

UNOFFICIAL COPY

The Talan Group# _____



0614545166

1379306 JP (4) 8 6

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

Doc#: 0614545166 Fee: \$116.50
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 05/25/2008 02:47 PM Pg: 1 of 47

Pacific Life Insurance Company
700 Newport Center Drive
Newport Beach, California 92660
Attention: Real Estate Division/Closing Area
Loan Nos. 206800101 and 206800102



(Space above line for Recorder's Use)

**FIRST MORTGAGE, FINANCING STATEMENT
AND SECURITY AGREEMENT
(WITH ASSIGNMENT OF RENTS AND FIXTURE FILING)**

MORTGAGOR: TIDES AT LAKESHORE EAST LLC, a Delaware limited liability company, whose address is c/o Magellan Development, One West Superior, Suite 200, Chicago, Illinois 60610

MORTGAGEE: PACIFIC LIFE INSURANCE COMPANY, a Nebraska corporation, whose address is 700 Newport Center Drive, Newport Beach, CA 92660

LOAN NOS: 206800101 and 206800102

PROJECT: THE TIDES AT LAKESHORE EAST APARTMENTS

UNOFFICIAL COPY

TABLE OF CONTENTS

ARTICLE I COVENANTS OF BORROWER	5
Section 1.1. Secured Obligations	5
Section 1.2. Insurance Policies	5
Section 1.3. Insurance and Condemnation Proceeds	9
Section 1.4. Taxes and Assessments	12
Section 1.5. Perfection of Security Interest	12
Section 1.6. Assignment of Property Income	12
Section 1.7. Transfer of Secured Property or any Interest in Borrower	13
Section 1.8. Maintenance, Repair, Alteration; Compliance with Laws	17
Section 1.9. Books, Records and Financial Information	17
Section 1.10. Title, etc.	19
Section 1.11. Security Agreement and Fixture Filing	20
Section 1.12. Payments	21
Section 1.13. Utilities	21
Section 1.14. Unanticipated Charges	22
Section 1.15. Management of the Secured Property	22
Section 1.16. Litigation	23
ARTICLE II EVENT OF DEFAULT	23
Section 2.1. Events of Default	23
ARTICLE III REMEDIES	23
Section 3.1. Remedies upon Default	23
Section 3.2. Foreclosure	26
Section 3.3. Remedies Not Exclusive	26
Section 3.4. Proceeds of Foreclosure Sale	26
Section 3.5. Marshalling	27
Section 3.6. Remedies are Cumulative	27
Section 3.7. WAIVER OF RIGHT OF REDEMPTION	27
Section 3.8. Recourse	27
ARTICLE IV MISCELLANEOUS	28
Section 4.1. Severability	28
Section 4.2. Processing Fees	28
Section 4.3. Notices	28
Section 4.4. Release, Modification, Partial Reconveyance	28
Section 4.5. Inspections	28
Section 4.6. Release	28
Section 4.7. Statutes of Limitations	28
Section 4.8. Borrower and Lender Defined	28
Section 4.9. Number and Gender	29
Section 4.10. Captions; Modifications	29

UNOFFICIAL COPY

Section 4.11.	Successors and Assigns; Transfer by Lender.....	29
Section 4.12.	Governing Law; Jurisdiction.....	29
Section 4.13.	Intentionally Omitted.....	29
Section 4.14.	Consents and Approvals.....	29
Section 4.15.	Indemnity.....	29
Section 4.16.	Hazardous Substances.....	30
Section 4.17.	Intentionally Omitted.....	34
Section 4.18.	Time of Essence.....	34
Section 4.19.	Business or Commercial Purpose.....	34
Section 4.20.	Changes in Law Regarding Taxation.....	34
Section 4.21.	Further Assurances.....	35
Section 4.22.	Recordation and Re-Recordation of Mortgage.....	35
Section 4.23.	Defense of Title and Litigation.....	35
Section 4.24.	Validity, Perfection and Enforceability.....	36
Section 4.25.	Commissions and Brokerage Fees.....	36
Section 4.26.	Waiver of Homestead and Redemption.....	36
Section 4.27.	Nonforeign Entity.....	36
Section 4.28.	Language of Agreement.....	37
Section 4.29.	Integrated Contract.....	37
Section 4.30.	Waivers.....	37
Section 4.31.	References to Loan Documents.....	38
Section 4.32.	Waiver of Jury Trial; Damages.....	38
Section 4.33.	Costs of Enforcement.....	38
Section 4.34.	Future Advances.....	38

UNOFFICIAL COPY

INDEX OF DEFINITIONS

I. Terms Defined in Mortgage

Assignment of Rents and Leases	4
Borrower	1
Encumbrance.....	14
Environmental Costs.....	25
ESA.....	30
Improvements	1
Indebtedness.....	4
Internal Revenue Code.....	36
Land	1
Lender	1
Loan Agreement.....	1
Loan Document.....	5
Loan Documents	5
Mortgage.....	1
Net Condemnation Proceeds.....	10
Net Insurance Proceeds.....	10
Note.....	1
Obligation	4
Obligations.....	4
Permitted Sale	15
Property Income.....	2
Real Property Collateral.....	2
Regulatory Authority	22
Sale.....	15
Secured Property.....	1
State.....	7
Superlien	31
Tax	34

II. Terms Defined in Other Loan Documents

<i>Affiliates</i> – (Loan Agreement - Section 1.1)
<i>Approved Leases</i> – (Loan Agreement - Section 5.18)
<i>CERCLA</i> – (Loan Agreement - Section 1.1)
<i>Completion</i> – (Loan Agreement Section 1.1)
<i>Completion Date</i> – (Loan Agreement - Section 1.1)
<i>Contract Rate</i> – (Note - Section 2.1)
<i>Debt Service</i> (Loan Agreement – Section 1.1)
<i>Default Rate</i> – (Note - Section 2.1)
<i>Environmental Indemnity</i> – (Loan Agreement – Section 1.1)
<i>Environmental Law</i> – (Loan Agreement - Section 1.1)
<i>General Contractor</i> – (Loan Agreement - Section 1.1)
<i>Governmental Authority</i> – (Loan Agreement – Section 1.1)

UNOFFICIAL COPY

Governmental Requirements – (Loan Agreement – Section 1.1)

Guarantor – (Loan Agreement – Section 1.1)

Hazardous Substance – (Loan Agreement - Section 1.1)

Losses – (Loan Agreement – Section 9.6(a))

Maturity Date – (Loan Agreement - Section 1.1)

Principal Sum – (Note – Section 1)

RCRA – (Loan Agreement - Section 1.1)

Property of Cook County Clerk's Office

UNOFFICIAL COPY

FIRST MORTGAGE, FINANCING STATEMENT AND SECURITY AGREEMENT (WITH ASSIGNMENT OF RENTS AND FIXTURE FILING)

THIS FIRST MORTGAGE, FINANCING STATEMENT AND SECURITY AGREEMENT (WITH ASSIGNMENT OF RENTS AND FIXTURE FILING) (this "Mortgage") is made as of May 24, 2006, by TIDES AT LAKESHORE EAST LLC, a Delaware limited liability company, whose address is c/o Magellan Development, One West Superior, Suite 200, Chicago, Illinois 60610, Attn: David Carlins, as mortgagor ("Borrower"), in favor of PACIFIC LIFE INSURANCE COMPANY, a Nebraska corporation, with its principal place of business at 700 Newport Center Drive, Newport Beach, California 92660, as mortgagee ("Lender").

WITNESSETH

WHEREAS, for value received, pursuant to the terms of the Loan Agreement of even date ("Loan Agreement") between Borrower and Lender, Borrower has executed and delivered to Lender that certain Secured Promissory Note of even date payable to Lender in the principal amount of up to One Hundred Twenty Million and 00/100 Dollars (\$120,000,000.00) (together with any and all extensions, substitutions, replacements, rearrangements, modifications, and/or renewals thereof, collectively, the "Note"), and Borrower shall execute and deliver this Mortgage to Lender as security for the payment of the Note,

NOW, THEREFORE, in consideration of the Loan Agreement and the Note, and in order to secure repayment of (i) all Indebtedness (as defined herein), and (ii) the performance and observance by Borrower of all covenants, conditions, and agreements in this Mortgage, Borrower irrevocably gives, grants, bargains, sells, transfers, assigns, mortgages, warrants, and conveys to Lender, its successors and assigns, together with all right, title and interest, including the right of use or occupancy, which Borrower may now have or hereafter acquire in and to the following described property (the property described in subsections (A) - (R) below is referred to as "Secured Property") :

A. The real property ("Land") located in Chicago, Illinois, described in the attached Exhibit A which is incorporated into this Mortgage by this reference, and all minerals, oil, gas and other hydrocarbon substances on the Land, and all development rights, air rights, water, water rights, water stock, parking, parking rights and general intangibles relating to the Land;

B. All present and future structures, buildings, improvements, appurtenances and fixtures (including goods that are or are to become fixtures) of any kind on the Land, including all apparatus, equipment and appliances of Borrower used in connection with the operation or occupancy of the Land, or in any development of the Land, including, but not limited to, heating, air conditioning, sprinkler and other fire control systems, and facilities used to provide gas, water, electricity or other utility services, refrigeration, ventilation, laundry, drying, dishwashing, garbage disposal, recreation or other services on the Land, and all window coverings, drapes and rods, carpeting and floor coverings, it being intended and agreed that all such items are part of the Land conveyed by this Mortgage, whether or not attached or affixed to the Land and as more particularly described in the Loan Agreement (collectively the "Improvements");

UNOFFICIAL COPY

C. All appurtenances of the Land and Improvements and all rights of Borrower in and to any streets, roads or public places, easements or rights of way, or parking rights, relating to the Land and Improvements;

D. All of the rents, security deposits, issues, profits, royalties, income, earnings, revenues, proceeds (due or to become due) and all other benefits of the Land or Improvements, and all rights of Borrower under all present and future leases affecting the Land or Improvements including any security deposits (collectively the "Property Income");

E. All rights of Borrower in and to proceeds, including insurance proceeds, and claims arising on account of any damage to or taking of the Land or Improvements and all causes of action and recoveries for any loss or diminution in value of the Land or Improvements;

All of the Secured Property described above in subsections (A)-(E) is collectively referred to as the "Real Property Collateral."

Borrower also grants to Lender a security interest in and to all of Borrower's present and future estate, right, title and interest in and to the following (to the extent assignable):

F. All existing and future goods, equipment and personal property, including any and all fixtures, that are now or in the future owned by Borrower or in which Borrower has an interest, and used in the operation or occupancy of the Land and/or the Improvements or in any development of the Land and/or the Improvements but that are not effectively made real property under this Mortgage, including, all appliances, gas, electric, water or other utility meters, pipes, wiring circuits, and any other apparatus for the generation or transmission of gas, water and electricity, furniture and furnishings, building service equipment and building materials, supplies, inventory and equipment; and the proceeds thereof, including any insurance proceeds; and all warranties and equipment guarantees relating thereto;

G. All general intangibles and all rights to the payment of money, accounts, accounts receivable, reserves, deferred payments, refunds, costs savings, payments and deposits, whether now or later to be received from third parties, or deposited by Borrower with third parties, relating to the construction, development, use, Sale (as defined herein), operation, management or enjoyment of the Land, or to any business or Improvement thereon, including any rights to payment of money, accounts receivable, reserves, deferred payments, refunds, cost savings, payments and deposits of any kind due to Borrower from any Governmental Authority (as defined in the Loan Agreement), all governmental permits relating to construction on the Land, all names under or by which the Land or any of the Improvements may at any time be operated or known and all rights to carry on business under any such names or any variant thereof, and all trademarks and good will in any way relating to the Land and/or the Improvements, all management agreements, service contracts or other contracts or agreements relating in any manner to the Land and/or the Improvements or any part thereof, and all warranties relating thereto, covering or arising in respect of or in connection with the Land and/or the Improvements or any part thereof, and the proceeds, including insurance proceeds, of all of the foregoing;

H. All water stock relating to the Land and/or the Improvements and all proceeds, including insurance proceeds, thereof; and all shares of stock or other evidence of ownership of

UNOFFICIAL COPY

any part of the Secured Property that is owned by Borrower in common with others, and all documents of membership in any owners' or members' association or similar group having responsibility for managing or operating any part of the Land and/or the Improvements, and the proceeds, including insurance proceeds, thereof;

I. All plans and specifications prepared for construction of Improvements on the Land and all studies, data, and drawings related thereto, and all contracts and agreements of Borrower relating to the aforesaid plans and specifications or to the aforesaid studies, data, and drawings or to the construction of Improvements on the Land, and the proceeds, including insurance proceeds, of all of the foregoing;

J. All permits, applications, licenses, and contracts to operate, improve, use, develop, subdivide, sell, study, survey or appraise the Land and/or the Improvements;

K. All use permits, rights under tentative, preliminary, or final maps, subdivision or condominium applications, and all other zoning, regulatory, and use approvals and permits, including extension, renewal, and modification rights, relating to the construction, use, development, Sale, operation, management, or enjoyment of any of the Real Property Collateral;

L. All Property Income, and any and all payments, funds or proceeds paid, or to be paid, to Borrower under the terms of any agreement by which Borrower has granted or grants an option to purchase the Land and/or the Improvements, or under which Borrower agrees to sell or transfer the Land and/or the Improvements, or any interest therein, and all funds held for the benefit of the Real Property Collateral, or pursuant to any document executed in connection with this Mortgage;

M. All environmental tests, studies and reports, current and future environmental claims and rights of action, including tort claims and rights of indemnity and contribution under CERCLA against the prior owners of the Land, neighboring owners, tenants, consultants, advisors and other third parties;

N. All damages, royalties and revenue of every kind, nature and description whatsoever that Borrower may be entitled to receive from any person or entity owning or having or hereafter acquiring a right to the oil, gas or mineral rights and reservations of the Land and/or the Improvements;

O. All deposits made with or other security given to utility companies by Borrower with respect to the Land and/or the Improvements or any part thereof, and all advance payments of insurance premiums made by Borrower with respect thereto and all claims or demands with respect to insurance;

P. All impounds of Borrower maintained with Lender, and each deposit account of Borrower assigned to Lender pursuant to any agreement;

Q. All substitutions, renewals, improvements, attachments, accessions, additions and replacements to any of the foregoing; and

UNOFFICIAL COPY

R. All collections, proceeds, Net Insurance Proceeds and Net Condemnation Proceeds (both as defined herein) and products of any of the foregoing or claim respecting any part thereof (pursuant to judgment, condemnation award or otherwise) and all documents, instruments, general intangibles, goods, equipment, inventory, chattel paper, monies, accounts, deposit accounts and other personal property that may arise from the sale or disposition of any of the foregoing, all guaranties of and security for any of the foregoing, and all books and records, including, all computer records, computer tapes and electronic and electromagnetic representations and reproductions thereof, relating to any of the foregoing.

All of the Secured Property described above in subsections (F)-(R) is collectively referred to as "Personal Property Collateral."

TO SECURE the following (collectively, "Secured Debt").

1. Payment by Borrower of an indebtedness in the principal sum of up to One Hundred Twenty Million and 00/100 Dollars (\$120,000,000.00), with interest thereon, according to the terms of the Note, and the payment, performance and discharge of each and every obligation, covenant and agreement of Borrower contained in the Note ("Indebtedness").
2. Payment by Borrower of such additional sums with interest thereon as may hereafter be loaned by Lender to Borrower when evidenced by a promissory note or notes executed by Borrower and stating by its terms to be secured hereby.
3. Payment, performance and discharge of each and every obligation, covenant and agreement of Borrower contained herein or in the other Loan Documents (as defined herein).
4. Payment by Borrower of all real estate taxes and assessments levied against and all insurance premiums relating to the Secured Property and all disbursements made by Lender for the payment of any such taxes and insurance premiums, and all fees, expenses or advances in connection with or relating to the Secured Property due hereunder.
5. Performance and discharge of each and every obligation, covenant and agreement of Borrower contained in any and all pledges, agreements, security agreements, supplemental agreements or other instruments of security executed by Borrower as of even date, or at any time subsequent to the date hereof, for the express purpose of further securing any Indebtedness hereby secured, or any part thereof, or any further advancements or further or additional loans of any sums hereafter made by Lender to Borrower during the continuance of this Mortgage and expressly secured hereby, or for the purpose of supplementing or amending this Mortgage or any instrument expressly secured hereby (2 through 5, collectively, the "Obligations" and individually, "Obligation").

The Loan Agreement, the Note, this Mortgage, the Assignment of Rents and Leases of even date executed by Borrower in favor of Lender ("Assignment of Rents and Leases"), the Deposit Account Security Agreement of even date herewith executed by Borrower in favor of Lender, the Closing Certificate by Borrower of even date executed by Borrower in favor of Lender, and all other documents, certificates and instruments executed by Borrower or any Guarantor and securing or relating to the Obligations (excluding specifically the Environmental

UNOFFICIAL COPY

Indemnity (as defined in the Loan Agreement)) are referred to herein collectively as the “Loan Documents” and individually as a “Loan Document”.

If Borrower shall pay unto Lender the Indebtedness, then this Mortgage and the estates and interests hereby granted and created shall cease, terminate, and be null and void, and shall be discharged of record at the expense of Borrower, which expense Borrower shall pay.

ARTICLE I COVENANTS OF BORROWER

To protect the security of this Mortgage, Borrower represents, warrants and agrees as follows:

Section 1.1. Secured Obligations. Borrower shall pay the Indebtedness and perform all Obligations in accordance with the respective terms of the Loan Documents.

Section 1.2. Insurance Policies.

(a) Property Insurance. Borrower will, at its sole cost and expense, keep (or cause to be kept) the Secured Property insured for the benefit of Borrower and Lender as follows:

(i) after Completion (as defined in the Loan Agreement), against risks of direct physical loss or damage from the perils that are covered by the Causes of Loss-Special Form available from time to time (including, without limitation, terrorism, fire, lightning, windstorm, hail, weight of snow, ice or sleet, breakage of glass, water damage, collapse, explosion, riot, civil commotion, vandalism, malicious mischief, aircraft, vehicles and smoke), in an amount not less than the “full insurable value” thereof (as defined herein), with a deductible amount not to exceed \$25,000. All of the policies evidencing the insurance required under this subsection shall provide for (1) full replacement cost coverage, (2) Ordinance or Law coverage (comparable to that provided by Form CP 04 05 06 95 published by the Insurance Services Office) in an amount not less than \$5,000,000, (3) a loss adjustment endorsement coordinating such coverage and the insurance required under subsection (iv) below, and (4) an “agreed amount” endorsement or similar provision deleting or suspending all coinsurance provisions;

(ii) after Completion, against rent loss or business interruption resulting from the occurrence of any of the perils covered by the insurance required in subsection (i) above, in an amount necessary to cover actual rental losses sustained for a period of at least twenty-four (24) months, and an extended period of indemnity of 365 days. All policies required under this subsection shall contain a loss adjustment endorsement coordinating such coverage and the coverage required under subsection (iv) below;

(iii) against risks of direct physical loss or damage from flood if the Land is located in an area identified by the Director of the Federal Emergency Management Agency or any successor thereto as an area within a flood plain or flood risk

UNOFFICIAL COPY

zone, or having special flood hazards, and in which flood insurance has been made available under the National Flood Insurance Act of 1968 or the Flood Disaster Protection Act of 1973, as amended, modified, supplemented or replaced from time to time, on such basis and in such amounts as shall be reasonably required by Lender, and subject to the limits of the above described Acts;

(iv) after Completion, against risks of direct physical loss or damage, and business interruption resulting, from explosion or other breakdown of objects contained in or on the Real Property Collateral as are covered in the Boiler and Machinery Coverage Form and the endorsements available therefore (including each and all of the following objects if contained in or on the Land or Improvements: fired vessels, electric steam generators, pressure vessels, unfired vessels, refrigeration and air conditioning vessels and piping, compressing and refrigerating units, auxiliary piping, heating and air conditioning units, boilers, machinery including, production machinery and electrical panels, electric steam generators, boiler tanks, and similar apparatus), all on such basis and in such amounts as shall be reasonably required by Lender. All such coverage shall include (A) a loss adjustment endorsement coordinating such coverage and the insurance required under subsections (i) and (ii), and (B) Ordinance or Law coverage comparable to that provided by Form CP 04 05 06 95 published by the Insurance Services Office;

(v) against risks of direct physical loss or damage during any period of construction, restoration or replacement of the Improvements, or any substantial portion thereof, including collapse and transit coverage and coverage for all of the perils covered by the insurance required in subsection (i) above, written on a Completed Value form and covering the actual costs of replacing the completed Improvements or part thereof being constructed, restored or replaced including the value of work performed and to be performed, and equipment, supplies and materials furnished or to be furnished for purposes of completing such construction, restoration or replacement. Such insurance shall not contain any condition terminating coverage if the Improvements being constructed, restored or replaced are occupied prior to completion. Such policy shall provide Ordinance or Law coverage comparable to that provided in Form CP 04 05 06 95 published by the Insurance Services Office;

(vi) against risks of direct physical loss or damage, and business interruption resulting, from earth movement including, earthquake, landslide, mudslide, subsidence or volcanic eruption (including sprinkler leakage resulting therefrom), in an amount not less than \$10,000,000. Such policy shall provide Ordinance or Law coverage comparable to that provided in Form CP 04 05 06 95 published by the Insurance Services Office; and

(vii) during the course of any construction or restoration of the Improvements, the following insurance coverages in amounts reasonably satisfactory to Lender will also be required: comprehensive public liability insurance (including coverage for elevators and escalators, if any) on an "occurrence basis" against claims for personal injury including bodily injury, death or property damage occurring on, in, or about the Real Property Collateral and the adjoining streets, sidewalks and passageways;

UNOFFICIAL COPY

worker's compensation insurance (including employer's liability insurance, if requested by Lender) for all employees of Borrower engaged on, or with respect to, the Secured Property; and completed value builder's risk insurance against "all risks of physical loss", including collapse and transit coverage, during construction of the Improvements, in non-reporting form, covering the total value of work performed and equipment, supplies and materials furnished. Said policy of insurance shall contain the "permission to occupy upon completion of work or occupancy" endorsement.

(b) Liability Insurance. Borrower shall, at its sole cost and expense, procure and maintain owner's and contractors' policies of commercial general liability insurance (including automobile coverage) insuring against claims for bodily injury or property damage arising out of the ownership, maintenance, or use of the Secured Property, in standard form, which insurance shall include blanket contractual liability coverage. Lender shall be added as an additional insured on all of the insurance required in this subsection, and such insurance shall afford limits of liability in an amount not less than \$25,000,000 in the aggregate.

(c) Other Insurance. Borrower shall procure and maintain such other insurance or such additional amount of insurance as may be required under any lease or agreement affecting the Secured Property and, at Lender's reasonable request, will procure and maintain such other insurance or such additional amounts of insurance, covering Borrower and/or the Secured Property, as Lender shall from time to time require, in the exercise of its reasonable business judgment in light of the commercial real estate practices existing at the time the insurance is issued and in the place where the Real Property Collateral is located.

(d) Form of Policy. All insurance required under this Section 1.2 shall be fully paid for and be nonassessable, and the policies therefore shall contain such other provisions, endorsements and expiration dates, as Lender shall from time to time reasonably request, and shall be in such form, content and amounts, and be issued by such insurance companies having an A.M. Best rating of "A-X" or better and doing business in the state where the Land is located ("State"), all as are reasonably satisfactory to Lender, or as otherwise provided and required by law. Without limiting the foregoing, each such policy shall contain a waiver of subrogation to all claims against Borrower or Lender, and shall provide that the policy shall not be canceled, amended or materially altered (including by reduction in the scope or limits of coverage) without at least thirty (30) days prior written notice to Lender. All policies of insurance required by this Mortgage shall contain an endorsement or agreement of the insurer that any loss payable to Lender in accordance with the terms thereof shall not be adversely affected by any act or negligence of Borrower, which might otherwise result in the forfeiture of such insurance. Further, no such policy shall contain an exclusion for suits or other proceedings as between or among insured's covered thereunder. All insurance required pursuant to subsection (a) of this Section 1.2 shall contain a noncontributory standard mortgagee clause in favor of Lender.

(e) Duplicate Originals or Certificates. Borrower shall deposit with Lender duplicate original policies or other evidence of insurance satisfactory to Lender evidencing the insurance required under this Section 1.2 and any additional insurance which shall be taken out on the Secured Property by or on behalf of Borrower, together with a certificate signed by Borrower or the insurance company issuing same to the effect that the

UNOFFICIAL COPY

policies so delivered are true and accurate duplicates of the originals thereof. In addition, Borrower will deliver to Lender: (i) receipts evidencing payment of all premiums thereon; and, (ii) duplicate original renewal policies or a binder thereof with evidence reasonably satisfactory to Lender of payment of all premiums thereon, at least thirty (30) days prior to the expiration of each such policy. In lieu of the duplicate original policies provided herein to be delivered to Lender or other evidence of insurance as provided above, Borrower may deliver an underlyer of any blanket policy together with signed certificates from the issuing insurance company certifying that such underlyer truly and accurately reflects the insurance in place, and that such insurance is in full force and effect. In addition, such underlyer shall contain sufficient information to allow Lender to determine whether such policy complies with the requirements of this Section 1.2. In addition, Borrower shall be deemed conclusively to have fulfilled its obligations under this Section 1.2, if, and to the extent Borrower causes, the general contractor to maintain any of the insurance required under Section 1.2 (pursuant to a construction contract approved by Lender).

(f) No Separate Insurance. Borrower shall not carry separate or additional insurance concurrent in form or contributing in the event of loss with that required under this Section unless endorsed in favor of Lender in accordance with the requirements of this Section and otherwise approved by Lender in all respects.

(g) Transfer of Title. In connection with any foreclosure of this Mortgage or other transfer of title or assignment of the Secured Property by Lender pursuant to its rights under this Mortgage, Borrower hereby authorizes Lender (if Lender shall so elect), without the consent of Borrower, to assign any and all insurance policies to the purchaser (which may be Lender) at any such foreclosure sale (to the extent assignable), and take such further or other action as Lender may deem necessary or advisable to cause the interests of said purchaser to be protected under any such insurance policies.

(h) Replacement Cost. For purposes of this Section, the term "full insurable value" shall mean the actual cost of replacing the property in question, without allowance for depreciation, as reasonably determined from time to time by Lender.

(i) Approval Not Warranty. No approval by Lender of any insurer shall be construed to be a representation, certification, or warranty of such insurer's solvency, and no approval by Lender as to the amount, type or form of any insurance shall be construed to be a representation, certification or warranty of its sufficiency.

(j) Insurance Proceeds. As further security for the obligations secured hereby, Borrower hereby assigns and grants to Lender a security interest in and to all insurance proceeds on the Secured Property and all causes of action, claims, compensation, awards and recoveries for any damage or injury to the Secured Property, or for any loss to the Secured Property, and all such proceeds shall be paid to Lender without, and notwithstanding, any other or further instruction from Borrower. Upon request from Lender, Borrower shall execute such further, or other, documents and/or instruments to evidence the foregoing assignment of, and security interest in, insurance proceeds, causes of action, claims, compensation, awards, and recoveries.

UNOFFICIAL COPY

Section 1.3. Insurance and Condemnation Proceeds. In the event of a casualty at, or condemnation of, all or any portion of the Real Estate Collateral, Net Insurance Proceeds and Net Condemnation Proceeds shall be disbursed as set forth in this Section 1.3

(a) Provided, that,

(i) no Event of Default has occurred and is continuing under this Mortgage, the Note, or any other Loan Document, or if an event or condition exists which constitutes, or with notice or lapse of time (or both) would constitute, an Event of Default under this Mortgage, the Note, or any other Loan Document (a "default" or "event of default"), Borrower is diligently pursuing a cure within the applicable cure periods allowed under the Loan Documents;

(ii) Borrower has provided Lender with evidence reasonably satisfactory to Lender that, (A) the expenditure of Net Insurance Proceeds and/or Net Condemnation Proceeds of the Secured Property (alone or when taken together with other sums delivered to Lender by Borrower for such purpose) will result in the restoration of same to substantially the same condition prior to the damage or destruction necessitating such restoration, and (B) the restoration or repair of the Secured Property can be completed in accordance with the plans and specifications therefore by the Completion Date (as defined in the Loan Agreement) as the same may be extended in accordance with the terms of the Loan Agreement, or, in the case of a casualty after Completion, the restoration or repair is to be completed substantially in accordance with the plans and specifications therefore (as approved by Lender) on or before the date that is three (3) months prior to the Maturity Date;

(iii) Borrower has provided Lender with the plans and specifications for the proposed restoration work, and Lender shall have approved such plans and specifications, which approval shall not be unreasonably withheld, conditioned, or delayed, and which approval shall not be required if restoration is to be pursuant to the originally approved plans and specifications for the Secured Property;

(iv) Borrower shall have provided evidence reasonably satisfactory to Lender that there are no legal impediments to the restoration of the Secured Property to its condition prior to such damage or destruction, or to the use of the restored Secured Property for the purposes for which it was used prior to such damage or destruction; and

(v) the general contractor selected to complete the repairs and restoration shall either be the General Contractor (as defined in the Loan Agreement), or another general contractor reasonably approved by Lender; provided that Lender will not object to Borrower retaining general contractors and subcontractors to complete the repairs and restoration based on the fact that such general contractors or subcontractors are craft workers represented by unions affiliated with local and/or national Builders and Contractors Trade Councils, AFL-CIO and/or the Building and Construction Trades Department, AFL-CIO;

UNOFFICIAL COPY

then Lender shall disburse to Borrower, in accordance with subsection (b), the Net Insurance Proceeds and/or Net Condemnation Proceeds for the repair and restoration of the Secured Property.

The term "Net Insurance Proceeds" shall mean the gross amount of insurance proceeds actually received by Lender in cash or other immediately available funds, under any fire or other property insurance policy as a result of a loss to the Secured Property, as reduced by expenses reasonably incurred by Lender in connection with such casualty loss including reasonable attorneys' fees and costs. Notwithstanding the foregoing, Net Insurance Proceeds shall not include the proceeds of business interruption insurance, which will be paid directly to Lender and applied to pay Debt Service on the Secured Debt as and when due and payable; provided, however, that any excess proceeds attributable to a given calendar month after payment of Debt Service for such month shall be made available to Borrower to pay operating expenses of the Secured Property then due and payable. The term "Net Condemnation Proceeds" shall mean the gross amount actually received by Lender in cash or other immediately available funds from causes of action, claims, compensation, awards and recoveries for any condemnation or taking of the Secured Property, as reduced by expenses reasonably incurred by Lender in connection with such condemnation or taking including, reasonable attorneys' fees and costs.

If Lender reasonably determines that any one of the conditions specified in clauses (i) - (v) above is not satisfied, Lender may apply any Net Insurance Proceeds and/or Net Condemnation Proceeds received by Lender to repayment of the Secured Debt, in such order as Lender may determine in its sole discretion. Lender shall apply Net Insurance Proceeds and/or Net Condemnation Proceeds to repayment in full of Tranche B prior to the application of any such proceeds to the repayment of Tranche A.

(b) If Lender reasonably determines that its security has not been impaired and the other conditions set forth in subsection (a) above for such disbursement have been satisfied, the Net Insurance Proceeds and/or Net Condemnation Proceeds shall be disbursed to Borrower, subject to, and in accordance with, the following conditions and procedures:

(i) Up to ninety percent (90%) of the Net Insurance Proceeds, and/or Net Condemnation Proceeds, shall be disbursed on Borrower's written request in amounts requested by Borrower, provided each such request shall be accompanied by:

(A) A certificate by the Architect of Record and confirmed by the Inspecting Architect, or by a licensed architect or engineer (which engineer or architect must be acceptable to Lender) addressed to Lender (which certificate shall be subject to Lender's verification and approval (not to be unreasonably withheld, conditioned or delayed)) that (1) such disbursement is to pay the actual costs of repair and/or restoration of damage caused by such loss and such costs have not been paid by any prior or then pending disbursement or out of any insurance or condemnation proceeds received directly by Borrower, and (2) the amount of such disbursement, together with the amount of all prior or then pending disbursements, does not exceed the cost of the work, labor and services performed and materials installed in or stored upon the Real Property Collateral as of the date of such certificate;

UNOFFICIAL COPY

(B) With respect to any portion of the Net Insurance Proceeds or Net Condemnation Proceeds being used by Borrower to restore space leased by a commercial lessee of the Improvements, a statement of such commercial lessee that the lease between Borrower and such lessee is in full force and effect with the lessee in occupancy on a full rent paying basis, and that there are no defaults by Borrower, as landlord under such lease, existing or outstanding (but the failure to provide such statement shall not affect the disbursement of Net Insurance Proceeds or Net Condemnation Proceeds which are being used to restore other portions of the Secured Property which are not leased to the lessee that has failed to provide such statement);

(C) Evidence reasonably satisfactory to Lender that all claims then existing for labor, services or materials enforceable by a lien upon the Secured Property have been paid in full, bonded or insured over, or a provision acceptable to Lender has been made therefore; and

(D) If the balance of the Net Insurance Proceeds and/or Net Condemnation Proceeds is insufficient to pay the total cost of such repair or restoration as reasonably estimated or determined by such architect or engineer and agreed to by Lender, evidence that Borrower has made provisions reasonably satisfactory to Lender for payment of any such deficiency.

(ii) Disbursement of the applicable retainage and other balance of the Net Insurance Proceeds and/or Net Condemnation Proceeds, shall be made only upon delivery to Lender of the items listed in the foregoing subsection (i), and upon delivery to Lender of the certificate of the Architect of Record and confirmed by the Inspecting Architect, or of an architect or engineer reasonably acceptable to Lender, that repairs or restoration have been completed in a good and workmanlike manner and in accordance with all Governmental Requirements (as defined in the Loan Agreement) then applicable to the work.

(iii) If Net Insurance Proceeds and/or Net Condemnation Proceeds exceed the costs of such repairs or restoration, such excess balance shall, in the discretion of Lender, either be disbursed to Borrower or applied to reduce the principal amount of the Note or used to pay such other amounts as may be due to Lender under the Note or hereunder. The obligations and agreements of Lender to apply funds to repair or restoration are subject to the right and option of Lender to apply any or all of such proceeds to cure any Event of Default existing or arising at any time while Lender is holding such proceeds, and to the extent such proceeds are so applied, Lender shall be relieved of its obligations to disburse funds for repair or restoration of the Secured Property.

(c) All causes of action, claims, compensation, awards and recoveries for any condemnation or taking of the Secured Property are hereby assigned to and shall be paid to Lender; provided, however, prior to the occurrence of an Event of Default, Borrower may prosecute and may adjust and compromise all claims, awards or recoveries with respect to the Secured Property, subject however, to Lender's prior written consent in the event such claims,

UNOFFICIAL COPY

award, or recovery involves in excess of \$250,000. Lender may (but shall not be obligated to) participate in any suits or proceedings relating to any such causes of action, claims, compensation, awards or recoveries.

(d) Nothing herein contained shall be deemed to excuse Borrower from repairing or maintaining the Secured Property as provided in Section 1.8 below or from restoring all damage or destruction to the Secured Property, regardless of whether there are Net Insurance Proceeds and/or Net Condemnation Proceeds made available to Borrower or whether any such proceeds are sufficient in amount to restore the Secured Property; provided, however, that if Net Insurance Proceeds and/or Net Condemnation Proceeds are not made available to Borrower to restore the Secured Property, Borrower shall have the right to prepay the Indebtedness in full, without any prepayment premium, if such payment is made within ninety (90) days of the date Lender notifies Borrower that the Net Condemnation Proceeds or Net Insurance Proceeds, as the case may be, are being applied to the Indebtedness. The application or release by Lender of any insurance proceeds or condemnation proceeds shall not cure or waive any default or Event of Default under this Mortgage or invalidate any act done pursuant to any notice thereof.

Section 1.4. Taxes and Assessments. Borrower shall pay, prior to the delinquency date thereof, all taxes and assessments that are or may become a lien on the Secured Property or that are assessed against the Secured Property or its Property Income, security deposits, issues, profits, royalties, income, earnings, revenues, proceeds and other benefits. At Lender's request, Borrower shall provide Lender with receipts and tax bills evidencing that such payment was made prior to the delinquency date thereof. Subject to the contest rights allowed by the Loan Agreement, Borrower shall also pay when due all lawful claims and demands of mechanics, material men, laborers, and others for any work performed or materials delivered that, if unpaid, might result in, or permit the creation of, a lien on the Secured Property, including the Property Income, and in general will do or cause to be done everything necessary so that the lien and security interest hereof shall be fully preserved, at the cost of Borrower, without expense to Lender. Borrower may contest any tax or assessment, provided, Borrower pays the disputed tax or assessment under protest.

Section 1.5. Perfection of Security Interest. By executing this Mortgage, Borrower authorizes the filing, at Borrower's sole cost and expense, of one or more financing statements pursuant to the State Uniform Commercial Code covering the collateral to be encumbered by this Mortgage.

Section 1.6. Assignment of Property Income.

(a) Borrower has, by a separate Assignment of Rents and Leases, executed, delivered and recorded simultaneously herewith, absolutely and presently assigned to Lender, all of its right, title and interest in and to the Property Income. The assignment of said leases and Property Income is intended to be and, to the maximum extent permitted by applicable law, is an absolute present assignment from Borrower to Lender and not merely the passing of a security interest. In the event of any inconsistency between the provisions of this Mortgage and the provisions of the Assignment of Rents and Leases, the provisions of the Assignment of Rents and Leases shall control.

UNOFFICIAL COPY

(b) All of the existing and future Property Income that arises from the use or occupancy of the Secured Property is hereby absolutely and presently assigned to Lender. However, until an Event of Default occurs under this Mortgage, Borrower will have a license to collect and receive all Property Income. Upon the occurrence and during the continuance of any Event of Default hereunder, Lender may, in its sole and absolute discretion at any time, without notice to Borrower except as required by law, terminate Borrower's license; and Lender, or Lender's agent, or a receiver may thereafter, during the continuance of such Event of Default, collect and receive the Property Income itself or by an agent or receiver. Notwithstanding the foregoing, to the maximum extent permitted by applicable law, no action taken by Lender to collect any Property Income will make Lender a "mortgagee in possession" of the Secured Property, unless Lender personally or by authorized agent enters into actual possession of the Secured Property. Possession by a court appointed receiver will not be considered possession by Lender. All Property Income collected by Lender or a receiver will be applied in the manner and to the extent required by applicable law, and unless otherwise required and specified by applicable law, such sums will be applied first to pay all expenses of collection, and then to the payment of all costs of operation and management of the Secured Property, and then to the payment of the Secured Debt in whatever order Lender directs in Lender's sole and absolute discretion and without regard to the adequacy of its security.

(c) Borrower will not execute any leases affecting the Secured Property, except pursuant to Approved Leases (as defined in the Loan Agreement).

(d) Without the prior written consent of Lender, Borrower: (i) will not modify or amend any lease, sublease, or occupancy agreement affecting the Secured Property, except to the extent permitted by the terms of the Loan Agreement; (ii) will not, except to the extent reasonable and prudent and in accordance with sound management practices, terminate or consent to the cancellation or surrender of any lease, sublease, or occupancy agreement affecting the Secured Property, now or hereafter made; or (iii) will not accept prepayments of any installment of rent to become due under such leases or subleases in excess of one month's rent, and has not previously accepted such prepayments.

(e) Upon written request of Borrower, Borrower shall provide Lender with executed copies of all leases and amendments to leases entered into during the Loan term.

(f) Borrower shall apply the Property Income to the payment of all necessary and reasonable operating costs and expenses of the Secured Property, debt service on the Indebtedness, and a reasonable reserve for future expenses, repairs and replacements for the Secured Property, before using the Property Income for Borrower's personal use or any other purpose not for the direct benefit of the Secured Property.

Section 1.7. Transfer of Secured Property or any Interest in Borrower.

(a) In determining whether or not to make the Loan, Lender examined the credit worthiness of Borrower and its Affiliates (as defined in the Loan Agreement), found them acceptable and relied and continues to rely upon same as the means of repayment of the Loan and performance of the obligations under the Loan Documents. Lender also evaluated the background and experience of Borrower including its Affiliates in owning and operating

UNOFFICIAL COPY

property such as the Secured Property, found them acceptable and relied and continues to rely upon same as the means of maintaining the value of the Secured Property, which is Lender's security for the Note. Borrower and its Affiliates are well-experienced in borrowing money and owning and operating property such as the Secured Property, are ably represented by a licensed attorney-at-law in the negotiation and documentation of the Loan and bargained at arm's length, and without duress of any kind, for all of the terms and conditions of the Note and other Loan Documents. Borrower recognizes that Lender is entitled to maintain its loan portfolio at current interest rates with acceptable levels of default risk by making new loans at current rates, collecting assumption fees, increasing the interest rate on a loan, making a loan recourse, or requiring guarantees on a loan, the security for which is purchased by a party other than the original Borrower. Borrower further recognizes that any secondary or junior financing placed upon the Secured Property: (i) may divert funds, which would otherwise be used to pay the Note secured hereby; (ii) could result in acceleration and foreclosure by any such junior Encumbrances (as defined herein), which would force Lender to take measures and incur expenses to protect its security; (iii) would detract from the value of the Secured Property should Lender come into possession thereof with the intention of selling same; and (iv) would impair Lender's ability to accept a deed in lieu of foreclosure, as a foreclosure by Lender would be necessary to clear the title to the Secured Property.

(b) In accordance with the foregoing and for the purposes of: (i) protecting Lender's security, both of repayment by Borrower and of the value of the Secured Property; (ii) giving Lender the full benefit of its bargain and contract with Borrower; (iii) allowing Lender to raise the interest rate charged under the Note and/or collect assumption fees upon the Sale (as defined herein) of the Secured Property by Borrower; and (iv) keeping the Secured Property free of Encumbrances, this Section 1.7 shall be deemed a reasonable restraint on alienation (if this Section 1.7 is ever deemed a restraint on alienation). In light of the above, Borrower and Lender agree as follows:

(i) Without the prior written consent of Lender, which consent may be withheld in Lender's sole and absolute discretion, and subject to the terms of this Section 1.7, Borrower shall not permit: (A) any Encumbrance or Sale (each as defined in Section 1.7(b)(ii) below); or (B) a contract to sell (except if such contract to sell shall close after the Note has been paid in full or otherwise be approved by Lender), transfer, encumber, or assign any interest in Borrower or in any Affiliate of Borrower other than a Permitted Sale (as defined herein).

(ii) The following capitalized terms used in this Section 1.7 shall for all purposes in this Mortgage, have the following meanings:

(A) "Encumbrance" shall mean a mortgage or other security arrangement which encumbers the Secured Property, or any other encumbrance thereon, which is reasonably likely to materially adversely affect the value or operation of the Secured Property, but shall exclude occupancy leases, construction easements and covenants, access and utility easements and other agreements that are permitted under the Loan Documents.

UNOFFICIAL COPY

(B) “Sale” shall mean any sale, transfer, trade, exchange, encumbrance, assignment, conveyance, lease (other than space leases entered into in accordance with the terms of the Loan Documents) or other disposition of the Secured Property or interest therein (including, the recording of a condominium declaration with respect to the Secured Property), whether voluntary or involuntary (including, a foreclosure sale) or of any beneficial ownership interest in Borrower, subject to subsection (c) below.

(c) Notwithstanding the prohibitions contained in Section 1.7(b), provided that: (i) no Event of Default exists and is continuing unless Borrower is diligently pursuing, within the applicable cure period, a cure of such default; and (ii) Borrower provides Lender with at least ten (10) business days prior written notice thereof, the term “Sale” shall not include the following, each of which shall be permitted (each, a “Permitted Sale”):

(A) Transfers of interests in Borrower which are committed to during the Term, provided that the interests, by the terms of the agreement of transfer, are not transferable and are not transferred until after the Note has been repaid in full even though the agreement to transfer may be entered into and the payment of consideration may occur during the Term;

(B) Any disposition of equipment in the ordinary course of business, so long as any such equipment is replaced with items of substantially equivalent use and value; and

(C) The sale of any interest in Borrower owned by either Lakeshore Tides LLC or ABIT Member (as defined in the Loan Agreement) to Lakeshore Tides LLC or ABIT Member, or any of their Affiliates, provided that: (i) ABIT Member continues to own or control the majority voting equity interests in Borrower and the right to select the property manager for the Secured Property; and (ii) the AFL-CIO Building Investment Trust is, at the time of any such sale, the sole owner of ABIT Member. Lender agrees that a transfer of any interest in Borrower from Lakeshore Tides LLC to ABIT Member or any of its Affiliates shall be deemed a Permitted Sale regardless of the existence of an Event of Default by Borrower, so long as Borrower or ABIT Member is complying with the conditions set forth in this subclause (C) and subclauses (i) and (ii) of Section 1.7(c) above.

(d) Commencing with the fifth (5th) Loan Year, Borrower may request that Lender grant its consent to a single proposed Sale of the entire Secured Property to a third party, which consent may be granted or withheld in Lender’s discretion, and if such consent is granted, the Sale shall be subject to the following conditions precedent:

(i) Lender has approved the prospective purchaser or transferee in light of Lender's then current underwriting standards which shall include, at a minimum, the following conditions which are detailed as an illustration and not a limitation of the factors Lender may consider:

UNOFFICIAL COPY

(A) the proposed purchaser or transferee meets Lender's then current financial and net worth requirements for borrowers (measured prior to the acquisition of the Secured Property, on a combined basis with the parent of any such wholly-owned proposed transferee), including but not limited to, a credit history acceptable to Lender as reported by an agency satisfactory to Lender, and a net worth of not less than \$50,000,000, with liquid assets of not less than \$12,000,000 as evidenced by financial statements prepared by an independent certified accountant within the preceding ninety (90) days in accordance with generally accepted accounting principles;

(B) the proposed purchaser or transferee has demonstrated successful ownership and management experience of Class A multi-family high rise properties located in Chicago, Illinois with not less than 200 units owned for not less than five consecutive years immediately preceding such sale;

(ii) the ratio of Net Income (as defined in the Loan Agreement) to debt service (determined by multiplying all existing and proposed financing secured or proposed to be secured by the Secured Property by the greater of (a) an 8.5% debt constant or (b) a debt constant determined using the then current ten year treasury ratio plus 150 basis points and a thirty (30) year amortization term) is not less than 1.10 to 1.00 prior to the consummation of the Sale as evidenced by operating statements satisfactory to Lender both as to form and content (which operating statements shall include, in addition to the actual expenses incurred or accrued during the preceding year, any projected additional *ad valorem* taxes to be assessed as a result of a transfer of title to the Secured Property);

(iii) a fee of one percent (1%) of the outstanding Principal Sum of the Note is paid to Lender;

(iv) the proposed purchaser or transferee expressly assumes all Borrower's obligations under the Loan Documents;

(v) the proposed purchaser or transferee executes a hazardous substances indemnity agreement comparable to that, if any, executed and delivered by Borrower to Lender in conjunction with this Mortgage, except containing any changes necessary to conform that agreement with the form thereof customarily being required by Lender at the time of the Sale in connection with non recourse loans; and

(vi) No Event of Default shall exist under this Mortgage, and there shall have occurred no event which, with notice or lapse of time, or both, would become an Event of Default.

In the event Lender consents to the assumption of the Loan by the proposed transferee as provided above, Lender will release Borrower and Guarantor from all obligations under the Loan Documents except that such release will not apply to Borrower's continuing obligation to indemnify Lender under the Environmental Indemnity for Losses (as defined in the

UNOFFICIAL COPY

Environmental Indemnity), unless such Losses arise directly by reason of the discharge, release, or disposal of any Hazardous Substances occurring for the first time after Borrower's transfer of the Secured Property to such transferee. Lender's consent to one Sale shall not be deemed to be a waiver of Lender's right to consent to any future occurrence of same.

Section 1.8. Maintenance, Repair, Alteration; Compliance with Laws.

(a) Borrower will not commit any waste on, or with respect to, the Secured Property, or take any action that might invalidate any insurance carried on the Secured Property. Borrower will maintain (or cause to be maintained) the Secured Property in good condition and repair. Borrower shall promptly complete (or cause to be completed) any Improvement that may be constructed on the Land, and subject to Borrower's right to prepay the Indebtedness pursuant to Section 1.3(d) hereof, promptly restore any such Improvement that is damaged or destroyed, in like manner, in a good and workmanlike manner, and when due pay all claims for labor performed and materials furnished. No Improvements located on the Land may be removed, demolished, or materially altered without the prior written consent of Lender. No Personal Property Collateral may be removed from the Real Property Collateral unless it is promptly replaced by similar property of at least equivalent value on which Lender will immediately have a valid first priority lien and security interest, ranking senior in priority to any and all other liens, security interests, Encumbrances, or charges thereon.

(b) Without the prior written consent of Lender, to be granted or withheld in its sole discretion, Borrower will not (i) seek, make, or consent to any change in the zoning, permits, approvals, conditions, or other Governmental Requirements affecting the use of the Real Property Collateral that would materially impair the ability of Borrower to operate or develop the Secured Property; (ii) change or consent to a change in the use of the Secured Property as set forth in the Loan Agreement; or (iii) change the name under which the business on the Secured Property is conducted. Borrower will comply in all material respects with, and make all payments required pursuant to all Governmental Requirements now or hereafter affecting the Secured Property or the business or the activity conducted thereon or in connection therewith. Borrower will not commit, and will use commercially reasonable efforts (including legal action to enforce the terms of all leases) not to suffer, permit or allow any act to be done in, upon or with respect to the Secured Property in violation of any Governmental Requirements. Borrower will comply in all material respects with all existing and future requirements of all Governmental Authorities having jurisdiction over the Secured Property, including the Americans With Disabilities Act of 1990, as it may be amended from time to time.

Section 1.9. Books, Records and Financial Information.

(a) Borrower will keep adequate books and records of account for the Secured Property and of Borrower's own financial affairs sufficient to permit the preparation of financial statements therefrom in accordance with generally accepted accounting principles consistently applied. Lender and its agents will have the right, upon reasonable advance notice, to examine, copy and audit Borrower's records and books of account relating to the Secured Property during regular business hours.

UNOFFICIAL COPY

(b) Borrower will deliver or cause to be delivered to Lender, within thirty (30) days after the end of each calendar quarter, copies of Guarantor's financial statements.

(c) At all times after Completion of Construction until the indebtedness secured hereby is repaid in full, Borrower will deliver to Lender at Borrower's expense, within thirty (30) days after the end of each calendar quarter:

- (i) copies of quarterly profit-and-loss statements detailing the operations of the Secured Property for the preceding calendar quarter and year to date, and
- (ii) management reports detailing the operations of the Secured Property for the preceding calendar quarter.

(d) At all times after Completion of Construction until the indebtedness secured hereby is repaid in full, Borrower will deliver to Lender at Borrower's expense, within ninety (90) days after the end of each calendar year:

- (i) copies of annual profit-and-loss statements detailing the operations of the Secured Property for the preceding calendar year along with a separate listing of actual capital expenditures for the year,
- (ii) a copy of the current rent roll for the Secured Property showing actual and scheduled rent,
- (iii) a budget for the following fiscal year stating the projected income and expenses for the Secured Property,
- (iv) copies of Borrower's financial statements for the preceding calendar year, and
- (v) a certification of the then current ownership of Borrower.

The statements described in subsections (b), (c) and (d) above shall (A) be prepared by Borrower and Guarantor in accordance with generally accepted accounting principles consistently applied; (B) be reviewed by Borrower's independent accountant and Guarantor's independent accountant as applicable to the extent they are annual statements; (C) set forth operating information for the Secured Property in such detail as Lender shall reasonably require; and (D) be certified by Borrower and Guarantor, as applicable, and such accountant as being fairly presented in all material respects.

(e) At all times during the Term prior to full disbursement of the Loan, Borrower will furnish Lender within thirty (30) days after the end of each quarter, an updated schedule of proposed Draw Requests. In addition, Borrower will furnish Lender, within thirty (30) days after the end of each calendar month, commencing with the first month following the month in which the term of a lease of any portion of the Improvements commences until the Indebtedness is repaid and all Obligations are satisfied in full, a monthly operating statement

UNOFFICIAL COPY

prepared on a cash basis and certified as correct in all material respects by Borrower's chief financial officer or equivalent.

(f) Borrower will promptly furnish, at its expense, and upon Lender's request, such financial information and statements for Borrower or the Secured Property as may reasonably be required in order for Lender to sell the Loan (or any interests therein).

(g) Borrower will furnish such other information as required under the terms of the Loan Agreement.

Section 1.10. Title, etc.

(a) Borrower has good and marketable title to an indefeasible fee estate in the Secured Property subject to no lien, charge, or Encumbrance, except: (i) the exceptions and Encumbrances noted as exceptions to title in the title insurance policy insuring the lien of this Mortgage and approved by Lender and any other exceptions expressly approved by Lender in writing; (ii) taxes; (iii) governmental assessments and similar charges for years subsequent to the date hereof; and (iv) other Encumbrances allowed by the Loan Documents (collectively clauses (i), (ii), (iii), and (iv) are "Permitted Exceptions"). This Mortgage is and will remain a valid and enforceable first priority lien on the Real Property Collateral subject only to the Permitted Exceptions. Borrower has good and marketable title to the Personal Property Collateral subject to no lien (other than liens for equipment leasing or financing incurred in the ordinary course of business), charge or Encumbrance, other than this Mortgage and the Permitted Exceptions. All easement, license, and use agreements affecting the Secured Property are and will remain valid, subsisting and in full force and effect, and to Borrower's Knowledge (as defined in the Loan Agreement), Borrower is not in default thereunder and has fully performed the terms thereof required to be performed through the date hereof, and has no knowledge of any default thereunder by any other party. Borrower will forever warrant and defend: (A) its title to the Secured Property; (B) the rights of Lender under the Secured Property, this Mortgage, and the financing statements encumbering the Personal Property Collateral; and (C) the validity and priority of the lien of this Mortgage on the Secured Property against the claims of all persons and parties except those having rights under the Permitted Exceptions, to the extent of those rights.

(b) Borrower will, at its own expense, prosecute, appear in or defend any action or proceeding that materially and adversely affects Lender's security or the rights or powers of Lender or any of the Secured Property. If Borrower fails to perform any of its material covenants or agreements contained in this Mortgage or in any instrument secured hereby, or if any action or proceeding of any kind (including any bankruptcy, insolvency, arrangement, reorganization or other debtor relief proceeding) is commenced, or if there occurs any other event that might affect Lender's or Borrower's interest in the Secured Property, or Lender's right to enforce its security hereunder; then, Lender may, after reasonable notice to Borrower, and at its option, make any appearances, disburse any reasonable sums, and take any reasonable actions as may be reasonably necessary or desirable to protect or enforce the Secured Property, or to remedy the failure of Borrower to perform its covenants hereunder (without, however, waiving any default or Event of Default of Borrower). Borrower shall pay all reasonable out of pocket expenses of Lender thus incurred (including reasonable fees and disbursements of counsel). Any reasonable sums disbursed by Lender will be additional

UNOFFICIAL COPY

Obligations of Borrower secured by this Mortgage, will bear interest from the date of payment by Lender at the Default Rate (as defined in the Note), and will be payable by Borrower upon demand. This subsection will not be construed to require Lender to incur any expenses, make any appearances, or take any actions. If Lender is made a party to any litigation concerning this Mortgage, or the Secured Property, or the occupancy thereof by Borrower, then Borrower shall indemnify, defend with counsel selected by Lender and reasonably acceptable to Borrower, protect and hold harmless Lender, its directors, officers, employees, agents, assigns, and any successors to Lender's interest under the Note or this Mortgage from and against all liability, claims, demands, obligations, reasonable costs and expenses, by reason of said litigation (except to the extent resulting from the gross negligence or willful misconduct of such parties), including reasonable attorneys' and experts' fees and expenses incurred by Lender in such litigation, whether or not any such litigation is prosecuted to judgment. If Lender commences an action against Borrower or appears in any bankruptcy, insolvency, reorganization or other proceeding for debtor relief to enforce any of the terms hereof, or because of the breach by Borrower of any of the terms hereof, or for the recovery of any sum secured hereby, Borrower shall pay to Lender the reasonable cost of Lender's attorneys' and experts' fees and expenses, and the right to such attorneys' and experts' fees and expenses shall be deemed to have accrued on the commencement of such action, and shall be enforceable whether or not such action is prosecuted to judgment.

(c) Nothing herein, and no authority given to Borrower to repair, rebuild, or restore the Secured Property, shall be deemed to constitute as Borrower the agent of Lender for any purpose, or to create, either expressly or by implication, any liens, claims, or rights on behalf of laborers, mechanics, material men, or other lien holders, which could in any way be superior to the lien or claim of Lender.

(d) Borrower shall maintain and preserve its existence, rights, and franchises material to its business, and all rights, power, and authority to perform its obligations under the Loan Documents.

(e) Until repayment of the Loan in full, and the full discharge of all other Obligations, the representations and warranties contained in the Loan Agreement shall be true and correct in all material respects (subject to any applicable cure rights as set forth in the Loan Agreement).

Section 1.11. Security Agreement and Fixture Filing.

(a) This Mortgage constitutes a security agreement with respect to the Personal Property Collateral, and Lender shall have all of the rights and remedies of a secured party under the Uniform Commercial Code and all other rights and remedies available at law, or in equity, with respect to the Personal Property Collateral. Borrower shall execute and deliver on demand, and irrevocably constitutes and appoints Lender as the attorney in fact of Borrower, to deliver, and, if appropriate, to file with the appropriate filing officer or office, such security agreements, financing statements, continuation statements, or other instruments as Lender may request or require in order to impose, perfect, or continue the perfection of the lien or security interest created hereby.

UNOFFICIAL COPY

(b) Expenses of retaking, holding, preparing for sale, selling or the like as provided in Section 1.11(a) above shall be borne by Borrower and shall include Lender's reasonable attorneys' fees and legal expenses. Borrower, upon demand of Lender, following an Event of Default, shall assemble the Personal Property Collateral and make it available to Lender at such place as shall be required by Lender in its reasonable discretion. Lender shall give Borrower at least fifteen (15) days prior written notice of the time and place of any public sale or other disposition of the Personal Property Collateral, or of the time on or after which any private sale or any other intended disposition thereof is to be made, and such notice shall be sent to Borrower as provided for the mailing of notices herein. It is hereby deemed that such notice shall be and is reasonable notice to Borrower.

(c) Portions of the Secured Property are goods which are or are to become fixtures relating to the Land and the Improvements; therefore, the filing of this Mortgage, in the real estate records of the county where the Secured Property is located, shall operate as a fixture filing, in accordance with the Uniform Commercial Code of the State, from the time of filing this Mortgage.

Section 1.12. Payments.

(a) All sums payable by Borrower hereunder, or secured hereby, shall be paid without notice (except as expressly provided in the Loan Documents), demand, counter claim, setoff, deduction, or defense, and without abatement, suspension, deferment, diminution, or reduction. The obligations and liabilities of Borrower hereunder shall in no way be released, discharged, or otherwise affected (except as expressly provided in the Loan Documents) by reason of: (i) any damage to or destruction of or any condemnation or similar taking of the Secured Property (subject to Borrower's right to prepay the Indebtedness pursuant to Section 1.3(d) hereof); (ii) any restriction or prevention of or interference with any use of the Secured Property; (iii) any defect in title to or Encumbrance on the Secured Property, or any eviction from the Secured Property by title paramount or otherwise; (iv) any claim which Borrower has or might have against Lender (provided that Borrower retains the right to assert any such claim in a separate action); (v) any Event of Default, default or failure on the part of Lender to perform or comply with any of the terms hereof or of any other agreement with Borrower; or (vi) any other occurrence whatsoever, whether similar or dissimilar to the foregoing; whether or not Borrower shall have notice or knowledge of any of the foregoing. To the maximum extent permitted by applicable law, Borrower waives all rights now or hereafter conferred by statute, or otherwise, to any setoff, abatement, suspension, deferment, diminution, or reduction of the Secured Debt.

(b) Borrower shall have no right to prepay any portion of the outstanding Indebtedness, except on the terms set forth in the Note.

Section 1.13. Utilities. Borrower shall pay, when due, all utility charges that are incurred by Borrower for the benefit of the Secured Property, or that may become a charge or lien against the Secured Property, for gas, electricity, water, and sewer services furnished to, or for the benefit of, the Secured Property, and all other assessments or charges of a similar nature, whether public or private, affecting the Secured Property, whether or not such taxes, assessments or charges are liens thereon.

UNOFFICIAL COPY

Section 1.14. Unanticipated Charges. If any change in applicable law or regulations or any interpretation thereof by any government, central bank, or agency or instrumentality of any of them (“Regulatory Authority”) charged with the administration thereof shall:

(a) impose, modify, or deem applicable any reserve, special deposit or special requirements against assets held by, or deposits in or for the account of, or loans by, or any other acquisition of funds for advances by Lender; or

(b) impose on Lender any other conditions regarding any of the Loan Documents; or

(c) subject Lender (or make it apparent that Lender is subject) to any tax (including, without limitation, any international interest equalization tax), levy, impost, duty, charge, fee, deduction or withholding on or from payment due from Borrower, other than income and franchise taxes; or

(d) change the basis of taxation of payments due from Borrower to Lender under any of the Loan Documents (other than by a change in the statutory rate of taxation of, or based upon, the overall income of Lender);

and any of the foregoing results in an increase in the cost to Lender of maintaining the Indebtedness at the Contract Rate, then, upon demand made by Lender to Borrower, Borrower shall pay to Lender, from time to time, as reasonably determined and certified by Lender, additional amounts that shall compensate Lender for such increased cost. Lender will notify Borrower of any event that entitles Lender to such additional amounts and will furnish Borrower with an explanatory certificate in reasonable detail as to the increased cost, as a result of any such event mentioned in this paragraph. Borrower shall immediately pay such additional amounts to Lender. All such determinations by Lender that are certified to Borrower shall be presumed to be correct, absent manifest computational errors, provided they are made in good faith. Borrower shall pay Lender on the days on which interest is payable under the Note, the actual costs to Lender, as determined in good faith by Lender and evidenced by an explanatory notice delivered to Borrower by Lender, of Lender’s complying with any reserve, special deposit, or similar requirements (including state law requirements), imposed or deemed applicable against foreign assets held by, or deposits in or for the account of, or loans by, or any other acquisition of funds for advances by Lender by any Regulatory Authority charged with the administration of such requirements, to the extent that such requirements increase the cost to Lender of maintaining the Indebtedness at the Contract Rate.

Section 1.15. Management of the Secured Property. Lender has evaluated the background and experience of the person or firm (including Borrower) managing the Secured Property, such management to be acceptable, and relied and continues to rely upon such management as a means of maintaining the value of the Secured Property, which is Lender’s security for the repayment of the Secured Debt. While Lender and Borrower agree that Borrower is the ultimate decision maker with respect to the Secured Property and its management, Lender reserves the right to approve or disapprove any person or firm (including Borrower) hired by Borrower to manage the Secured Property (provided, however, that Lender’s approval shall not be unreasonably withheld, conditioned, or delayed). Borrower shall give

UNOFFICIAL COPY

Lender five (5) business days prior written notice of any change in the person or firm hired to manage the Secured Property. Lender will have ten (10) days from receipt of the notice to request further information about the proposed manager. Within twenty (20) business days after the later of Lender's receipt of: (a) the notice; or (b) information reasonably requested by Lender, if any, Lender shall give Borrower notice of its approval or disapproval. Failure to give such notice of disapproval within such 20 day period shall constitute approval. Lender may disapprove of such management person or firm, if, in its reasonable judgment, such person or firm is not capable of effectively managing the Secured Property. Lender hereby approves Near North Properties, Inc. and Magellan Development Group, Ltd. as the initial manager of the Secured Property.

Section 1.16. Litigation. Borrower shall give Lender prompt written notice of any action or proceeding commenced or, if Borrower has Knowledge thereof, threatened against Borrower or the Secured Property, where the amount in controversy, as to Borrower, is in excess of \$100,000, or, as to the Secured Property, is in excess of \$100,000. Borrower will, at Lender's request, deliver to Lender copies of all notices, documents, and other information regarding any such action or proceeding as Lender may request.

ARTICLE II EVENT OF DEFAULT

Section 2.1. Events of Default. Any Event of Default (as defined in the Loan Agreement) shall be an "Event of Default" under this Mortgage.

ARTICLE III REMEDIES

Section 3.1. Remedies upon Default.

At any time after the occurrence of an Event of Default, Lender shall have the following rights and remedies:

- (a) Declare any or all Indebtedness to be due and payable immediately;
- (b) Bring a court action to foreclose this Mortgage or to enforce its provisions or any provisions of the other Loan Documents;
- (c) Obtain a receiver appointed by a court of competent jurisdiction to manage the Secured Property and collect the income therefrom. Borrower irrevocably and unconditionally waives any right to contest the appointment of such receiver and consents thereto. Such receiver may be appointed without notice and without regard to the solvency or insolvency of Borrower at the time of application for such receiver and without regard to the then value of the Secured Property or without regard to whether or not the Secured Property is then occupied as a homestead. Lender, or any holder of the Note, may be appointed as such receiver or as a mortgagee in possession. Such receiver, or such mortgagee in possession, shall have the power to collect the Property Income during such times (if any) when Borrower would be

UNOFFICIAL COPY

entitled to collect such Property Income, issues and profits, except for the intervention of such receiver or mortgagee in possession. Also, the receiver, or the Lender in possession, shall have all other powers, which may be necessary or are usual in such cases for the protection, possession, control, management and operation of the Secured Property or such powers as may otherwise be granted by the court or under applicable law. The receiver, or mortgagee in possession, may apply the net income in its hands in payment in whole or in part of the Secured Debt;

(d) Lender, or its employees and agents, acting by themselves or through a court-appointed receiver, may enter upon, possess, manage, operate, dispose of, and contract to dispose of the Secured Property, and take any and all steps which may be desirable in Lender's judgment to complete any unfinished development, manage, and operate the Secured Property. Lender may apply any Property Income collected by Lender against the Secured Debt without, in any way, curing or waiving any default of Borrower or Event of Default. Lender, or its employees and agents, acting by themselves or through a court appointed receiver, may: (i) take custody of all accounts; (ii) negotiate with Governmental Authorities with respect to the Secured Property's environmental compliance and remedial measures; (iii) take any action necessary to enforce compliance with environmental provisions, including spending Property Income collected by Lender to abate or remediate Hazardous Substances (as defined in the Loan Agreement); (iv) make, terminate, enforce or modify leases of the Secured Property upon such terms and conditions as Lender deems proper; (v) contract for goods and services; (vi) hire agents, employees, and counsel; (vii) make repairs, alterations, and improvements to the Secured Property as necessary, in Lender's sole judgment, to protect or enhance the security thereof; (viii) incur the risks and obligations ordinarily incurred by owners of property (without any personal obligation on the part of the receiver or Lender); and (ix) take any and all other actions, which may be necessary or desirable to comply with Borrower's obligations hereunder and under the Loan Documents. All sums realized by Lender under this subsection, less all costs and expenses incurred by it under this subsection, including reasonable attorney fees, and less such sums as Lender deems appropriate as a reserve to meet future expenses under this subsection, shall be applied to the Secured Debt in such order as Lender shall determine. Application of said sums to the Secured Debt, or any other action taken by Lender under this subsection, shall not cure or waive any Event of Default hereunder. Lender, or any employee or agent of Lender, or a receiver appointed by a court, may take any action or proceeding hereunder without regard to: (A) the adequacy of the security for the Secured Debt; (B) the existence of a declaration that the Indebtedness has been declared immediately due and payable, or (C) the filing of a notice of default or Event of Default;

(e) Lender or its agents, acting by themselves or through a court-appointed receiver, may enter upon and/or take possession of the Secured Property and perform such acts as Lender deems necessary or desirable to inspect, investigate, assess, and protect the Secured Property, with or without notice of, and without releasing Borrower from, any obligation hereunder to cure any default of Borrower or Event of Default. All costs and expenses incurred by Lender with respect to the audits, tests, inspections, and examinations, which Lender or its agents or employees may conduct, including the fees of the engineers, laboratories, contractors, consultants, and attorneys, shall be paid by Borrower immediately upon demand;

UNOFFICIAL COPY

(f) To seek a judgment that Borrower has breached its covenants, representations and/or warranties with respect to Section 4.16 hereof, by commencing and maintaining an action or actions in any court of competent jurisdiction for breach of contract, whether commenced prior to or after foreclosure of the Secured Property;

(g) To seek the recovery from Borrower of any and all costs, damages, expenses, fees, penalties, fines, judgments, indemnification payments to third parties, and other out-of-pocket costs or expenses actually incurred or advanced by Lender, which relate to the cleanup, remediation, or other response action required by applicable law, or which Lender believes necessary to protect the Secured Property (collectively, the "Environmental Costs"), it being conclusively presumed between Lender and Borrower that all such Environmental Costs incurred or advanced by Lender relating to the cleanup, remediation, or other response action, of or to the Secured Property, were made by Lender in good faith. All Environmental Costs incurred by Lender under this subsection (including court costs, consultant fees and attorney fees, whether or not incurred in litigation and whether before or after judgment) shall be added to the Secured Debt and bear interest at the Default Rate from the date of expenditure until said sums have been paid in full. Notwithstanding any terms or provision contained herein, or in the Loan Documents, Borrower shall be fully and personally liable for the Environmental Costs hereunder, and all judgments and awards entered against Borrower in connection therewith, and such liability shall not be limited to the Principal Sum (as defined in the Note), and such obligations shall survive foreclosure, deed in lieu of foreclosure, release, reconveyance, or any other transfer of the Secured Property or this Mortgage; provided, however, Borrower shall not be liable for any Environmental Costs arising directly from the discharge, release, or disposal of any Hazardous Substance occurring for the first time after Lender, or a third party, has taken title to and actual possession of the Secured Property through foreclosure or deed-in-lieu of foreclosure, and such discharge, release, or disposal is unrelated to any presence, discharge, release, or disposal of any Hazardous Waste which existed prior to such taking of title and possession. For the purposes of any action brought under this subsection, to the maximum extent permitted by applicable law, Borrower hereby waives the defense of laches and any applicable statute of limitations;

(h) To waive its lien against the Secured Property, to the extent such property is found to be environmentally impaired, and to exercise any and all rights and remedies of an unsecured creditor against Borrower and all of Borrower's assets and property for the recovery of any deficiency and Environmental Costs;

(i) Exercise any other right or remedy available under law or in equity;

(j) Cause any of the Personal Property Collateral to be sold at any one or more public or private sales as permitted by applicable law, and Lender shall further have all other rights and remedies, whether at law, in equity, or by statute, as are available to secured creditors under applicable law. Any such disposition may be conducted by an employee or agent of Lender. Any person, including Lender, shall be eligible to purchase any part or all of such property at any such disposition; or

UNOFFICIAL COPY

(k) Exercise any and all other remedies available to a secured party under the State Uniform Commercial Code.

Section 3.2. Foreclosure.

(a) If more than one property, lot or parcel is covered by this Mortgage, and if this Mortgage is foreclosed upon, such foreclosure action may be pursued against any one or more of the properties, lots or parcels and not upon the others, or upon all of such properties or parcels, either together or separately, and at different times or at the same time, and foreclosure sales may likewise be conducted separately or concurrently, in each case at Lender's election.

(b) In the event of a foreclosure of this Mortgage, the Obligations then due to Lender shall not be merged into any decree of foreclosure entered by the court, and Lender may concurrently or subsequently seek to foreclose one or more other mortgages which also secure the Obligations.

Section 3.3. Remedies Not Exclusive. To the extent permitted by applicable law, Lender shall be entitled to enforce payment of the Indebtedness and performance of any Obligations, and to exercise all rights and powers under this Mortgage or any other Loan Document or under any other agreement or any laws now or hereafter in force, without regard to whether or not some or all of the Secured Debt may now or hereafter be otherwise secured by mortgage, pledge, lien, assignment, or otherwise. Acceptance of this Mortgage or its enforcement, whether by court action or pursuant to other powers contained herein, shall not prejudice, or in any manner affect, Lender's right to realize upon or enforce any other security now or hereafter held by Lender. Lender shall be entitled to enforce this Mortgage, and any other security now or hereafter held by Lender, in such order and manner as they or either of them may in their absolute discretion determine, except as otherwise required by law. No remedy in this Mortgage conferred upon or reserved to Lender is intended to be exclusive of any other remedy herein, or by law provided or permitted. Each remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter existing at law, in equity, or by statute. Each time Borrower fails or refuses to make payment, or to perform, as required by the Loan Documents, Lender shall have the right, exercisable in Lender's sole discretion, to cure all or any part of such failure or refusal upon such terms as Lender shall, in its sole discretion, deem necessary or advisable, but in accordance with the Loan Documents. Any amounts advanced by Lender pursuant to this provision shall be added to, and deemed a part of, the Indebtedness, be secured in the same manner as the Note is secured, and be payable to Lender on demand, with interest at the Contract Rate or Default Rate, as applicable, from the date of the advance until paid in full.

Section 3.4. Proceeds of Foreclosure Sale. In any foreclosure of this Mortgage, there shall be allowed, and included in the decree for sale, to be paid out of the rents or the proceeds of such foreclosure proceeding or sale the following:

(a) all of the Obligations and other sums secured hereby which then remain unpaid;

UNOFFICIAL COPY

(b) all other items advanced or paid by Lender pursuant to the Loan Agreement, this Mortgage, the Assignment of Rents and Leases or the Environmental Indemnity, with interest thereon at the Default Rate specified in the Note from the date of advancement; and

(c) all court costs, reasonable attorneys' and paralegals' fees and expenses, appraiser's fees, advertising costs, notice expenses, expenditures for documentary and expert evidence, stenographer's charges, publication costs, and costs, which may be estimated as to items to be expended after entry of the decree, of procuring all abstracts of title, title searches and examinations, title guarantees, title insurance policies and similar data with respect to title which Lender may deem necessary. All such expenses shall become additional Obligations secured hereby and shall be immediately due and payable, with interest thereon at the Default Rate specified in the Note, when paid or incurred by Lender in connection with any proceedings, including, but not limited to, probate and bankruptcy proceedings, to which Lender shall be a party, either as plaintiff, claimant, or defendant, by reason of this Mortgage or any indebtedness hereby secured or in connection with the preparations for the commencement of any suit for foreclosure, whether or not actually commenced. The proceeds of any sale shall be distributed and applied to the items described in (a), (b) and (c) of this paragraph as Lender may in its sole discretion determine, and any surplus of the proceeds of such sale shall be paid to Borrower.

Section 3.5. Marshalling. To the maximum extent permitted by applicable law, Borrower waives all rights to direct the order in which the Secured Property will be sold in the event of a Sale under this Mortgage, and also any right to have any of the Secured Property marshalled upon Sale.

Section 3.6. Remedies are Cumulative. All remedies contained in this Mortgage are cumulative, and Lender shall have all other remedies provided by law or in any other agreement between Borrower and Lender. The delay or failure of Lender to exercise any right or remedy under the Loan Documents will not be construed as a waiver of any right or remedy, or any Event of Default. Lender may exercise any one or more of its rights and remedies, at its option, without regard to the adequacy of its security. To the extent permitted by applicable law, every power or remedy given to Lender by any of the Loan Documents, or otherwise, may be exercised by Lender concurrently or independently, from time to time, as often as Lender may determine, and Lender may pursue inconsistent remedies.

Section 3.7. WAIVER OF RIGHT OF REDEMPTION. BORROWER REPRESENTS THAT IT HAS BEEN AUTHORIZED TO, AND BORROWER DOES HEREBY WAIVE, TO THE FULL EXTENT PERMITTED UNDER LAW, ANY AND ALL STATUTORY OR EQUITABLE RIGHTS OF REDEMPTION, REINSTATEMENT OR ANY OTHER RIGHT UNDER ANY "MORATORIUM LAW" ON BEHALF OF BORROWER AND EACH AND EVERY PERSON ACQUIRING ANY INTEREST IN OR TITLE TO THE SECURED PROPERTY SUBSEQUENT TO THE DATE HEREOF.

Section 3.8. Recourse. Reference is made to Section 10.13 of the Loan Agreement, which is incorporated herein by reference, for limitations on the personal liability of Borrower and related parties with respect to the Secured Debt.

UNOFFICIAL COPY

ARTICLE IV MISCELLANEOUS

Section 4.1. Severability. The invalidity or unenforceability of any one or more provisions of this Mortgage will not affect any other provision of this Mortgage.

Section 4.2. Processing Fees. Borrower shall pay Lender a reasonable charge for, and reasonable attorney fees in connection with, considering, negotiating, preparing, and providing, at Borrower's request: (a) a waiver of any provision of, or amendment or modification to, any of the Loan Documents; or (b) any approval or other document requested by Borrower. Such charges shall be payable, whether or not Lender complies with Borrower's request.

Section 4.3. Notices. All notices, demands, consents, approvals, requests or other communications provided for, or required to be given or furnished, by either party at the address specified on the first page of this Mortgage, or under any of the other Loan Documents, shall be in writing and delivered in accordance with the Loan Agreement.

Section 4.4. Release, Modification, Partial Reconveyance. Without affecting Borrower's liability for the payment of the Secured Debt, Lender may from time to time, without notice: (a) release any person liable for the payment of the Secured Debt; (b) extend or modify the Indebtedness and/or any of the Obligations; (c) accept additional real or personal property of any kind as security, or alter, substitute, or release any of the Secured Property; or (d) consent to any map or plat of the Real Property Collateral, reconvey any part of the Real Property Collateral, join in granting any easement or creating any restriction on the Real Property Collateral, or join in any subordination or other agreement affecting this Mortgage.

Section 4.5. Inspections. Upon at least two (2) days notice anytime prior to an Event of Default, and at any time, without notice, during the continuance of an Event of Default, Lender may enter upon and inspect the Secured Property in person or by agent, subject to Borrower's indemnity (and the exclusions thereto) in Section 9.6 of the Loan Agreement and the rights of tenants of the Improvements.

Section 4.6. Release. Upon payment in full of the Secured Debt, or otherwise in accordance with Section 4.6(d) of the Note, Lender shall release the lien of this Mortgage from the Secured Real Property. Borrower must pay all costs and expenses in connection with the release, including recordation in the applicable public records.

Section 4.7. Statutes of Limitations. Borrower waives all present and future statutes of limitations as a defense to any action to enforce the provisions of this Mortgage, collect any Indebtedness or enforce the Obligations to the fullest extent permitted by applicable law.

Section 4.8. Borrower and Lender Defined. The term "Borrower" includes both the original Borrower and any subsequent owner or owners of any of the Secured Property. The term "Lender" includes the original Lender and also any future owner or holder, including the pledgees and participants, of the Note or any interest therein. If more than one person or entity constitutes, collectively, Borrower, all of the provisions with reference to Borrower shall be construed to refer to each such person or entity. For example, if there are two persons who are,

UNOFFICIAL COPY

collectively, Borrower, and one shall become bankrupt, then Lender shall have the right to invoke the remedies set forth in this Mortgage applicable to the bankruptcy of Borrower.

Section 4.9. Number and Gender. Whenever the context requires, the singular includes the plural and vice versa and each gender includes each other gender.

Section 4.10. Captions; Modifications. The captions and headings of the articles and sections of this Mortgage are for convenience only and are not to be used in construing this Mortgage. The provisions of any of the Loan Documents may be amended, or waived, only by written instrument executed by Borrower and Lender.

Section 4.11. Successors and Assigns; Transfer by Lender. This Mortgage will bind and benefit the legal representatives, successors, and assigns of Borrower and Lender. This provision does not alter, limit or restrict the effect of the transfer restrictions contained herein. Lender may, in accordance with the provisions of the Loan Agreement, sell, assign, or otherwise transfer all or any portion of the Loan, its rights under the Loan Documents, and the Environmental Indemnity, including, granting or selling participations therein, to one or more institutional investors, or affiliates thereof, or to one or more of Lender's wholly-owned subsidiaries, all without notice to or the consent of Borrower.

Section 4.12. Governing Law, Jurisdiction. To induce Lender to accept this Mortgage, Borrower irrevocably agrees that all actions or proceedings in any way, manner or respect, arising out of or from or related to this Mortgage may be litigated or enforced in the state or federal courts located in Cook County, Illinois. Borrower hereby consents and submits to the jurisdiction of any such court located within said county and hereby waives any objection it may have based on improper venue or forum non conveniens to the conduct of any proceeding brought against Borrower by Lender in accordance with this paragraph.

Section 4.13. Intentionally Omitted.

Section 4.14. Consents and Approvals. No waiver of any Event of Default, or breach by Borrower under the Loan Documents, shall be implied from any omission by Lender to take action on account of such Event of Default or breach, if such Event of Default or breach persists or is repeated. No express waiver shall affect any Event of Default or breach, other than the Event of Default or breach specified in the waiver. Any such waiver shall be operative only for the time, and to the extent, stated in a writing executed by a senior officer of Lender. Waivers of any covenant, term, or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term, or condition. Lender's consent to or approval of any act or omission by Borrower, requiring further consent or approval, shall not be deemed to waive, or render unnecessary, the consent to or approval of any subsequent and/or similar act.

Section 4.15. Indemnity. Borrower shall indemnify, defend, and hold Lender harmless with respect to Losses (as defined in the Loan Agreement), which may be imposed on, incurred, suffered or paid by, or asserted against, Lender by reason, on account of, or in connection with: (a) any negligence, willful misconduct, or default of Borrower, Guarantor, (as defined in the Loan Agreement) any lessee, or any of their respective agents, contractors, subcontractors, servants, employees, licensees, or invitees causing or resulting in an Event of Default under any

UNOFFICIAL COPY

Loan Document; (b) Lender's good faith and commercially reasonable exercise of any of its rights and remedies, or the performance of any of its duties, under any Loan Document; (c) any assertion or claim of liability or responsibility of Lender for (i) the payment or performance by Borrower or Guarantor of any indebtedness or obligation of Borrower or Guarantor contemplated under the Loan Documents, or (ii) the cost of any investigation, litigation, or other proceeding, including any threatened investigation, litigation, or other proceeding relating to any of the foregoing; (d) the construction, reconstruction, or alteration of the Secured Property; or (e) any accident, injury, death, or damage to any person or property occurring in, on, about, or in connection with the Secured Property, or any street, drive, sidewalk, curb, or passageway adjacent thereto, except to the extent caused by the willful misconduct or gross negligence of Lender. Borrower's obligations to Lender under this Section 4.15 shall be the same as Borrower's obligations to Lender under Section 9.6 of the Loan Agreement, and the provisions of Section 9.6 of the Loan Agreement are deemed incorporated into this Mortgage in order to impose such obligations on Borrower with respect to Lender hereunder.

Section 4.16. Hazardous Substances.

(a) For purposes of this Mortgage the terms "Hazardous Substance", "CERCLA", "RCRA", and "Environmental Law" shall have the meanings specified in the Loan Agreement.

(b) Borrower represents, warrants, acknowledges and agrees that:

(i) To Borrower's Knowledge, the Secured Property does not contain any Hazardous Substance, except that which is disclosed in the environmental site assessments and other reports listed on Exhibit N to the Loan Agreement (such reports collectively referred to as the "ESA");

(ii) Borrower has no Knowledge that any Hazardous Substance is present, used, manufactured, handled, generated, transported, stored, treated, discharged, released, buried or disposed of on, under or about the Secured Property, other than as specifically disclosed in the ESA.

(iii) Borrower has obtained environmental site assessments, copies of which have been furnished to Lender. Such assessment included inquiry into the previous ownership and uses of the Secured Property consistent with good commercial or customary practices in an effort to minimize liability under CERCLA and all other statutes referred to in subsection (a) of this section as specified in 42 U.S.C. Sections 9601 (35) (A) and 9607(b), all as amended, except that this clause (iii) is subject to that which is specifically disclosed in the ESA;

(iv) Borrower has not undertaken, permitted, authorized or suffered, and will not undertake or authorize or knowingly suffer or permit, the manufacture, handling, generation, transportation, storage, treatment, discharge, release, burial or disposal of any Hazardous Substance on, under or about, or in a location that may adversely affect, the Secured Property, or the transportation to or from the Real

UNOFFICIAL COPY

Property Collateral of any Hazardous Substance, other than as specifically disclosed in the ESA;

(v) There is no pending or, to Borrower's best Knowledge, threatened, litigation or proceedings before any administrative agency in which any person or entity alleges the release or threat of release of Hazardous Substances, or their placement on, under, about, or in connection with the Secured Property, or the use, manufacture, handling, generation, transportation, storage, treatment, discharge, burial or disposal of Hazardous Substances, on, under, about, or in connection with the Secured Property, or the transportation of Hazardous Substances, to or from the Real Property Collateral, other than as specifically disclosed in the ESA;

(vi) The undersigned has not received any notice and has no Knowledge that any Governmental Authority or any employee or agent thereof has determined, or threatens to determine, that there is a presence, release or threat of release of Hazardous Substances, or the placement of Hazardous Substances on, under, about, or in connection with the Secured Property, or the manufacture, handling, generation, transportation, storage, treatment, discharge, burial or disposal of Hazardous Substances, on, under, about, or in connection with the Secured Property, or the transportation of Hazardous Substances to or from the Real Property Collateral, other than as specifically disclosed in the ESA;

(vii) There have been no communications or agreements by Borrower with any Governmental Authority or any private entity, including any prior owners of the Secured Property, relating in any way to the release, threat of release or placement of Hazardous Substances on, under, about, or in connection with the Secured Property, or the manufacture, generation, transportation, storage, treatment, discharge, burial or disposal of Hazardous Substances, on, under, about, or in connection with the Secured Property, or the transportation of Hazardous Substances, to or from the Real Property Collateral other as specifically disclosed in the ESA;

(viii) Neither Borrower nor, to the best Knowledge of Borrower, any other person, including any predecessor owner, tenant, licensee, occupant, user or operator of the Secured Property, has ever caused, permitted, authorized or suffered, and Borrower will not cause, permit, authorize or suffer any Hazardous Substance to be placed, held, located or disposed of, on, under, about, or in connection with any other real property all or any portion of which is legally or beneficially owned (or any interest or estate therein which is owned) by Borrower in any jurisdiction now or hereafter having in effect a so called "Superlien" law or ordinance or any part thereof the effect of which law or ordinance would be to create a lien on the Secured Property to secure any obligation in connection with the real property in such other jurisdiction other than that which is specifically disclosed in the ESA;

(ix) Borrower has no Knowledge of any occurrence or condition on the Secured Property or on any real property adjoining or in the vicinity of the Real Property Collateral that could cause the Secured Property to be subject to any restrictions on the ownership, occupancy, transferability or use of the Secured Property

UNOFFICIAL COPY

under any Environmental Laws or any other federal, state or local Governmental Requirements relating to Hazardous Substances, except as disclosed in the ESA.

(c) Borrower recognizes and acknowledges that in entering into this Loan transaction and accepting this Mortgage, Lender is expressly and primarily relying on the truth and accuracy of the foregoing warranties and representations without any obligation to investigate the Secured Property; that such reliance exists on the part of Lender despite any environmental reports or investigations which may have been submitted to Lender prior hereto; that such warranties and representations are a material inducement to Lender in making the Loan and accepting this Mortgage; and that Lender would not be willing to make the Loan and accept this Mortgage in the absence of any of such warranties and representations.

(d) Borrower shall keep and maintain the Secured Property in compliance with and shall not cause or permit the Secured Property to be in violation of, any Environmental Laws relating to health and safety, industrial hygiene or to the environmental conditions on, under, about, or in connection with the Secured Property including air, soil and ground water conditions. Borrower, any agent, servant, employee, or tenant shall not generate, manufacture, handle, store, treat, discharge, release, bury, or dispose of on, under or about, or in a location that may adversely affect, the Secured Property, any Hazardous Substance in violation of any Environmental Law. Without limiting the generality of the foregoing provisions of this subsection, and at all times, Borrower shall fully comply in a timely manner with, and cause all of its employees, agents, contractors, subcontractors, tenants and any other persons occupying or present on the Real Property Collateral to so comply with, all Environmental Laws applicable to the generation, manufacture, handling, storage, treatment, discharge, release, burial or disposal of any Hazardous Substance now or hereafter located or present on, under, about, or in connection with the Secured Property, or the transportation to or from the Real Property Collateral of any Hazardous Substance. Any lease concerning the Secured Property shall contain a provision prohibiting the lessee, and any agent, servant, employee or tenant of the lessee, from generating, manufacturing, storing, treating, discharging, releasing, burying or disposing on, under, about, or in connection with the Secured Property, or transporting to or from the Real Property Collateral, any Hazardous Substance.

(e) If the release, threat of release, placement on, under, about, or in connection with the Real Property Collateral, or the use, generation, manufacture, storage, treatment, discharge, release, burial or disposal on, under or about, or in a location that may adversely affect, the Secured Property, or transportation to or from the Real Property Collateral, of any Hazardous Substance: (i) gives rise to liability, costs or damages (including a response action, remedial action, or removal action) under RCRA, CERCLA, the State Toxic Substances Laws, or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decision of a state or federal court, (ii) causes or threatens to cause a significant public health effect, or (iii) pollutes or threatens to pollute the environment, Borrower shall promptly take any and all response, investigation, remedial and removal action required by applicable law to clean up the Secured Property and any other affected property and mitigate exposure to liability arising from the Hazardous Substance.

(f) Borrower shall indemnify, defend with counsel selected by Lender, protect and hold harmless Lender, its directors, officers, employees, agents, assigns and any

UNOFFICIAL COPY

successor or successors to Lender's interest under the Note, this Mortgage and/or the Secured Property through foreclosure or deed in lieu of foreclosure from and against all Losses of any kind whatsoever which may be imposed on, paid, incurred or suffered by, or asserted against, any indemnified party at any time before, on or after the date of foreclosure of the Secured Property by Lender or any transfer of the Secured Property to Lender in lieu of foreclosure directly or indirectly arising from or attributable to (i) any breach by Borrower of any of its agreements, warranties or representations set forth in this Section 4.16, or the actions or omissions of Borrower (irrespective of Borrower's lack of notice (actual or constructive)) with respect to Hazardous Substances, or (ii) any repair, cleanup or detoxification, or preparation and implementation of any investigation, removal, remedial response, closure or other plan concerning any Hazardous Substance on, under, about, or in connection with the Secured Property, regardless of whether undertaken due to governmental action. To the fullest extent permitted by applicable law, the foregoing indemnification shall apply regardless of the fault, active or passive negligence, breach of warranty or contract of Lender; provided, however, that Borrower shall not have any obligation pursuant to this subsection (f) with respect to those Losses arising directly by reason of the gross negligence or willful misconduct of Lender. Without limiting the generality of the foregoing indemnity, such indemnity is intended to operate as an agreement pursuant to Section 107 (e) of CERCLA, 42 U.S.C. Section 9607(e), to insure, protect, hold harmless and indemnify Lender for any liability pursuant to such statutes.

(g) In the event of any release of, or the discovery of any disposal of, any Hazardous Substance on, under, about, or in connection with the Secured Property, except as disclosed by the ESA, or the incurring of any expense or loss by a Governmental Authority or third party in connection with any such Hazardous Substance, in violation of any Environmental Laws for which Borrower may be liable or for which a lien may be imposed on the Secured Property, Borrower shall immediately notify Lender in writing and shall take all steps necessary to abate and remove all such released or disposed substances to background levels. Whenever Borrower shall take any such remedial action, or enters into any settlement agreement, consent decree or other compromise with respect to any Hazardous Substances claims, Borrower shall notify Lender in writing as soon as practicable thereafter of any such remedial action so taken or any such settlement agreement, consent decree or other compromise entered into, and, on a contemporaneous basis, provide to Lender (i) copies of all data, reports, proposals and studies regarding such remediation or investigation of or preparation for remediation, and (ii) provide Lender with a true and correct copy of any such settlement agreement, consent decree or other compromise entered into.

(h) Without Lender's prior written consent, which shall not be unreasonably withheld, conditioned or delayed, except as contemplated by the ESA, Borrower shall not take any remedial action in response to the presence of any Hazardous Substance on, under, about, or in connection with the Secured Property, nor enter into any settlement agreement, consent decree, or other compromise in respect to any claims referred to in subsection (f), which remedial action, settlement, consent or compromise might, in Lender's reasonable judgment, impair the value of Lender's security hereunder; provided, however, that Lender's prior consent shall not be necessary if the presence of any Hazardous Substance on, under, about, or in connection with the Secured Property either poses an immediate threat to the health, safety or welfare of any individual or is of such a nature that an immediate remedial response is necessary and it is not possible to obtain Lender's consent before taking such action,

UNOFFICIAL COPY

provided that in such event Borrower shall notify Lender as soon as practicable of any action so taken. Lender shall not withhold its consent, where such consent is required hereunder, if either (i) a particular remedial action is ordered by a court of competent jurisdiction, or (ii) Borrower establishes to the reasonable satisfaction of Lender that there is no reasonable alternative to such remedial action which would result in less impairment of Lender's security hereunder; provided that if Lender's security is impaired in Lender's reasonable judgment, Borrower, within ten days after Lender's request therefore, shall provide Lender with additional or substitute security acceptable to Lender in its sole discretion, and shall execute, acknowledge, deliver and record such documents and instruments as Lender reasonably requests to grant and perfect such security interest.

(i) The failure of Borrower to comply with any of the foregoing covenants, and the expiration of any applicable notice and cure periods will, to the extent permitted by applicable law, automatically entitle Lender to appoint a receiver to operate the Secured Property.

(j) The representations and warranties set forth in Sections 4.16(b)(vi), (b)(vii) and (b)(viii) and the covenants set forth in Sections 4.16(e) and (f) shall not apply to any materials that would be included within the definition of "Hazardous Substance" which are customarily used in the construction, operation, maintenance and cleaning of properties similar to the Secured Property, or to common household items, if the same are stored in reasonable quantities and used in accordance with applicable Environmental Laws and manufacturer's recommended standards.

(k) Without limitation to any other provisions hereof, all rights of Lender and all obligations of Borrower under this Section 4.16 shall survive the following, as unsecured rights and obligations: (i) the payment of the Indebtedness and performance of the Obligations; (ii) the surrender of the Note, reconveyance of this Mortgage and/or release of any other security for the Loan; (iii) the acquisition of the Secured Property by Lender; and (iv) the transfer of all of Lender's rights under the Loan Documents and/or the Secured Property. All references to Borrower hereunder shall include Borrower's successors and assigns.

Section 4.17. Intentionally Omitted.

Section 4.18. Time of Essence. Time shall be of the essence in the payment and performance by Borrower of the obligations of Borrower under this Mortgage, under the other Loan Documents and under the Environmental Indemnity.

Section 4.19. Business or Commercial Purpose. Borrower warrants that the extension of credit evidenced by the Note is solely for business and commercial purposes.

Section 4.20. Changes in Law Regarding Taxation. In the event of the passage after the date of this Mortgage of any law of the State deducting from the value of the Secured Property for the purpose of taxation any lien or Encumbrance thereon or changing in any way the laws for the taxation of mortgages or debts secured by mortgages for state or local purposes or the manner of the collection of any such taxes, and imposing a tax, duty, levy, impost, fee or other charge (collectively, "Tax"), either directly or indirectly, on this Mortgage or the Note, Lender may, at

UNOFFICIAL COPY

its option, upon ninety (90) days' written notice to Borrower, declare the Note to be due and payable, without any prepayment premium or penalty; provided, however, that Lender shall not make such declaration and this Mortgage shall remain in effect if, notwithstanding said law: (a) (i) Borrower may lawfully pay such taxes on behalf of Lender or (ii) Borrower and Lender may lawfully, and do, enter into an enforceable agreement obligating Borrower to pay to Lender an amount equal to any increase in taxation or charges imposed on or incurred by Lender by reason of such change in law (which agreement shall become part of this Mortgage), and (b) Borrower does in fact pay such taxes or such increases in taxation or charges, as applicable.

Section 4.21. Further Assurances. Borrower will, at Borrower's sole cost and expense and at the reasonable request of Lender, (a) promptly correct any defect or error which may be discovered in the contents of the Note, the other Loan Documents, the Environmental Indemnity or in the execution, acknowledgment or recordation thereof, (b) promptly do, execute, acknowledge and deliver, any and all such further acts, deeds, conveyances, mortgages, trust deeds, assignments, estoppel certificates, security agreements, notices of assignment and of security interest, transfers, certificates, assurances and other instruments as Lender may reasonably require from time to time in order to carry out more effectively the purposes of this Mortgage, to subject to the lien and security interest hereby created any of Borrower's properties, rights or interests covered or now or hereafter intended to be covered hereby, to perfect and maintain said lien and security interest and to better assure, convey, grant, assign, transfer and confirm unto Lender the rights granted or now or hereafter intended to be granted to Lender hereunder or under any other instrument executed in connection with this Mortgage or which Borrower may be or become bound to convey or assign to Lender in order to carry out the intention or facilitate the performance of the provisions of this Mortgage; provided, however, that nothing contained in this Section shall be construed to permit Lender to unilaterally require a material change in the substantive terms and conditions of the Note, the other Loan Documents or the Environmental Indemnity.

Section 4.22. Recordation and Re-Recordation of Mortgage. Borrower will, at the reasonable request of Lender, promptly record and re-record, file and refile and register and re-register this Mortgage, any financing or continuation statements and every other instrument in addition or supplemental to any thereof that shall be required by any present or future law in order to perfect and maintain the validity, effectiveness and priority of this Mortgage and the lien and security interest intended to be created hereby, or to subject after acquired property of Borrower to such lien and security interest, in such manner and places and within such times as may be reasonably necessary to accomplish such purposes and to preserve and protect the rights and remedies of Lender. Borrower will furnish to Lender evidence reasonably satisfactory to Lender of every such recording, filing or registration. Lender may file copies or reproductions of this instrument at any time and from time to time at Lender's option without further authorization from Borrower.

Section 4.23. Defense of Title and Litigation. If the lien, security interest, validity, enforceability or priority of this Mortgage, or if title or any of the rights of Lender in or to the Secured Property, shall be endangered, or shall be attacked directly or indirectly or if any action or proceeding is instituted against Borrower or Lender with respect thereto, Borrower will, upon obtaining knowledge thereof, promptly notify Lender and will diligently endeavor to cure any defect which may be developed or claimed, and will take all commercially reasonable, necessary

UNOFFICIAL COPY

and proper steps for the defense of such action or proceeding, including the employment of counsel, the prosecution or defense of litigation and, subject to Lender's reasonable approval, the compromise, release or discharge of any and all adverse claims. Lender (whether or not named as a party to such actions or proceedings) is hereby authorized and empowered (but shall not be obligated) to take such additional steps as it may deem necessary or proper for the defense of any such action or proceeding or the protection of the lien, security interest, validity, enforceability or priority of this Mortgage or of such title or rights, including the employment of counsel, the prosecution or defense of litigation, the compromise, release or discharge of such adverse claims, the purchase of any tax title and the removal of such prior liens and security interests. Borrower shall, on demand, reimburse Lender for all reasonable expenses (including reasonable attorneys' fees and disbursements) incurred by Lender in connection with the foregoing matters, and the party incurring such expenses shall be subrogated to all rights of the person receiving such payment. All such costs and expenses of Lender, until reimbursed by Borrower, shall be deemed to be secured by this Mortgage.

Section 4.24. Validity, Perfection and Enforceability. This Mortgage, when duly recorded and when financing statements are duly filed in the appropriate public records, will create a valid, perfected and enforceable lien upon and security interest in all the Secured Property, and there will be no defenses or offsets to this Mortgage or to the Secured Debt at the time this Mortgage is recorded.

Section 4.25. Commissions and Brokerage Fees. Borrower shall indemnify Lender against and protect, defend and hold Lender harmless from any action, suit, claim, debt, loss, demand, liability, or expense, including reasonable attorney's fees and court costs arising from or in connection with the payment of any brokerage commissions, charges or fees which may be payable or which may be alleged to be payable in connection with the Loan or any other activities, events or occurrences herein contemplated, it being acknowledged by Borrower that any such commissions, charges or fees, or the defense against claims for any of the foregoing, shall be paid solely by Borrower to the party or parties entitled thereto.

Section 4.26. Waiver of Homestead and Redemption. Borrower releases and waives all rights under the homestead and exemption laws of the State of Illinois. Borrower acknowledges that the Property does not include "agricultural real estate" or "residential real estate" as those terms are defined in 735 ILCS 5/15-1201 and 5/15-1219. Pursuant to 735 ILCS 5/15-1601(b) Borrower waives any and all rights of redemption from sale under any order of foreclosure of this Mortgage or other rights of redemption which may run to Borrower or any other "Owner of Redemption", as that term is defined in 735 ILCS 5/15-1212. Borrower waives all rights of reinstatement under 735 ILCS 5/15-1602 to the fullest extent permitted by Illinois law.

Section 4.27. Nonforeign Entity. Section 1445 of the Internal Revenue Code of 1986, as amended ("Internal Revenue Code"), provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform Lender that the withholding of tax will not be required in the event of the disposition of the Secured Property pursuant to the terms of this Mortgage, Borrower hereby certifies, under penalty of perjury, that:

UNOFFICIAL COPY

(a) Borrower is not a foreign corporation, foreign partnership, foreign trust or foreign estate, as those terms are defined in the Internal Revenue Code and the regulations promulgated thereunder;

(b) Borrower's U.S. employer identification number is 20-3929113;
and

(c) Borrower's principal place of business is c/o Magellan Development Group, Ltd., 303 East Wacker Drive, Suite 2750, Chicago, Illinois 60601.

It is understood that Lender may disclose the contents of this certification to the Internal Revenue Service and that any false statement contained herein could be punished by fine, imprisonment or both. Borrower shall execute such further certificates, which shall be signed under penalty of perjury, as Lender shall reasonably require. The covenant set forth herein shall survive the foreclosure of the lien of this Mortgage or acceptance of a deed in lieu thereof.

Section 4.28. Language of Agreement. The language of this Mortgage, the other Loan Documents and the Environmental Indemnity shall be construed as a whole according to its fair meaning, and not strictly for or against any party. As used in this Mortgage, the term "including" means "including, without limitation" and the term "Secured Property" means all, or any part or portion of the Secured Property.

Section 4.29. Integrated Contract. This Mortgage, the other Loan Documents, the Environmental Indemnity and any agreement, document or instrument attached hereto or thereto or referred to herein or therein integrate all the terms and conditions mentioned herein or incidental hereto, and supersede all oral negotiations and prior writings in respect to the subject matter hereof.

Section 4.30. Waivers. To the fullest extent permitted by applicable law, Borrower waives the benefit of all laws now existing or that hereafter may be enacted providing for (a) any appraisal before Sale of the Secured Property or (b) in any way extending the time for the enforcement or the collection of the Note or the Indebtedness evidenced thereby, or creating or extending a period of redemption from any Sale made in collecting said Indebtedness. To the fullest extent permitted by applicable law, Borrower shall not: (i) at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force providing for any appraisal, valuation, stay, extension or redemption; and (ii) Borrower, for Borrower, Borrower's representatives, successors, and assigns, and for any and all persons ever claiming any interest in the Secured Property, hereby waives and releases all rights of redemption, valuation, appraisal, stay of execution, notice of election to mature or declare due the whole of the Indebtedness and marshalling in the event of foreclosure of the liens hereby created. If any law referred to in this Section and now in force, of which Borrower, Borrower's representatives, successors and assigns or other person might take advantage despite this Section, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this Section. Borrower expressly waives and relinquishes any and all rights and remedies, which Borrower may have or be able to assert by reason of the laws or decisions of the State pertaining to the rights and remedies of sureties.

UNOFFICIAL COPY

Section 4.31. References to Loan Documents. All references in this Mortgage to this Mortgage, and/or any other Loan Documents shall include and be deemed to include a reference to any and all amendments, modifications, substitutions, replacements, rearrangements, restatements, extensions, and renewals thereof and thereto, executed by Lender.

Section 4.32. Waiver of Jury Trial; Damages. Each of Lender and Borrower hereby waives the right to a trial by jury in any action or proceeding based upon, or related to, the subject matter of the Note, this Mortgage securing same or any other Loan Document. Neither Lender nor Borrower shall seek to consolidate any such action in which a jury trial has been waived, with any other action in which a jury trial cannot or has not been waived. This waiver is knowingly, intentionally and voluntarily made by Borrower and Lender, and Borrower and Lender each acknowledges that no person has made any representations of fact to induce this waiver of jury trial. Borrower acknowledges (a) that it bargained at arm's length and in good faith, without duress, (b) that the provisions hereof shall be subject to no exceptions whatever, (c) that it has been represented (or has had the opportunity to be represented) in the signing of the Note, this Mortgage securing same or any other Loan Document and in the making of this waiver by independent legal counsel, selected of its own free will and (d) that it had the opportunity to discuss this waiver with counsel. Borrower and Lender each specifically acknowledges that no party has in any way agreed with or represented to any other party that the provisions of this Section will not be fully enforced in all instances. Borrower further acknowledges that it has read and understands the meaning and ramifications of this waiver provision and as evidence of this fact signs its initials.

Borrower's initials

Section 4.33. Costs of Enforcement. On demand, Borrower shall pay or reimburse Lender for the payment of any costs or expenses (including attorneys' fees and disbursements) incurred or expended by Lender in connection with or incidental to (a) any default or Event of Default, or (b) the exercise or enforcement by or on behalf of Lender of any of its rights or remedies or Borrower's obligations under this Mortgage or under the other Loan Documents, including (i) the enforcement, compromise or settlement of the obligations of the Note, and (ii) if prompted by an act or omission of Borrower, all actions taken by Lender to protect its security under the Note and the other Loan Documents, including consultation with an attorney whether or not the matter prompting such consultation is eventually involved in litigation. In the event either Borrower or Lender institutes an action against the other party with respect to this Mortgage, the non-prevailing party in such action shall pay all reasonable expenses incurred by the prevailing party, including but not limited to, reasonable attorneys' fees and court costs.

Section 4.34. Future Advances. This Mortgage is given to secure payment of the Note, whether the entire amount thereof shall have been advanced to Borrower at the date hereof, or at a later date, and to secure the payment and performance of all other liabilities and obligations of Borrower under the Note or under any other Loan Documents and any other amount or amounts that may be added to the indebtedness secured hereby under the terms of this Mortgage, all of which indebtedness being equally secured with and having the same priority as any amounts advanced at the date hereof. It is agreed that any future advances by Lender to or for the benefit of Borrower from time to time under this Mortgage or under any other Loan Documents and

UNOFFICIAL COPY

whether or not such advances are obligatory or are made at the option of Lender, or otherwise, made at any time from the date of this Mortgage, and all interest accruing thereon, shall be equally secured by this Mortgage and have the same priority as all amounts, if any, advanced as of the date hereof and be subject to all of the terms and provisions of this Mortgage; provided, however, that the aggregate amount of the indebtedness secured hereby together with all such additional sums advanced shall not exceed two hundred percent (200%) of the stated principal amount of the Note.

[Signature page follows]

Property of Cook County Clerk's Office

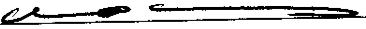
UNOFFICIAL COPY

Executed as of the day and year first above written.

BORROWER:

TIDES AT LAKESHORE EAST LLC, a
Delaware limited liability company

By: Lakeshore Tides LLC, an Illinois limited
liability company, its Managing Member

By:  _____
David Carlins, a Manager

Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF ILLINOIS)
)
 COUNTY OF COOK) SS

I, the undersigned, a Notary Public in and for the County and State aforesaid, do hereby certify that David Carlins personally known to me to be the Manager of Lakeshore Tides LLC, an Illinois limited liability company, which is the Managing Member of Tides at Lakeshore East LLC, a Delaware limited liability company, and personally known to be the same person whose name is subscribed to the foregoing instrument as such, appeared before me this day in person and acknowledged that he signed and delivered the said instrument in his capacity as Manager of such company, as his free and voluntary act and deed and as the free and voluntary act and deed of said company as Managing Member of Tides at Lakeshore East LLC, for the uses and purposes therein set forth.

Given under my hand and official seal this 24th day of May, 2006.

Leeann Plikuhn

 Notary Public



Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT "A" LEGAL DESCRIPTION

PARCEL 1:

LOT 14, TOGETHER WITH THE EAST 2.00 FEET OF LOT 22 IN LAKESHORE EAST SUBDIVISION, BEING A SUBDIVISION OF THE UNSUBDIVIDED LANDS LYING EAST OF AND ADJOINING FORT DEARBORN ADDITION TO CHICAGO, SAID ADDITION BEING IN THE SOUTHWEST FRACTIONAL QUARTER OF SECTION 10, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, ACCORDING TO THE PLAT OF SAID LAKESHORE EAST SUBDIVISION RECORDED MARCH 4, 2003 AS DOCUMENT 0030301045.

PARCEL 2:

NON-EXCLUSIVE EASEMENT APPURTENANT TO AND FOR THE BENEFIT OF PARCEL 1, INCLUDING EASEMENTS FOR ACCESS TO IMPROVEMENTS BEING CONSTRUCTED OVER TEMPORARY CONSTRUCTION EASEMENT AREAS, FOR PEDESTRIAN AND VEHICULAR INGRESS AND EGRESS ON, OVER, THROUGH AND ACROSS THE STREETS, AND TO UTILIZE THE UTILITIES AND UTILITY EASEMENTS, IN AND UPON LOTS AND PARTS OF LOTS IN LAKESHORE EAST SUBDIVISION AFOREMENTIONED, ALL AS MORE PARTICULARLY DEFINED, DESCRIBED AND CREATED BY DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR LAKESHORE EAST MADE BY AND BETWEEN LAKESHORE EAST LLC, LAKESHORE EAST PARCEL P LLC, AND ASN LAKESHORE EAST LLC DATED AS OF JUNE 26, 2002 AND RECORDED JULY 2, 2002 AS DOCUMENT 0020732020, AS AMENDED BY FIRST AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR LAKESHORE EAST EXECUTED BY LAKESHORE EAST LLC DATED AS OF MARCH 3, 2003 AND RECORDED MARCH 7, 2003 AS DOCUMENT 0030322531 AND AS FURTHER AMENDED BY SECOND AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR LAKESHORE EAST EXECUTED BY LAKESHORE EAST LLC DATED AS OF NOVEMBER 18, 2004 AND RECORDED NOVEMBER 19, 2004 AS DOCUMENT NUMBER 0501919098 AND AS FURTHER AMENDED BY THIRD AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR LAKESHORE EAST EXECUTED BY LAKESHORE EAST LLC DATED AS OF FEBRUARY 24, 2005 AND RECORDED FEBRUARY 25, 2005 AS DOCUMENT NUMBER 0505632009, AND LAST AMENDED BY THE FOURTH AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR LAKESHORE EAST EXECUTED BY LAKESHORE EAST LLC DATED AS OF FEBRUARY 24, 2005 AND RECORDED FEBRUARY 25, 2005 AS DOCUMENT 0505632012.

Common Address: 360 East South Water Street, Chicago, Illinois

PIN: 17-10-318-049
17-10-318-050