rent rolls, leases (including the form lease), subleases (including the form sublease) and rental and license agreements with the tenants, subtenants and licensees in possession of the Property or any part or parts thereof; tenants', subtenants' and licensees' money deposits or other property (including, without limitation, any letter of credit) given to secure tenants', subtenants' and licensees' obligations under leases, subleases or licenses, together with a list of the foregoing; all lists pertaining to current rent and license fee arrears; any and all architects' plans and specifications, licenses and permits, documents, books, records, accounts, surveys and property which relate to the management, leasing, operation, occupancy, ownership, insurance, maintenance, or service of or construction upon the Property relating thereto and Borrower agrees to surrender possession of the Property and of such books, records and accounts to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) complete any construction on the Property in such manner and form as Lender deems advisable; (iii) make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require Borrower to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and

# UNOFFICIAL COPY

occupation of such part of the Property as may be occupied by Borrower; (vi) require Borrower to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vii) apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as Lender shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable legal fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, Insurance Premiums and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(i) exercise any and all rights and remedies granted to a secured party upon default under the Uniform Commercial Code, including, without limiting the generality of the foregoing: (i) the right to take possession of the Personal Property and other UCC Collateral or any part thereof, and to take such other measures as Lender may deem necessary for the care, protection and preservation of the Personal Property and other UCC Collateral, and (ii) request Borrower at its expense to assemble the Personal Property and other UCC Collateral and make it available to Lender at a convenient place acceptable to Lender. Any notice of sale, disposition or other intended action by Lender with respect to the Personal Property and other UCC Collateral sent to Borrower in accordance with the provisions hereof at least ten (10) days prior to such action, shall constitute commercially reasonable notice to Borrower;

(j) apply any sums then deposited in each Escrow Fund and any other sums held in escrow or otherwise by Lender in accordance with the terms of the Loan Agreement or any other Security Document to the payment of the following items in any order in its sole and absolute discretion:

- (i) Taxes and Other Charges;
- (ii) Insurance Premiums;
- (iii) Interest on the unpaid principal balance of the Note; and
- (iv) amortization of the unpaid principal balance of the Note; and all other sums payable pursuant to the Note, this Security Instrument and the other Security Documents, including, without limitation, advances made by Lender pursuant to the terms of the Loan Agreement.

(k) apply the undisbursed balance of any Net Proceeds or any Net Proceeds Deficiency deposit, together with interest thereon, to the payment of the Debt in such order, priority and proportions as Lender shall deem to be appropriate in its discretion;

(l) prohibit Borrower and anyone claiming on behalf of or through Borrower from making use of or withdrawing any sums from any lockbox or similar account, if any; and

(m) pursue such other remedies as Lender may have under Applicable Laws.

**Section 8.2 Continued Lien Priority.** In the event of a sale, by foreclosure, power of sale, or otherwise, of less than all of the Property, this Security Instrument shall

# UNOFFICIAL COPY

continue as a lien and security interest on the remaining portion of the Property unimpaired and without loss of priority. Notwithstanding the provisions of Section 8.1 to the contrary, if any Event of Default as described in Section 7.1(g) or (i) of the Loan Agreement shall occur, the entire unpaid Debt shall be automatically due and payable, without any further notice, demand or other action by Lender.

**Section 8.3 Adjournment.** Lender may adjourn from time to time any sale by it to be made under or by virtue of this Security Instrument by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and, except as otherwise provided by any Applicable Laws, Lender, without further notice or publication, may make such sale at the time and place to which the same shall be so adjourned.

**Section 8.4 Lender Bid.** Upon any sale made under or by virtue of Section 8.1, whether made under a power of sale or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, Lender may bid for and acquire the Property or any part thereof and in lieu of paying cash therefor may make settlement for the purchase price by crediting upon the Debt the net sales price after deducting therefrom the expenses of the sale and costs of the action and any other sums which Lender is authorized to deduct under the Loan Agreement.

**Section 8.5 Application of Proceeds.** The purchase money, proceeds and avails of any disposition of the Property, or any part thereof, or any other sums collected by Lender pursuant to the Security Documents, may be applied by Lender to the payment of the Debt in such priority and proportions as Lender in its discretion shall deem proper.

**Section 8.6 Right to Cure Defaults.** Upon the occurrence of any Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, cure the same in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Debt, and the cost and expense thereof (including reasonable legal fees to the extent permitted by Applicable Laws), with interest as provided in this Section 8.6, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such costs and expenses incurred by Lender in remedying such Event of Default or in appearing in, defending, or bringing any such action or proceeding shall bear interest at a rate equal to the Default Interest Rate (as defined in the Note) for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such costs and expenses incurred by Lender together with interest thereon calculated at the Default Interest Rate shall be deemed to constitute a portion of the Debt and be secured by this Security Instrument and shall be immediately due and payable upon demand by Lender therefor.

**Section 8.7 Actions and Proceedings.** After the occurrence and during the continuance of an Event of Default, Lender has the right to appear in and defend any action or proceeding brought with respect to the Property and to bring any action or proceeding, in the name and on behalf of Borrower, which Lender, in its discretion, decides should be brought to protect its interest in the Property.

# UNOFFICIAL COPY

**Section 8.8 Recovery of Sums Required to Be Paid.** Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Debt as the same become due, without regard to whether or not the balance of the Debt shall be due, and without prejudice to the right of Lender thereafter to bring an action of foreclosure, or any other action, for a default or defaults by Borrower existing at the time such earlier action was commenced.

**Section 8.9 Examination of Books and Records.** Lender, its agents, accountants and attorneys shall have the right upon prior written notice (unless an Event of Default exists, in which case no notice is necessary) to examine the records, books, management and other papers of Borrower and its affiliates or of any Sponsor or Indemnitor which pertain to their financial condition or the financial condition of the Property, at the Property or at any office regularly maintained by Borrower, its affiliates or any Sponsor or Indemnitor where the books and records are located. Lender and its agents shall have the right upon notice to make copies and extracts from the foregoing records and other papers.

**Section 8.10 Other Rights, Etc.**

(a) The failure of Lender to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument or any other Security Document. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (i) the failure of Lender to comply with any request of Borrower, any Sponsor or any Indemnitor to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or the other Security Documents, (ii) the release, regardless of consideration, of the whole or any part of the Property, or of any person liable for the Debt or any portion thereof, or (iii) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the other Security Documents.

(b) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall have no liability whatsoever for decline in value of the Property, for failure to maintain the Policies, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief, if any such possession is requested or obtained, with respect to the Property or collateral not in Lender's possession.

(c) Lender may resort for the payment of the Debt to any other security held by Lender in such order and manner as Lender, in its discretion, may elect. Lender may take action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Lender thereafter to foreclose this Security Instrument. The rights of Lender under this Security Instrument shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Lender shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision. Lender shall not be limited exclusively to the rights and remedies herein stated but shall be entitled to every right and remedy now or hereafter afforded at law or in equity.

# UNOFFICIAL COPY

**Section 8.11 Right to Release Any Portion of the Property.** Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

**Section 8.12 Violation of Laws.** If the Property is not in compliance with Applicable Laws, Lender may impose additional requirements upon Borrower in connection herewith including, without limitation, monetary reserves or financial equivalents.

**Section 8.13 Right of Entry.** Lender and its agents shall have the right upon prior written notice to enter and inspect the Property at all reasonable times upon not less than five (5) Business Days' notice (except in the case of emergencies when no notice shall be required) to Borrower.

**Section 8.14 Subrogation.** If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, 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 the repayment of the Debt, the performance and discharge of Borrower's obligations hereunder and the other Security Documents and the performance and discharge of the Other Obligations.

**Section 8.15 Cross-Collateralization.** Without limitation of any other right or remedy provided to Lender in this Security Instrument or any of the other Security Documents, Borrower acknowledges that (i) upon the occurrence of an Event of Default under the Security Documents, to the full extent permitted by Applicable Laws, Lender shall have the right to pursue all of its rights and remedies in one proceeding, or separately and independently in separate proceedings which it, as Lender, in its sole and absolute discretion, shall determine from time to time, (ii) Lender is not required to marshal assets, sell the Properties in any inverse order of alienation, or be subjected to any "one action" or "election of remedies" law or rule, (iii) the exercise by Lender of any remedies against the Property will not impede Lender from subsequently or simultaneously exercising remedies against any other property that is the subject of any other Security Document (including without limitation, any mortgage, deed of trust, or deed to secure debt, as the case may be, that secures the Loan), (iv) all liens and other rights, remedies and privileges provided to Lender in the Security Documents or otherwise shall remain in full force and effect until Lender has exhausted all of its remedies against the Properties and all Properties have been foreclosed, sold and/or otherwise realized upon in satisfaction of the Loan, and (v) the Properties shall remain security for the performance of all of Borrower's obligations under any of the other Security Documents.

# UNOFFICIAL COPY

## ARTICLE IX WAIVERS

**Section 9.1 Waiver of Counterclaim.** Borrower hereby waives 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 this Security Instrument, the other Security Documents or the Obligations.

**Section 9.2 Marshalling and Other Matters.** Borrower hereby waives, to the extent permitted by Applicable Laws, the benefit of all appraisement, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Borrower hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Security Instrument on behalf of Borrower, and on behalf of each and every person acquiring any interest in or title to the Property subsequent to the date of this Security Instrument and on behalf of all persons to the extent permitted by Applicable Laws.

**Section 9.3 Waiver of Notice.** To the extent permitted by Applicable Laws, Borrower shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Security Instrument specifically and expressly provides for the giving of notice by Lender to Borrower and except with respect to matters for which Lender is required by Applicable Law to give notice, and Borrower hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

**Section 9.4 Waiver of Statute of Limitations.** Borrower hereby expressly waives and releases to the fullest extent permitted by Applicable Laws, the pleading of any statute of limitations as a defense to payment of the Debt or performance of its Other Obligations. Notwithstanding anything to the contrary contained herein or in any other Security Document, but except as set forth in the Environmental Indemnity, any liability of Borrower (and any trustee or other person or persons winding up the affairs of Borrower pursuant to the applicable Sections of the Delaware Revised Uniform Limited Partnership Act) under any of the Security Documents shall be deemed satisfied in full and fully discharged on the date that is one year after the Debt is paid in full.

**Section 9.5 Sole Discretion of Lender.** Wherever pursuant to this Security Instrument (a) Lender exercises any right given to it to approve or disapprove, (b) any arrangement or term is to be satisfactory to Lender, or (c) any other decision or determination is to be made by Lender, the decision of Lender to approve or disapprove all decisions that arrangements or terms are satisfactory or not satisfactory, and all other decisions and determinations made by Lender, shall be in the sole and absolute discretion of Lender and shall be final and conclusive, except as may be otherwise expressly and specifically provided herein.

**Section 9.6 Waiver of Trial by Jury.** BORROWER HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED

# UNOFFICIAL COPY

BY THE NOTE, THE APPLICATION FOR THE LOAN EVIDENCED BY THE NOTE, THE NOTE, THIS SECURITY INSTRUMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER, ITS OFFICERS, EMPLOYEES, DIRECTORS OR AGENTS IN CONNECTION THEREWITH.

**Section 9.7 Appraisal.** Notwithstanding anything to the contrary contained herein or in the Note or in the other Security Documents, if the Lender elects to foreclose on any one or more of the Security Instruments by judicial proceedings, appraisal of the Property is waived, or not waived, at the option of the Lender, such option to be exercised at or prior to the time judgment is rendered in any judicial foreclosure hereof.

## ARTICLE X EXCULPATION

**Section 10.1 Exculpation.** Notwithstanding anything to the contrary contained herein, the liability of Borrower and of any general partner, principal or member of Borrower to pay the indebtedness evidenced by the Note and for the performance of the other agreements, covenants and obligations contained herein and in the other Security Documents shall be limited as set forth in Article VIII of the Loan Agreement.

## ARTICLE XI MISCELLANEOUS PROVISIONS

**Section 11.1 Notices.** All notices or other written communications hereunder shall be deemed to have been properly given as provided in Section 15.1 of the Loan Agreement.

**Section 11.2 Choice of Law.** This Security Instrument shall be governed, construed, applied and enforced in accordance with the laws of the state where the Property is located (without giving effect to its conflict of laws rules) and the applicable laws of the United States of America.

**Section 11.3 Headings, Etc.** The headings and captions of various Sections of this Security Instrument are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

**Section 11.4 Inapplicable Provision.** If any term of this Security Instrument or any application thereof shall be invalid or unenforceable, the remainder of this Security Instrument and any other application of the term shall not be affected thereby.

**Section 11.5 No Oral Change.** This Security Instrument, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower (other than the payment and performance by Borrower of all of its obligations under this Security Instrument, in which case any indemnities and other provisions that expressly survive such repayment shall survive in accordance with their terms), Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

# UNOFFICIAL COPY

**Section 11.6 Liability.** If Borrower consists of more than one person, the obligations and liabilities of each such person hereunder shall be joint and several. This Security Instrument shall be binding upon and inure to the benefit of Borrower and Lender and their respective permitted successors and assigns forever.

**Section 11.7 Duplicate Originals; Counterparts.** This Security Instrument may be executed in any number of duplicate originals and each duplicate original shall be deemed to be an original. This Security Instrument may be executed in several counterparts, each of which counterparts shall be deemed an original instrument and all of which together shall constitute a single Security Instrument. The failure of any party hereto to execute this Security Instrument, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

**Section 11.8 Number and Gender.** Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

**Section 11.9 Entire Agreement.** The Note, this Security Instrument and the other Security Documents constitute the entire understanding and agreement between Borrower and Lender with respect to the transactions arising in connection with the Debt and supersede all prior written or oral understandings and agreements between Borrower and Lender with respect thereto. Borrower hereby acknowledges that, except as incorporated in writing in the Note, this Security Instrument and the other Security Documents, there are not, and were not, and no persons are or were authorized by Lender to make, any representations, understandings, stipulations, agreements or promises, oral or written, with respect to the transaction which is the subject of the Note, this Security Instrument and the other Security Documents.

**Section 11.10 Capitalized Terms.** Capitalized terms not defined in this Security Instrument shall have the respective meanings assigned to them in the Loan Agreement.

## ARTICLE XII LOCAL LAW PROVISIONS

The provisions set forth on Exhibit B annexed hereto are incorporated herein by reference as if fully set forth herein.

**[NO FURTHER TEXT ON THIS PAGE]**



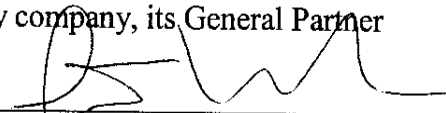
# UNOFFICIAL COPY

IN WITNESS WHEREOF, this Security Instrument has been executed by Borrower as of the date first above written.

**BORROWER:**

**NGP REALTY SUB, L.P.**, a Delaware limited partnership

By: NGP Realty Sub GP, LLC, a Delaware limited liability company, its General Partner

By:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

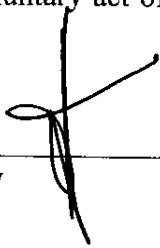
Property of Cook County Clerk's Office

**COOK COUNTY  
RECORDER  
EUGENE "GENE" MOORE  
MAYWOOD OFFICE**

# UNOFFICIAL COPY

STATE OF NEW YORK    )  
  )    ss  
COUNTY OF NEW YORK )

I, the undersigned, a Notary Public in and for said county in the state aforesaid, do hereby certify that Peter Weidman, the Authorized Signatory of NGP Realty Sub GP, LLC, a Delaware limited liability company, the general partner of NGP Realty Sub, L.P., a Delaware limited partnership, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as such Authorized Signatory as his own free and voluntary act and as the free and voluntary act of said limited partnership, for the uses and purposes set forth therein.



\_\_\_\_\_  
Notary

My commission expires:

\_\_\_\_\_

ANDREW W. ROTTNER  
Notary Public, State Of New York  
No. 01-RO6059941  
Qualified In New York County  
Commission Expires June 11, 2009/7

Notary of Cook County Clerk's Office

# UNOFFICIAL COPY

## EXHIBIT A

### DESCRIPTION OF LAND

#### Parcel 1:

Outlots A, G, H, I, J and K in Ruffled Feathers, being a subdivision of part of Section 27 and part of the North Half of Section 34, all in Township 37 North, Range 11, East of the Third Principal Meridian, in Cook County, Illinois (excepting therefrom that part described as follows: That part of Outlot H in Ruffled Feathers, being a subdivision of part of Section 27 and part of the North Half of Section 34, all in Township 37 North, Range 11, East of the Third Principal Meridian, bounded and described as follows: Beginning at the Northwest corner of Lot 18 in said Ruffled Feathers subdivision; thence North 9 degrees 25 minutes 33 seconds East, along the Westerly line of said Lot 18 extended North, a distance of 5.21 feet to a line that is 5.00 feet North of and parallel with the North line said Lot 18; thence North 83 degrees 12 minutes 59 seconds East, along said parallel line, a distance of 149.37 feet to the Westerly line of Outlot P, said line being a curve, concave to the West and having a radius of 350.00 feet, an arc distance of 5.07 feet to the Northeast corner of said Lot 18; thence South 83 degrees 12 minutes 59 seconds West, along the Northerly line of said Lot 18, a distance of 150.00 feet to the point of beginning).

#### Parcel 2:

The Northeast Quarter of the Southeast Quarter (except the West 1165 feet thereof measured on the North and South lines thereof) of Section 27, Township 37 North, Range 11, East of the Third Principal Meridian, in Cook County, Illinois.

#### Parcel 3:

Easements for ingress and egress, placement of golf cart paths, irrigation and electric lines and other rights granted to the owner of the golf course for the benefit of Parcels 1 and 2 over Outlots F, P and R and other common areas of the Ruffled Feathers Golf Estates as created by the Declaration of Covenants, Conditions and Restrictions for Ruffled Feathers Golf Estates dated October 7, 1991 and recorded October 15, 1991 as document number 91536901.

#### Parcel 4:

Easement for the benefit of Parcels 1 and 2 as created by grant made by and between Commonwealth Edison Company and National Golf Operating Partnership, L.P., a Delaware Partnership dated October 23, 1995 and recorded October 24, 1995 as document number 95725752.

**Ruffled Feathers**  
1 Pete Dye Dr  
Lemont, IL 60439

# UNOFFICIAL COPY

Tax ID No.: 22-27-400-007-0000;  
22-27-400-008-0000;  
22-27-405-024-0000;  
22-34-103-011-0000;  
22-34-106-001-0000;  
22-34-110-002-0000  
22-27-401-008-0000  
County: Cook

Property of Cook County Clerk's Office

**COOK COUNTY  
RECORDER  
EUGENE "GENE" MOORE  
MAYWOOD OFFICE**

# UNOFFICIAL COPY

## EXHIBIT B

### LOCAL LAW PROVISIONS

**Section 12.1 Principles of Construction.** In the event of any inconsistencies between the terms and conditions of this Article 12 and the terms and conditions of this Security Instrument, the terms and conditions of this Article 12 shall control and be binding.

**Section 12.2 Illinois.**

(a) **Illinois Mortgage Foreclosure Law.**

In the event that any provision in this Security Instrument shall be inconsistent with any provision of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1501 et seq. herein called the "**Act**"), the provisions of the Act shall take precedence over the provisions of this Security Instrument, but shall not invalidate or render unenforceable any other provision of this Security Instrument that can be construed in a manner consistent with the Act.

If any provision of this Security Instrument shall grant to Lender any rights or remedies upon the occurrence and during the continuation of an Event of Default of Borrower which are more limited than the rights that would otherwise be vested in Lender under the Act in the absence of said provision, Lender shall be vested with the rights granted in the Act to the full extent permitted by law.

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 Act, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in this Security Instrument, shall be added to the Debt.

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 Act) or residential real estate (as defined in Section 15-1219 of the Act), and to the full extent permitted by law, hereby voluntarily and knowingly waives its rights to reinstatement and redemption to the extent allowed under Section 15-1610(b) of the Act, and to the full extent permitted by law, the benefits of all present and future valuation, appraisal, homestead, exemption, stay, redemption and moratorium laws under any state or federal law.

Borrower and Lender shall have the benefit of all of the provisions of the Act, including all amendments thereto which may become effective from time to time after the date hereof. In the event any provision of the Act which is specifically referred to herein may be repealed, Lender shall have the benefit of such provision as most recently existing prior to such repeal, as though the same were incorporated herein by express reference.

# UNOFFICIAL COPY

(b) **Borrower Waivers.**

(i) Borrower agrees, to the fullest extent that Borrower may lawfully so agree, that Borrower will not at any time insist upon or plead or in any manner whatsoever claim the benefit of any valuation, stay, extension, or exemption law now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Security Instrument or the absolute sale of the Property or the possession thereof by any purchaser at any sale made pursuant to any provision hereof, or pursuant to the decree of any court of competent jurisdiction; but Borrower, for Borrower and all who may claim through or under Borrower, so far as Borrower or those claiming through or under Borrower now or hereafter lawfully may, hereby waives the benefit of all such laws. Borrower, to the extent Borrower may lawfully do so, hereby waives any and all right to have the Property marshaled upon any foreclosure of this Security Instrument, or sold in inverse order of alienation, and agrees that Lender or any court having jurisdiction to foreclose this Security Instrument may sell the Property as an entirety. If any law now or hereafter in force referred to in this Paragraph of which Borrower or Borrower's successor or successors might take advantage despite the provisions hereof, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to constitute any part of the contract herein contained or to preclude the operation or application of the provisions of this Paragraph.

(ii) In the event of the commencement of judicial proceedings to foreclose this Security Instrument, Borrower, on behalf of Borrower, its successors and assigns, and each and every person or entity they may legally bind acquiring any interest in or title to the Property subsequent to the date of this Security Instrument: (a) expressly waives any and all rights of appraisal, valuation, stay, extension and (to the extent permitted by law) reinstatement and redemption from sale under any order or decree of foreclosure of this Security Instrument; and (b), to the extent permitted by applicable law, agrees that when sale is had under any decree of foreclosure of this Security Instrument, upon confirmation of such sale, the officer making such sale, or his successor in office, shall be and is authorized immediately to execute and deliver to any purchaser at such sale a deed conveying the Property, showing the amount paid therefor or if purchased by the person in whose favor the order or decree is entered, the amount of his bid therefor.

(c) **Maximum Amount Secured.** The maximum principal indebtedness secured by this Security Instrument shall not exceed two hundred percent (200%) of the face amount of the Note.

(d) **No Lien Management Agreements.** Borrower shall include a "no lien" provision in any property management agreement hereafter entered into by Borrower with a property manager for the Property, whereby the property manager waives and releases any and all mechanics' lien rights that the property manager, or anyone claiming through or under the property manager, may have pursuant to 770 ILCS 60/1. Such property management agreement containing such "no lien" provision or a short form thereof shall, at Lender's request, be recorded with the Recorder of Deeds of Cook County, Illinois, as appropriate.

# UNOFFICIAL COPY

(e) **Collateral Protection Act.** Unless Borrower provides Lender with evidence of the insurance required by this Security Instrument or any other Loan Document, Lender may purchase insurance at Borrower's expense to protect Lender's interest in the Property or any other collateral for the indebtedness secured hereby. This insurance may, but need not, protect Borrower's interests. The coverage Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the Property or any other collateral for the indebtedness secured hereby. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained insurance as required under by this Security Instrument or any other Loan Document. If Lender purchases insurance for the Property or any other collateral for the indebtedness secured hereby, Borrower shall be responsible for the costs of that insurance, including interest in any other charges that Lender may lawfully 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 the indebtedness secured hereby. The costs of the insurance may be more than the cost of insurance that Borrower may be able to obtain on its own.

(f) **Fixture Filing.** This Security Instrument shall also constitute a "fixture filing" for the purposes of the UCC against all of the Property which is or is to become fixtures. Information concerning the security interest herein granted may be obtained at the addresses of Debtor (Borrower) and Secured Party (Lender) as set forth in the first paragraph of this Security Instrument.

(g) **Future Advances.** This Security Instrument secures not only present indebtedness but also future advances, whether such future advances are obligatory or are to be made at the option of Lender, or otherwise. The amount of indebtedness secured hereby may increase or decrease from time to time, and the rate or rates of interest payable may vary from time to time.

(h) **Maturity Date.** The Loan shall be due and payable in full on or before July 9, 2007, with the option to extend the term of the Loan for three (3) successive terms of one (1) year each as provided in the Note.

(i) Borrower acknowledges and agrees that (A) the Loan is secured by a mortgage on real estate and is thus an exempted transaction in accordance with subparagraph (1)(1) of Section 4 of the Interest Act, as amended. (815 ILCS 105/4 (1)(1)); and (C) the secured Debt is an exempted transaction under the Truth-In-Lending Act, 15 U.S. C. Sec. 1601 et. Seq. and has been entered into solely for business purposes of Borrower and for Borrower's investment or profit, as contemplated by said section.

**UNOFFICIAL COPY****EXHIBIT C****ALLOCATED LOAN AMOUNTS**

	<b>NGP Asset</b>	<b>Address</b>	<b>State</b>	<b>Type</b>	<b>First Mortgage Allocated Loan Amt.</b>
1	Ahwatukee	Phoenix	AZ	Owned	1,779,070
2	Amala	Scottsdale	AZ	Owned	10,318,605
3	Arrowhead.Az	Glendale	AZ	Owned	5,159,302
4	Arrowhead.Co	Littleton	CO	Owned	6,523,256
5	Arrowhead.Fl	Davie	FL	Owned	2,965,116
6	BearCreek.Wa	Woodinville	WA	Owned	4,655,233
7	BeaverBrook	Annandale	NJ	Owned	4,151,163
8	BentTree	Sunbury	OH	Owned	2,923,605
9	BradshawFarms	Woolstock	GA	Owned	4,091,860
10	Brandywine	Maumee	OH	Owned	4,234,186
11	Brookstone	Acworth	GA	Owned	2,490,698
12	CanyonOaks	Chico	CA	Owned	3,629,302
13	CastaDelSol	Mission Viejo	CA	Owned	5,366,860
14	Continental	Scottsdale	AZ	Owned	2,431,395
15	DeerCreek	Overland Park	KS	Owned	3,736,047
16	DesertLakes	Bullhead City	AZ	Owned	1,423,256
17	EagleBrook	Geneva	IL	Owned	7,608,488
18	ElCamino	Oceanside	CA	Owned	8,836,047
19	ElCaro	Phoenix	AZ	Owned	711,628
20	Escondido	Escondido	CA	Owned	5,100,000
21	Foothills	Phoenix	AZ	Owned	3,617,442
22	ForrestCrossing	Franklin	TN	Owned	3,320,930
23	FowlersMills	Chesterland	OH	Owned	3,190,465
24	Gettysvue	Knoxville	TN	Owned	3,202,326
25	Highlands	Hutchinson	KS	Owned	59,302
26	HuntValley	Phoenix	MD	Owned	12,898,256
27	Kokopelli	Gilbert	AZ	Owned	3,558,140
28	LakesAhwatukee	Phoenix	AZ	Owned	1,186,047
29	LakeWilderness	Maple Valley	WA	Owned	1,162,326
30	LasVegasNational	Las Vegas	NV	Owned	14,944,186
31	LegendArrowhead	Glendale	AZ	Owned	1,423,256
32	LomasSF.Exec	Solana Beach	CA	Owned	3,973,256
33	LondonBridge	Lake Havasu	AZ	Owned	4,862,791
34	MajesticOaks	Ham Lake	MN	Owned	6,671,512
35	Marbella	San Juan Capistrano	CA	Owned	10,881,977
36	Meadowbrook	Broken Arrow	OK	Owned	4,922,093
37	MissionHills	Northbrook	IL	Owned	5,355,000
38	Monterey	Palm Desert	CA	Owned	7,294,186



# UNOFFICIAL COPY

39	Oakhurst.Ca	Clayton	CA	Owned	5,633,721
40	Oakhurst.Oh	Grove City	OH	Owned	2,662,674
41	Oregon	Westlim	OR	Owned	4,886,512
42	PaintedDesert	Las Vegas	NV	Owned	4,803,488
43	PalmValley	Palm Desert	CA	Owned	18,324,419
44	Plantation	Boise	ID	Owned	2,609,302
45	RanchoSanJoaquin	Irvine	CA	Owned	13,787,791
46	Rancocas	Willingboro	NJ	Owned	2,075,581
47	RoyalAmerican	Galena	OH	Owned	2,698,256
48	RuffledFeathers	Lemont	IL	Owned	8,670,000
49	Seascape	Aptos	CA	Owned	8,628,488
50	Stonecreek	Phoenix	AZ	Owned	4,625,581
51	Summitpointe	Milpitas	CA	Owned	6,570,698
52	SunsetHills	Thousand Oaks	CA	Owned	8,420,930
53	SuperstitionSprings	Mesa	AZ	Owned	3,795,349
54	Tallgrass	Wichita	KS	Owned	2,550,000
55	Tamarack	Naperville	IL	Owned	3,638,527
56	Tanoan	Albuquerque	NM	Owned	9,429,070
57	TatumRanch	Cave Creek	AZ	Owned	2,520,349
58	TrophyApalachee	Dacula	GA	Owned	2,787,209
59	TrophyAtlanta	Apharettta	GA	Owned	5,574,419
60	VistaValencia	Valencia	CA	Owned	7,768,605
61	WoodRanch	Simi Valiey	CA	Owned	9,547,674
	Total				322,667,248

# UNOFFICIAL COPY

## SCHEDULE I

### LIST OF PROPERTIES

Course Name	City	State/County
1. Ahwatukee	Phoenix	AZ
2. Ancala	Scottsdale	AZ
3. Arrowhead	Littleton	CO
4. Arrowhead	Glendale	AZ
5. Arrowhead	Davie	FL
6. Bear Creek	Woodinville	WA
7. Beaver Brook	Annandale	NJ
8. Bert Tree	Sunbury	OH
9. Bradshaw Farm	Woodstock	GA
10. Brandywine CC	Maumee	OH
11. Brookstone CC	Acworth	GA
12. Canyon Oaks	Chico	CA
13. Casta Del Sol	Mission Viejo	CA
14. Continental	Scottsdale	AZ
15. Deer Creek Golf Club	Overland Park	KS
16. Desert Lakes	Bullhead City	AZ
17. Eagle Brook	Geneva	IL
18. El Camino Country Club	Oceanside	CA
19. El Caro Golf Club	Phoenix	AZ
20. Escondido Country Club	Escondido	CA
21. Foothills Golf Club	Phoenix	AZ
22. Forrest Crossing	Franklin	TN
23. Fowlers Mill	Chesterland	OH
24. Gettysvue Polo & Golf	Knoxville	TN
25. Highlands Golf & Supper Club	Hutchinson	KS
26. Hunt Valley	Hunt Valley	MD
27. Kokopelli	Gilbert	AZ
28. Lake Wilderness	Maple Valley	WA
29. Lakes at Ahwatukee	Phoenix	AZ
30. Las Vegas National	Las Vegas	NV
31. Legend at Arrowhead	Glendale	AZ
32. Lomas Santa Fe	Solana Beach	CA
33. London Bridge	Lake Havasu	AZ
34. Majestic Oaks - 3 Courses	Ham Lake	MN
35. Marbella	San Juan Capistrano	CA
36. Meadowbrook CC	Broken Arrow	OK
37. Mission Hills CC	Northbrook	IL
38. Monterey Country Club	Palm Desert	CA
39. Oakhurst Country Club	Clayton	CA
40. Oakhurst Country Club	Grove City	OH
41. Painted Desert	Las Vegas	NV
42. Palm Valley 2 Courses	Palm Desert	CA
43. Rancho San Joaquin	Irvine	CA
44. Rancocas	Willingboro	NJ
45. Royal American Links	Galena	OH

# UNOFFICIAL COPY

Course Name	City	State/County
46. Ruffled Feathers	Lemont	IL
47. Seascape	Aptos	CA
48. Stone Creek	Phoenix	AZ
49. Summitpointe	Milpitas	CA
50. Sunset Hills	Thousand Oaks	CA
51. Superstition Springs	Mesa	AZ
52. Tallgrass CC	Wichita	KS
53. Tamarack	Naperville	IL
54. Tanoan	Albuquerque	NM
55. Tatum Ranch	Cave Creek	AZ
56. The Oregon	West Linn	OR
57. The Plantation	Boise	ID
58. Trophy Club of Apalachee	Dacula	GA
59. Trophy Club of Atlanta	Atlanta	GA
60. Vista Valencia - 2 Courses	Valencia	CA
61. Wood Ranch	Simi Valley	CA