

UNOFFICIAL COPY



Horner IIB Rental – 10/24/06

Doc#: 0630442186 Fee: \$94.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 10/31/2006 01:20 PM Pg: 1 of 36

This instrument was prepared by:

Jay Gilbert, Esq.
Kutak Rock LLP
1 S. Wacker Dr., Suite 2050
Chicago, IL 60606

After recording, this instrument should be returned to:

Carol Turner, Esq.
Office of the General Counsel
Chicago Housing Authority
200 W. Adams St., Suite 2100
Chicago, IL 60606

4371065 (13)

SUBORDINATE MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

THIS SUBORDINATE MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT (this "Mortgage") is made as of the 1st day of October, 2006, by WHP-IIB, LLC, an Illinois limited liability company ("Mortgagor"), with an address of 666 Dundee Road, Suite 1102, Northbrook, Illinois 60062, to Chicago Housing Authority, an Illinois municipal corporation ("CHA"), together with its successors and assigns, having its principal office at 626 West Jackson Street, Chicago, Illinois 60661 (collectively, "Mortgagee").

All capitalized terms, unless otherwise defined herein, shall have the meaning ascribed thereto in that certain Chicago Housing Authority Loan Agreement dated of even date herewith between Mortgagor and Mortgagee (herein as the same may be amended, supplemented or restated from time to time called the "Loan Agreement").

WITNESSETH:

WHEREAS, Mortgagor has concurrently herewith executed and delivered a promissory note bearing even date herewith, in the principal sum of Ten Million Two Hundred Thirty-Six Thousand Two Hundred and One Dollars (\$10,236,201.00) payable to Mortgagee (herein such note, together with all amendments or supplements thereto, extensions thereof and notes which may be taken in whole or partial renewal, substitution or extension thereof, shall be called the "Note") in which Mortgagor promises to pay said principal sum, plus interest, if any, thereon, at the rate specified therein, upon the maturity thereof; and

WHEREAS, Mortgagee desires to secure repayment of the indebtedness evidenced by the Note, together with interest, if any, thereon, in accordance with the terms of the Loan Documents and any additional indebtedness or obligations incurred by Mortgagor on account of any future payments, advances or expenditures made by Mortgagee pursuant to this Mortgage, and/or all other agreements, instruments and documents executed and delivered to Mortgagee previously, now or hereafter by, on behalf of or for the benefit of Mortgagor in connection with the Premises (as hereinafter defined), including but not limited to this Mortgage, the Note, the Loan Agreement, the Assignment of Rents and Leases, the Declaration of Restrictive Covenants, UCC Financing Statements, the Environmental

UNOFFICIAL COPY

Indemnity Agreement, and the Regulatory and Operating Agreement, as defined below, all as from time to time amended, supplemented or restated (collectively, the "Loan Documents"); and

WHEREAS, the Loan Documents contemplate the construction of a mixed-income rental development having, in the aggregate, 127 residential dwelling units (the "Project Units") and certain associated infrastructure improvements, parking areas and open spaces; and

WHEREAS, 70 of the Project Units shall be CHA Units; and

WHEREAS, the property that is demised under the Ground Lease (as defined below) is legally described on Exhibit A attached hereto and consists of the subdivided lots and other legally described parcels of real property described therein; and

WHEREAS, CHA will provide financial assistance for the Project in conjunction with that provided by the U.S. Department of Housing and Urban Development ("HUD") under the U.S. Housing Act of 1937 (42 U.S.C. 1437, et seq.) (the "1937 Act") with respect to the 70 CHA Units and, in exchange for such assistance, Mortgagor will agree to develop, operate and maintain such CHA Units in accordance with All Applicable Public Housing Requirements.

NOW, THEREFORE, in order to secure payment of principal and interest, if any, under the Note and of all other payments due to Mortgagee by Mortgagor under any of the Loan Documents and performance of the covenants and agreements contained in this Mortgage, including any substitutions, extensions or modifications hereto, Mortgagor does grant, assign, warrant, convey and mortgage to Mortgagee, its successors and assigns, and grants to Mortgagee, its successors and assigns, forever a continuing security interest in and to, all of the following rights, interests, claims and property:

(A) all of the Mortgagor's interest and rights as tenant under that certain Ground Lease described on Exhibit A, as the same may be amended, modified, and supplemented from time to time in accordance with its terms (the "Ground Lease"), demising the real estate more particularly described on Exhibit A together with all of the Mortgagor's interest in infrastructure improvements, parking, open spaces and common areas, easements, water rights, hereditaments, mineral rights and other rights and interests appurtenant thereto (the "Real Property");

(B) all buildings, structures and other improvements of every kind and description now or hereafter erected, situated or placed upon the Real Property, together with any fixtures or attachments now or hereafter owned by Mortgagor and located in or on, forming part of, attached to, used or intended to be used in connection with or incorporated in the Real Property, including all extensions, additions, betterments, renewals, substitutions and replacements of any of the foregoing (the "Improvements");

(C) any interests, estates or other claims of every name, kind or nature, both at law and in equity, which Mortgagor now has or may acquire in the Real Property, the Improvements, the Equipment (as hereinafter defined) or any of the property described in clauses (D), (E), (F), (G), (H) or (I) hereof;

(D) all of Mortgagor's interest and rights in and to that certain Regulatory and Operating Agreement between Mortgagor and Mortgagee of even date (the "Regulatory and Operating Agreement"), together with all of Mortgagor's interest and rights as lessor in and to all leases, subleases and agreements, written or oral, now or hereafter entered into, affecting the Real Property, the Improvements, the Equipment or any part thereof, and all income, rents, rent subsidies (but only when received), issues, proceeds and profits accruing therefrom (provided that the assignment hereby made shall not diminish or impair the obligations of Mortgagor under the provisions of such leases, subleases or agreements, nor shall such obligations be imposed on Mortgagee);

UNOFFICIAL COPY

(E) all right, title and interest of Mortgagor in and to all fixtures, personal property of any kind or character now or hereafter attached to, contained in and used or useful in connection with the Real Property or the Improvements, together with all furniture, furnishings, apparatus, goods, systems, fixtures and other items of personal property of every kind and nature, now or hereafter located in, upon or affixed to the Real Property or the Improvements, or used or useful in connection with any present or future operation of the Real Property or the Improvements, including, but not limited to, all apparatus and equipment used to supply heat, gas, air conditioning, water, light, power, refrigeration, electricity, plumbing and ventilation, including all renewals, additions and accessories to and replacements of and substitutions for each and all of the foregoing, and all proceeds therefrom (the "Equipment");

(F) all of the estate, interest, right, title or other claim or demand which Mortgagor now has or may acquire with respect to (i) proceeds of insurance in effect with respect to the Real Property, the Improvements or the Equipment, and (ii) any and all awards, claims for damages, judgments, settlements and other compensation made for or consequent upon the taking by condemnation, eminent domain or any like proceeding of all or any portion of the Real Property, the Improvements or the Equipment;

(G) all intangible personal property, accounts, licenses, permits, instruments, contract rights, and chattel paper of Mortgagor, including, but not limited to cash, accounts receivable, bank accounts, certificates of deposit, rights (if any) to amounts held in escrow, deposits, judgments, liens and causes of action, warranties and guarantees, relating to the Real Property, the Equipment or the Improvements or as otherwise required under the Loan Documents;

(H) all other property rights of Mortgagor of any kind or character related to all or any portion of the Real Property, the Improvements or the Equipment; and

(I) the proceeds from the sale, transfer, pledge or other disposition of any or all of the property described in the preceding clauses.

All of the property referred to in the preceding clauses (A) through (I) shall be called, collectively, the "Premises." For purposes of this Mortgage, the "Act" shall mean the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 et seq., as amended, supplemented and restated from time to time.

IT IS FURTHER agreed, intended and declared that all the aforesaid property rights and interests shall, so far as permitted by law and as permitted by All Applicable Public Housing Requirements, be deemed to form a part and parcel of the Premises and be covered by this Mortgage.

TO HAVE AND TO HOLD the Premises unto Mortgagee and its successors and assigns, forever, for the purposes and uses herein set forth.

To protect the security of this Mortgage, Mortgagor further covenants and agrees as follows:

1. **Principal and Interest.** Mortgagor shall pay promptly when due the principal of and interest, if any, on the Note and any other sums required to be paid on the Note or under the other Loan Documents at the times and in the manner provided therein and shall pay any other indebtedness secured hereby as the same becomes due and shall perform and observe all of the covenants, agreements and provisions contained herein and in the other Loan Documents.

UNOFFICIAL COPY

2. Representation, Warranties and Covenants of Mortgagor.

(a) Mortgagor represents and warrants to Mortgagee as follows:

(i) all representations and warranties of Mortgagor contained in this Mortgage and the other Loan Documents are true, accurate and complete in all material respects at the time of Mortgagor's execution hereof and thereof and shall survive in all material respects the execution, delivery and acceptance hereof by the parties hereto for as long as any amounts payable under Section 1 hereof are outstanding;

(ii) Mortgagor is a limited liability company, duly organized and validly existing under the laws of the State of Illinois;

(iii) Mortgagor has the right, power and authority to enter into, execute and deliver and perform the terms and conditions of this Mortgage and the other Loan Documents;

(iv) the execution, delivery and performance by Mortgagor of this Mortgage and the other Loan Documents have been duly authorized by all necessary action of Mortgagor and will not violate any provision of law (including any order, writ, injunction or decree binding upon Mortgagor or the Premises) or the operating agreement of Mortgagor, or result in the breach of or constitute a default under or require any consent under or, other than the lien created by this Mortgage and other Loan Documents, result in the creation of any lien, charge or encumbrance upon the Premises or any other property or assets of Mortgagor under any agreement, instrument, restriction or document to which Mortgagor is now or hereafter a party or by which Mortgagor or the Premises are or may become bound or affected;

(v) Mortgagor has good, indefeasible and merchantable title to the Premises (which, with respect to the property described on Exhibit A hereto, shall be the leasehold estate under the Ground Lease), free and clear of all liens, charges and encumbrances except for those matters described in Exhibit C annexed hereto ("Permitted Exceptions");

(vi) Mortgagor is now solvent and able to pay its debts as they mature;

(vii) there are no actions or proceedings by or before any court or governmental commission, board, bureau or other administrative agency pending or to the Mortgagor's best knowledge, threatened, against or affecting Mortgagor which if adversely determined could materially and adversely affect Mortgagor's ability to perform its obligations under the Note, this Mortgage or the other Loan Documents, or which might result in any material, adverse change to Mortgagor's financial condition or may materially affect the Premises or Mortgagor's other property or assets; and

(viii) Mortgagor is not obligated under any written contract, lease or agreement with respect to the ownership, use, operation or maintenance of the Premises, except for the obligations of Mortgagor under the Regulatory and Operating Agreement, any management agreements and the Permitted Exceptions as described on Exhibit C hereto.

UNOFFICIAL COPY

(b) Mortgagor hereby covenants that Mortgagor shall:

(i) comply with all requirements of the Ground Lease, the Regulatory and Operating Agreement, and the Permitted Exceptions as described on Exhibit C hereto;

(ii) subject to the requirements of the Ground Lease, the Senior Loan Documents and the City Loan Documents, promptly repair, restore, replace or rebuild any portion of the Premises which may become damaged, destroyed, altered, removed, severed or demolished, whether or not insurance proceeds are available or sufficient for the purpose, with replacements of at least equal value and substantially the same character as existed prior thereto, free from any security interest in, encumbrances on or reservation of title thereto except Permitted Exceptions;

(iii) keep and maintain the Premises in good condition and repair, without waste and free from mechanics' liens, materialmen's liens or other liens and claims except Permitted Exceptions (provided that nothing contained herein shall affect or impair the Mortgagor's ability to diligently and in good faith contest any lien or bill for labor or materials, provided that any lien placed upon the Premises must be fully and irrevocably discharged (by bond or otherwise in a manner acceptable to CHA or an endorsement to lender's title insurance policy in form acceptable to CHA within 60 days after the date the same is first placed upon the Premises));

(iv) subject to the requirements of the Ground Lease, complete, within a reasonable time, any construction of improvements now or hereafter constructed upon the Premises;

(v) comply in all material respects with all statutes, rules, regulations, orders, decrees and other requirements of any federal, state or local governments having jurisdiction over the Premises and the use thereof, and observe and comply with both All Applicable Public Housing Requirements and any conditions and requirements necessary to preserve and extend any and all rights, licenses, permits (including without limitation zoning variances, special exceptions and non-conforming uses), privileges, franchises and concessions that are applicable to the ownership, renovation, use and occupancy of the Premises;

(vi) after completion of construction make no material alterations in the Premises (except those required by law and in the ordinary course of business) without Mortgagee's prior written consent, which consent will not be unreasonably withheld or delayed;

(vii) suffer or permit no change in the general nature of the occupancy or use of the Premises for residential purposes without Mortgagee's prior written consent;

(viii) for so long as there is no default under the Regulatory and Operating Agreement by Mortgagee, pay all operating costs of the Premises when due, including all utility charges and all other assessments or charges of a similar nature;

(ix) not initiate or acquiesce in any zoning reclassification with respect to the Premises, without Mortgagee's prior written consent;

(x) not abandon the Premises, nor do anything whatsoever to depreciate or impair the value of the Premises or the security of this Mortgage;

UNOFFICIAL COPY

(xi) refrain from any action and correct any condition which would increase the risk of fire or other hazard to all or any portion of the Premises;

(xii) not permit any unlawful use or nuisance to exist upon the Premises;

(xiii) comply in all material respects with all instruments and documents of record or otherwise affecting the use or occupancy of all or any portion of the Premises; and

(xiv) promptly pay when due any sums due, and promptly and fully perform any acts, required under the Project Loan Documents and the Ground Lease. Mortgagor will not, without prior written consent of Mortgagee, modify, extend or amend the Senior Loan Documents, the City Loan Documents or the AHP Loan Documents to increase the amount of the indebtedness secured thereby or change the repayment terms of such indebtedness, if any, so as to increase or accelerate the repayment of such indebtedness, or so as to increase or accelerate the payment of any rent, as applicable. Mortgagor shall promptly give Mortgagee a copy of any notice received by Mortgagor from any Other Lender, if any, or given by Mortgagor to any Other Lender, if any, pursuant to such Other Lender's loan documents.

3. **Taxes and Charges.** Mortgagor agrees to pay or cause to be paid, prior to delinquency, all Charges (as hereinafter defined) that are assessed or imposed upon the Premises or upon any of the Project Loan Documents, or become due and payable, and that create, may create or appear to create a lien upon the Premises or any part thereof or upon any of the Project Loan Documents; provided, however, that if by law any such Charge is payable or, at the option of Mortgagor, may be paid in installments, Mortgagor may pay the same together with any accrued interest on the unpaid balance of such Charge in installments as the same become due and before any fine, penalty, interest or cost may be added thereto for the nonpayment of any such installment and interest. ("Charge" shall mean and include all federal, state, county, city, municipal or other governmental entity (or any instrumentality, division, agency, body or department thereof) taxes, levies, assessments, charges, liens, claims or encumbrances related to the Premises, Project, Mortgagor, or any of the Project Loan Documents).

Mortgagor shall furnish Mortgagee, within thirty (30) days after the date upon which any Charge is due and payable by Mortgagor, official receipts of the appropriate authority or other proof satisfactory to Mortgagee, evidencing the payment thereof. Mortgagor shall have the right, before any delinquency occurs, to contest or object to the amount or validity of any Charge or mechanic's lien by appropriate legal proceedings properly instituted and prosecuted in such manner as shall stay collection of the contested Charge and prevent the imposition of a lien or (in the case of mechanic's liens or other Charges subject to forfeiture or foreclosure), the sale or forfeiture of the Premises to collect the same provided that no such contest or objection shall be deemed or construed in any way as relieving, modifying or extending Mortgagor's covenant to pay any such Charge at the time and in the manner provided in this Mortgage unless Mortgagor has given prior written notice to Mortgagee of Mortgagor's intent to contest or object to a Charge and (i) Mortgagor shall demonstrate to Mortgagee's satisfaction that legal proceedings instituted by Mortgagor contesting or objecting to such Charge shall conclusively operate to prevent a lien against or the sale or forfeiture of the Premises, or any part thereof, as satisfaction of such Charge prior to final determination of such proceedings, and (ii) Mortgagor shall furnish to Mortgagee or Senior Lender (and if to Senior Lender, notice thereof to Mortgagee) a good and sufficient bond or surety, or a good and sufficient undertaking as may be required or permitted by law, to accomplish a stay of any such sale or forfeiture of the Premises during the pendency of such contest, in an amount (x) not less than 125% of such Charge and (y) adequate fully to pay all such contested Charges and all interest and penalties upon the adverse determination of such contest.

UNOFFICIAL COPY

4. **Insurance.** Mortgagor shall procure and maintain, or cause to be maintained by the General Contractor, at all times, at Mortgagor's own expense, until final repayment of the indebtedness secured hereby, the types of insurance specified in Exhibit B attached hereto, with insurance companies authorized to do business in the State of Illinois covering all operations contemplated in connection with the Project, whether performed by Mortgagor, the General Contractor, any Subcontractor or others.

Mortgagor shall furnish Mortgagee with original certificates of insurance evidencing the required coverages to be in force on the date hereof, and renewal certificates of insurance, or such similar evidence, if the coverages have an expiration or renewal date occurring during the term hereof.

The receipt of any certificate does not constitute an agreement by Mortgagee that the insurance requirements of this Section have been fully met or that the insurance policies indicated on the certificate are in compliance with all requirements. The failure of Mortgagee to obtain certificates or other insurance evidence from Mortgagor shall not be deemed to be a waiver by Mortgagee. Mortgagor shall advise all insurers of the provisions of this Section regarding insurance. Non-conforming insurance shall not relieve Mortgagor of its obligation to provide insurance as specified herein. Nonfulfillment of the insurance conditions of this Section may constitute an Event of Default, and Mortgagee retains the right to suspend disbursement of Loan proceeds until proper evidence of insurance is provided.

All insurance policies shall provide that Mortgagee shall be given thirty (30) days' prior written notice of any modification, non-renewal or cancellation.

If Mortgagor fails to obtain or maintain any of the insurance policies required under this Mortgage or to pay any premium in whole or in part when due, Mortgagee may (without waiving or releasing any obligation or Event of Default by Mortgagor hereunder) obtain and maintain such insurance policies and take any other action that Mortgagee deems advisable to protect its interest in the Premises, including acceleration of the Note. All sums so disbursed by Mortgagee, including reasonable attorneys' fees, court costs and expenses, shall be reimbursed by Mortgagor upon demand by Mortgagee.

Mortgagor shall require the General Contractor and all Subcontractors to carry the insurance required herein, or Mortgagor may provide the coverage for any or all of the General Contractor and Subcontractors, and, if so, the evidence of insurance submitted shall so stipulate.

Any and all deductibles or self-insured retention on the insurance coverages required herein shall be borne by Mortgagor, the General Contractor or the appropriate Subcontractor, as applicable.

Mortgagor expressly understands and agrees that any insurance coverages and limits furnished by Mortgagor shall in no way limit Mortgagor's liabilities and responsibilities specified under any of the Loan Documents or by law.

Mortgagor agrees and shall cause the General Contractor to agree that all insurers shall waive their rights of subrogation against Mortgagee, its employees, elected officials, agents or representatives. Mortgagor hereby agrees to assume any liabilities of Mortgagee related to subrogation rights of Subcontractors' insurers.

Mortgagor expressly understands and agrees that any insurance or self-insurance programs maintained with respect to the Premises by Mortgagee shall apply in excess of and not contribute with insurance provided by Mortgagor, the General Contractor or any Subcontractor under this Section.

The insurance required hereunder to be carried shall not be limited by any limitations expressed in the indemnification language herein or any limitation placed on the indemnity therein given as a matter of law.

UNOFFICIAL COPY

If Mortgagor, General Contractor or any Subcontractor desires additional coverage, higher limits of liability, or other modifications for its own protection, Mortgagor, the General Contractor or such Subcontractor, as appropriate, shall be responsible for the acquisition and cost of such additional protection.

Mortgagee maintains the right to modify, delete, alter or change these requirements in a commercially reasonable manner, after providing Mortgagor with prior written notice.

5. **Inspection of Premises and of Books and Records.** Mortgagor shall permit Mortgagee, HUD, and/or their agents to inspect the Premises at all reasonable times upon prior written notice, and access thereto shall be permitted for that purpose. Mortgagor shall keep and maintain full and correct records at Mortgagor's office showing in detail the income and expenses of the Premises and shall make such books, records and all supporting vouchers, data and other documents available for inspection, copying (including excerpts and transcriptions), audit and examination upon request by Mortgagee, HUD and their respective agents, successors and assigns until the fifth anniversary of the date of repayment of the Loan in full.

6. **Insurance Proceeds.** In the event of any damage to, or destruction of the Premises, Mortgagor will give written notice to Mortgagee of such damage or destruction within five (5) Business Days thereafter and, subject to the rights granted to Senior Lender under the Senior Loan Documents or to the City under the City Loan Documents, and subject further to any applicable terms and conditions of the Ground Lease and the Mixed-Finance Amendment, authorize Mortgagee to proceed as follows:

(a) In the event of any loss covered by insurance policies, Mortgagee is hereby authorized at its option to either (i) settle and adjust any claim under such policies without the consent of Mortgagor, or (ii) allow Mortgagor to agree with the insurance company or companies on the amount to be paid upon the loss. Mortgagee shall, and is hereby authorized to, collect any such insurance proceeds, and the reasonable expenses incurred by Mortgagee in the adjustment and collection of insurance proceeds shall be deemed additional indebtedness secured by this Mortgage and shall be reimbursed to Mortgagee by Mortgagor upon demand.

(b) In the event of any insured damage to, or destruction of, the Premises or any part thereof, Mortgagee shall apply the proceeds of insurance to reimburse or, at the option of Mortgagee, pay directly Mortgagor for the cost of restoring, repairing, replacing or rebuilding the Premises if: (i) an Event of Default hereunder or an event of default under any of the other Loan Documents, or under the Other Lenders' loan documents, shall not have occurred and be continuing; (ii) such insurance proceeds shall be available and in an amount sufficient to restore the Premises to at least the same value and substantially the same character as the Premises had been immediately prior to such damage or destruction (and subject to no liens or encumbrances other than Permitted Exceptions), or if such proceeds are not so sufficient, Mortgagor shall promptly deposit with Mortgagee funds equal to the amount of such deficiency; (iii) Mortgagor shall obtain all required governmental approvals with respect to such restoration, repair, replacement or rebuilding; (iv) prior to such restoration, repair, replacement or rebuilding, Mortgagee shall receive and approve plans and specifications and a detailed budget and cost breakdown with respect to such work; and (v) such restoration, repair, replacement or rebuilding is reasonably susceptible to completion not less than six months prior to the Maturity Date.

(c) In the event that proceeds of insurance, if any, shall be made available to Mortgagor for the restoration, repair, replacement or rebuilding of the Premises, Mortgagor hereby covenants to restore, repair, replace or rebuild the same, to at least equal value, and substantially the same character as prior to such damage or destruction, all to be effected in accordance with plans and specifications submitted to and reasonably approved by Mortgagee,

UNOFFICIAL COPY

and to expend all such proceeds and any funds deposited by Mortgagor pursuant to Section 6(b)(ii) hereof prior to the further disbursement of any Loan proceeds. If the amount of such insurance proceeds shall be in excess of \$50,000, such proceeds shall be disbursed through an escrow pursuant to an escrow agreement approved by Mortgagee.

(d) If all of the conditions described in Paragraph (b) of this Section 6 with respect to the application of proceeds of insurance shall not be met, Mortgagee may, in its sole discretion, apply such proceeds to the indebtedness secured hereby in such order or manner as Mortgagee may elect.

(e) To the extent that any amount of proceeds of insurance remain unexpended after completion of the restoration, repair, replacement or rebuilding of the Premises, such amount shall be applied to the indebtedness secured hereby, with any remaining amounts being paid to Mortgagor or, if applicable, to the Other Lenders as their interests may appear.

To the extent that any terms or conditions contained in this Section 6, with respect to the restoration of the Property after a casualty conflict with the insurance section of the Mixed Finance ACC Amendment, the Mixed Finance ACC Amendment shall prevail.

7. **Condemnation/Eminent Domain.** Mortgagor shall give Mortgagee prompt notice of any proceedings, pending or threatened, seeking condemnation or taking by eminent domain or any like process ("Taking"), of all or any portion of the Premises or affecting any easement thereon or appurtenance thereto and shall deliver to Mortgagee copies of any and all papers served in connection with any such proceedings, and Mortgagor hereby assigns and transfers to Mortgagee, subject only to the rights granted to Senior Lender under the Senior Loan Documents and to the City under the City Loan Documents, and subject further to any applicable terms and conditions of the Ground Lease and the Mixed-Finance ACC Amendment, the entire proceeds of all awards resulting from any Taking. Mortgagee is hereby authorized to collect and receive from the condemnation authorities said awards and is further authorized to give appropriate receipts therefor. In the event of any such Taking, the proceeds of all awards resulting from such taking shall be applied subject to the Mixed Finance ACC Amendment and the Regulatory and Operating Agreement: (i) to reimburse Mortgagor for or, at the option of Mortgagee, pay directly, the cost of restoring, repairing, replacing or rebuilding the Premises, except as and to the extent the Ground Lease applies and provides otherwise; and (ii) the balance of such proceeds shall be applied to the indebtedness secured hereby in such order or manner as Mortgagee may elect. In the event that such proceeds, if any, shall be made available to Mortgagor for the restoration, repair, replacement or rebuilding of the Premises, Mortgagor hereby covenants to restore, repair, replace or rebuild the same, to at least equal value and substantially the same character as prior to such Taking, all to be effected in accordance with plans and specifications submitted to and approved by Mortgagee. If the amount of such proceeds shall be in excess of \$50,000, such proceeds shall be disbursed through an escrow pursuant to an escrow agreement approved by Mortgagee.

Notwithstanding the foregoing, if any provision of this Section 7 conflicts with the Mixed-Finance ACC Amendment, the provisions of Section 11 of the Mixed-Finance ACC Amendment shall control, and Mortgagee recognizes its rights under this Section 7 are presently subordinate in priority to those of a senior mortgage or mortgages recorded of record against all or a portion of the collateral secured by this Mortgage.

8. **Transfer and Encumbrance of Premises.** Except as expressly permitted pursuant to this Section 8, Mortgagor shall not create, effect, contract for, commit to, consent to, suffer or permit any conveyance, sale, assignment, transfer, lien, pledge, mortgage, security interest or other encumbrance (other than liens being contested in accordance with the provisions of this Mortgage) or alienation (or any agreement to do any of the foregoing, other than a contract for-sale or financing to pay in full the

UNOFFICIAL COPY

Note and all other amounts due and owing by Mortgagor to Mortgagee under the Loan Documents, provided that any such contract shall be expressly contingent upon the receipt of prior written consent to such sale or financing by Mortgagee, which consent shall not be unreasonably withheld by Mortgagee with respect to any contract providing for payment in full of the Note and all other amounts due and owing by Mortgagor to Mortgagee under the Loan Documents), directly or indirectly, by willful act, by operation of law or otherwise, of all or any portion of the Premises or any interest therein, other than Permitted Exceptions, or any interest in Mortgagor or any member thereof (each of the foregoing being referred to herein as a "Prohibited Transfer"), without (x) Mortgagee's prior written consent, and (y) the consent of HUD if and to the extent required by the Mixed Finance ACC Amendment. If Mortgagor shall do or allow any of the foregoing Prohibited Transfers without (x) Mortgagee's prior written consent and (y) the consent of HUD if and to the extent required by the Mixed Finance ACC Amendment, Mortgagee, at its option, has the right to accelerate the maturity of the Note causing the full principal balance thereof and accrued interest, if any, thereon to be immediately due and payable without notice to Mortgagor. Any waiver by Mortgagee of the provisions of this paragraph shall not be deemed to be a waiver of the right of Mortgagee to insist upon strict compliance with the provisions of this paragraph in the future.

Notwithstanding the foregoing, Mortgagee shall not unreasonably withhold its consent to the replacement and/or addition of a member of Mortgagor pursuant to the terms of Mortgagor's Operating Agreement and to the extent Mortgagee so consents, it shall not be considered a Prohibited Transfer hereunder. In addition, transfers of interests in the "Owner or in any partner, member or stockholder thereof" permitted under the Regulatory and Operating Agreement shall not be considered a Prohibited Transfer hereunder, provided that the transferee is not a "Prohibited Party". As used herein, the term "Prohibited Party" shall mean a person or entity (which term shall include all principals of such entity) who has, or an affiliate of any such person or entity has, been prohibited or debarred from doing business with Mortgagee or the City. Further, "Prohibited Transfers" shall not include leases of Project Units to residential tenants in the ordinary course of business.

In the event that Mortgagee (and, where required, HUD) consent(s) to any sale, assignment transfer or other conveyance of the Premises, which shall not be unreasonably withheld or denied, the transferee or assignee shall enter into an assumption agreement with Mortgagee by which it assumes all of the Mortgagor's rights and obligations under the Note, this Mortgagee and the other Loan Documents. Upon the consummation of the transfer of the Premises as set forth above and the delivery of such assumption agreement to Mortgagee, the transferee or assignee shall succeed to all rights and obligations of Mortgagor herein contained, and shall be deemed a permitted assignee of Mortgagor, and Mortgagor making such sale, assignment, transfer or other conveyance shall be relieved of any continuing obligations hereunder, provided that no such consent shall relieve any guarantor of the obligations set forth in any guaranty securing the indebtedness evidenced by the Note, nor any obligations of any guarantor under the Performance and Completion Guaranty Agreement unless such relief is specifically granted in the instrument of consent.

9. **Mortgagee's Options; Subrogation.** (a) In case of an Event of Default hereunder by Mortgagor, Mortgagee may, but is not obligated to, receive and utilize the PHA-Assisted Units Operating Subsidy (as defined in the Regulatory and Operating Agreement) to pay operating expenses, and/or make any payment or perform any act herein required of Mortgagor in any form and manner deemed expedient, and may (but is not obligated to) make full or partial payments of principal or interest on prior encumbrances, if any, and purchase, discharge, compromise or settle any tax lien or other prior lien or title or claim thereof, or redeem the Premises from any tax sale or forfeiture affecting the Premises or contest any tax or assessment thereon. All monies paid for any of the purposes herein authorized and all expenses paid or incurred in connection therewith, including attorneys' fees, and any other monies advanced by Mortgagee to protect the Premises and the lien hereof, shall be deemed additional indebtedness secured hereby, and shall become immediately due and payable, with interest thereon at a

UNOFFICIAL COPY

rate of the lesser of five percent (5%) above the JPMorgan Chase Bank, N.A. Prime Rate per annum or the maximum amount permitted by law. Inaction of Mortgagee shall never be considered as a waiver of any right accruing to it on account of any default on the part of Mortgagor.

(b) To the extent that Mortgagee, on or after the date hereof, pays any sum under any provision of law or any instrument or document creating any lien or other interest prior or superior to the lien of this Mortgage, or Mortgagor or any other person or entity pays any such sum with the proceeds of the indebtedness secured hereby, Mortgagee shall have and be entitled to a lien or other interest on the Premises equal in priority to the lien or other interest discharged and Mortgagee shall be subrogated to, and receive and enjoy all rights and liens possessed, held or enjoyed by, the holder of such lien, which shall remain in existence and benefit Mortgagee in securing the indebtedness secured hereby.

10. **Events of Default.** The following shall constitute an "Event of Default" under this Mortgage:

(i) Mortgagor's failure to pay, when due, any installment of principal or interest if any, on the Note, or to pay when due (taking into account applicable notice and cure periods, if any) any other sums required to be paid by Mortgagor under the Loan Documents;

(ii) subject to Section 33 hereof, default by Mortgagor in the performance or observance of any condition, warranty, representation, covenant, provision or term (other than as referred to in the other paragraphs of this Section 10) contained herein or in the other Loan Documents, which remains unremedied for thirty (30) days after written notice thereof from Mortgagee to Mortgagor; provided, however, that if any such default cannot reasonably be remedied within said 30-day period and if Mortgagor shall have commenced to remedy such default within said 30-day period and shall thereafter continue diligently to effect such remedy, then said 30-day period shall be extended to sixty (60) days upon written request from Mortgagor to Mortgagee delivered during such 30-day period, and upon further written request from Mortgagor to Mortgagee delivered during said 60-day period, said 60-day period shall be extended to ninety (90) days, provided, however, that Mortgagee shall not be precluded during any such periods from exercising any remedies available under any of the Loan Documents if its security becomes or is about to become materially jeopardized by any failure to cure a default within such period;

(iii) the occurrence of a default or an event of default by Mortgagor under any of the Project Loan Documents or the Ground Lease, which default or event of default is not timely cured pursuant to any applicable cure period as set forth in the Project Loan Documents or the Ground Lease, whichever is applicable;

(iv) a writ of execution, attachment or any similar process shall be issued or levied against all or any portion of the Premises or any interest therein, or any judgment involving monetary damages shall be entered against Mortgagor which shall become a lien on all or any portion of the Premises or any interest therein and such execution, attachment or similar process or judgment is not released, bonded, satisfied, vacated or stayed within ninety (90) days after its entry or levy;

(v) any warranty, representation or statement made or furnished to Mortgagee by or on behalf of Mortgagor proving to have been false in any material respect when made or furnished, so as to diminish in a material way the security provided in this Mortgage;

(vi) the abandonment by Mortgagor of all or any portion of the Premises for thirty (30) or more consecutive days;

UNOFFICIAL COPY

(vii) Mortgagor's failure to discharge any Charge in accordance with the terms hereof or a failure to procure or maintain any insurance required hereunder;

(viii) the dissolution of Mortgagor or the entry of a decree or order for relief by a court having jurisdiction with respect to Mortgagor in an involuntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or appointing a receiver, liquidator, assignee, custodian, trustee or sequestrator (or other similar official) of Mortgagor or for the Premises or for any substantial part of the property of Mortgagor or ordering the winding-up or liquidation of the affairs of Mortgagor and the continuance of any such decree or order unstayed and in effect for a period of sixty (60) consecutive days;

(ix) the commencement by Mortgagor of a voluntary case under the federal bankruptcy laws, as now or hereafter constituted, or any other applicable federal or state bankruptcy, insolvency or other similar law, or the consent by Mortgagor to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian or sequestrator (or other similar official) of Mortgagor or the Premises or of any substantial part of the property of Mortgagor or of any royalties, revenues, rents, issues or profits therefrom, or the making by Mortgagor of any assignment for the benefit of creditors or the failure of Mortgagor generally to pay its debts as such debts become due or the taking of action by Mortgagor in furtherance of any of the foregoing;

(x) a final, non-appealable judgment for the payment of money in excess of \$100,000 shall be rendered by a court of record against Mortgagor and Mortgagor shall not discharge the same or provide for its discharge in accordance with its terms, or procure a stay of execution thereof, within sixty (60) days from the date of entry thereof, or such longer period during which execution of such judgment shall have been stayed;

(xi) the occurrence of a Prohibited Transfer;

(xii) any event of default under any of the other Loan Documents which has not been cured within any applicable grace period;

(xiii) failure by Mortgagor to submit or cause to be submitted, on a timely basis, documentation required under Section 12.01 of the Loan Agreement, or a determination by Mortgagee, upon analysis of the documentation submitted by or on behalf of Mortgagor pursuant to said Section 12.01, that Mortgagor is not complying in all material respects with its obligations under said Section 12.01, the delivery by Mortgagee to Mortgagor of written notice of such failure or such determination, and Mortgagor's failure to cure such failure within thirty (30) days of receipt of Mortgagee's written notice; or

(xiii) with respect to any loan secured by a mortgage (or deed of trust) on the Premises, or any portion thereof: (a) such loan has matured and has not been refinanced with a loan that has terms, conditions and documentation acceptable to Mortgagee; or (b) the default by Mortgagor under any of the documents evidencing, securing or relating to such loan, which default has not been cured within the notice and cure period applicable thereto, if any, and the holder of such loan has either: (1) accelerated the maturity of such loan; or (2) taken affirmative action to exercise its rights under such document(s) to collect rent, to appoint (or seek the appointment of) a receiver, or to foreclose on such mortgage (or deed of trust).

11. **Acceleration Etc.** Upon the occurrence of an Event of Default hereunder, Mortgagee may elect to accelerate the maturity of the Note, causing the full principal balance of and accrued

UNOFFICIAL COPY

interest, if any, on the Note, together with all other amounts then due and owing by Mortgagor to Mortgagee under any of the Loan Documents, to become immediately due and payable at the place of payment as aforesaid, and Mortgagee may proceed to foreclose this Mortgage and to exercise any rights and remedies available to Mortgagee under this Mortgage, the Assignment of Rents and Leases or any of the other Loan Documents and to exercise any other rights and remedies against Mortgagor, or with respect to the Note, which Mortgagee may have at law, in equity or otherwise; provided, however, that upon the occurrence of an Event of Default under Section 10(viii) or (ix) hereof, the entire unpaid principal of and interest, if any, on the Note (as the same may be reduced pursuant to the Loan Agreement) shall, without any declaration, notice or other action on the part of Mortgagee, be immediately due and payable, anything herein or in the other Loan Documents to the contrary notwithstanding. Mortgagee may also elect to commence an action to enforce specifically any of the provisions contained in any of the Loan Documents.

12. **Remedies.** Mortgagee's remedies as provided in this Mortgage or the other Loan Documents shall be cumulative and concurrent and may be pursued singularly, successively or together, at the sole discretion of Mortgagee and may be exercised as often as occasion therefor shall arise, and shall not be exclusive but shall be in addition to every other remedy now or hereafter existing at law, in equity or by statute. Failure of Mortgagee, for any period of time or on more than one occasion, to exercise any such remedy shall not constitute a waiver of the right to exercise the same at any time thereafter or in the event of any subsequent Event of Default. No act of omission or commission of Mortgagee, including specifically any failure to exercise any right or remedy, shall be deemed to be a waiver or release of the same; any such waiver or release is to be effected only through a written document executed by Mortgagee and then only to the extent specifically recited therein. A waiver or release with reference to any one event shall not be construed as a waiver or release of any subsequent event or as a bar to any subsequent exercise of Mortgagee's rights or remedies hereunder. Except as otherwise specifically required herein, notice of the exercise of any right or remedy granted to Mortgagee by the Loan Documents is not required to be given.

13. **Additional Indebtedness.** In the event that: (a) the Note is placed in the hands of an attorney for collection or enforcement or is collected or enforced through any legal proceeding; (b) an attorney is retained to represent Mortgagee in any bankruptcy, reorganization, receivership or other proceedings affecting creditors' rights and involving a claim under any of the Loan Documents; (c) an attorney is retained to protect or enforce the lien of this Mortgage, or the liens or security interests of any of the other Loan Documents; or (d) an attorney is retained to represent Mortgagee in any other proceedings whatsoever in connection with the Loan Documents, or any property subject thereto, then Mortgagor shall pay to Mortgagee all reasonable attorneys' fees, and all costs and expenses incurred in connection therewith.

14. **Waiver.** Mortgagee's failure to require strict performance by Mortgagor of any provision of this Mortgage shall not waive, affect or diminish any right of Mortgagee thereafter to demand strict compliance and performance therewith, nor shall any waiver by Mortgagee of an Event of Default waive, suspend or affect any other Event of Default under this Mortgage, whether the same is prior or subsequent thereto, or of the same or a different type. Mortgagee's delay in instituting or prosecuting any action or proceeding or otherwise asserting its rights hereunder or under any of the other Loan Documents, shall not operate as a waiver of such rights or limit them in any way so long as an Event of Default shall be continuing.

15. **Right of Possession.** To the extent permitted by law, in any case in which, under the provisions of this Mortgage, Mortgagee has a right to institute foreclosure proceedings, whether before or after the institution of such proceedings or before or after sale thereunder, Mortgagor shall, at the option of Mortgagee, surrender to Mortgagee, and Mortgagee shall be entitled to take, actual possession

UNOFFICIAL COPY

of all or any portion of the Premises personally or by its agents or attorneys, and Mortgagee, in its sole discretion, may enter upon, take and maintain possession of all or any portion of the Premises.

Upon taking possession of the Premises, Mortgagee may make all necessary or proper repairs, decoration, renewals, replacements, alterations, additions, betterments and improvements in connection with the Premises as it may deem judicious to insure, protect and maintain the Premises against all risks incidental to Mortgagee's possession, operation and management thereof, and may receive all rents, issues and profits therefrom. Mortgagee shall have, in addition to any other power provided herein, all powers and duties as provided for in Sections 5/15-1701, 5/15-1702 and 5/15-1703 of the Act.

16. **Appointment of Receiver.** Upon or at any time after the filing of any complaint to foreclose the lien of this Mortgage, the court may, upon application, appoint a receiver of the Premises. Such appointment may be made either before or after foreclosure sale, without notice, without regard to the solvency or insolvency, at the time of application for such receiver, of the person or persons, if any, liable for the payment of the indebtedness hereby secured, without regard to the value of the Premises at such time and whether or not the same is then occupied as a homestead, and without bond being required of the applicant. Mortgagee or any employee or agent thereof may be appointed as such receiver. The receiver shall have the power to take possession, control and care of the Premises and to collect all rents and profits thereof during the pendency of such foreclosure suit, and all powers and duties provided for in Section 5/15-1704 of the Act, and such other powers as the court may direct.

17. **Foreclosure Sale.** The Premises or any interest or estate therein sold pursuant to any court order or decree obtained under this Mortgage shall be sold in one parcel, as an entirety, or in such parcels and in such manner or order as Mortgagee, in its sole discretion, may elect, to the maximum extent permitted by Illinois law. At any such sale, Mortgagee may bid for and acquire, as purchaser, all or any portion of the Premises and, in lieu of paying cash therefor, may make settlement for the purchase price by crediting upon the indebtedness due the amount of Mortgagee's bid.

18. **Application of Proceeds from Foreclosure Sale.** Subject to the rights of the Senior Lender under the Senior Loan Documents and the City under the City Loan Documents, proceeds of any foreclosure sale of the Premises shall be distributed and applied in the following order of priority: (i) on account of all costs and expenses incident to the foreclosure proceedings, (ii) all other items which, under the terms hereof, constitute secured indebtedness additional to that evidenced by the Note, with interest thereon, (iii) all principal and interest, if any, remaining unpaid on the Note, and (iv) any surplus or remaining funds to Mortgagor, its successors or assigns, as their rights may appear.

19. **Insurance Upon Foreclosure.** Wherever provision is made in this Mortgage for insurance policies to bear mortgage clauses or other loss payable clauses or endorsements in favor of Mortgagee, or to confer authority upon Mortgagee to settle or participate in the settlement of losses under policies of insurance or to hold and disburse or otherwise control use of insurance proceeds, from and after the entry of judgment of foreclosure all such rights and powers of Mortgagee shall continue in Mortgagee as judgment creditor or mortgagee until confirmation of sale. Upon confirmation of sale, Mortgagee shall be empowered to assign all policies of insurance to the purchaser at the sale. In case of an insured loss after foreclosure proceedings have been instituted, the proceeds of any insurance policy or policies, if not applied in restoring the Premises, shall be used to pay the amount due in accordance with any foreclosure decree that may be entered in any such proceedings, and the balance, if any, shall be paid as the court may direct.

20. **Waiver of Statutory Rights.** To the extent permitted by law, Mortgagor shall not apply for or avail itself of any appraisal, valuation, redemption, reinstatement, stay, extension or exemption laws or any so-called "Moratorium Laws" now existing or hereafter enacted, in order to prevent or hinder the enforcement of foreclosure of this Mortgage and hereby waives the benefit of such

UNOFFICIAL COPY

laws. Mortgagor, for itself, and all who may claim through or under it, waives any and all right to have the property and estates comprising the Premises marshalled upon any foreclosure of the lien hereof and agrees that any court having jurisdiction to foreclose such lien may order the Premises sold as an entirety. To the extent permitted by law, Mortgagor hereby expressly waives any and all rights of redemption and reinstatement, on its own behalf and on behalf of each and every person having a beneficial interest in Mortgagor, it being the intent hereof that any and all such rights of redemption or reinstatement of Mortgagor and of all other persons are and shall be deemed to be hereby waived. Mortgagor acknowledges that the Premises do not constitute agricultural real estate, as said term is defined in Section 5/15-1201 of the Act or residential real estate as defined in Section 5/15-1219 of the Act.

21. **Partial Payments.** Acceptance by Mortgagee of any payment which is less than payment in full of all amounts due and payable at the time of such payment shall not constitute a waiver of Mortgagee's right to exercise its option to declare the whole of the principal sum then remaining unpaid, together with all accrued interest, if any, thereon, immediately due and payable without notice, or any other rights of Mortgagee at that time or any subsequent time, without its express written consent, except and to the extent otherwise provided by law.

22. **Rescission of Election.** Acceleration of maturity, once made by Mortgagee, may at the option of Mortgagee be rescinded, and any proceedings brought to enforce any rights or remedies hereunder may, at Mortgagee's option, be discontinued or dismissed. In either of such events, Mortgagor and Mortgagee shall be restored to their former positions, and the rights, remedies and powers of Mortgagee shall continue as if such acceleration had not been made or such proceedings had not been commenced, as the case may be.

23. **Notice.** Unless otherwise specified, any notice, demand or request required hereunder shall be given in writing at the addresses set forth below, by any of the following means: (a) personal service; (b) electronic communications, whether by telex, telegram or telecopy; (c) overnight courier, receipt requested; or (d) registered or certified mail, return receipt requested.

IF TO MORTGAGEE:

Chicago Housing Authority
626 West Jackson Street
Chicago, Illinois 60661
Attention: Chief Executive Officer

WITH COPIES TO:

Chicago Housing Authority
200 West Adams Street
Suite 2100
Chicago, Illinois 60606
Attention: Office of the General Counsel

AND TO:

The Habitat Company LLC, as Receiver for
Chicago Housing Authority
350 West Hubbard Street
Chicago, Illinois 60610
Attn: President

UNOFFICIAL COPY

IF TO MORTGAGOR:

WHP-IIB, LLC
 c/o Brinshore Development LLC
 666 Dundee Road – Suite 1102
 Northbrook, Illinois 60062
 Facsimile: 847-562-9401
 Attention: Richard Sciortino

and

c/o The Michaels Development Company, Inc.
 One East Stow Road
 Marlton, New Jersey 08053
 Attention: President

and

c/o The Michaels Development Company, Inc.
 322 S. Green Street, Suite 212
 Chicago, Illinois 60607
 Attention: Whitney Weller

WITH COPIES TO:

Applegate & Thorne-Thomsen
 322 South Green Street
 Suite 400
 Chicago, Illinois 60607
 Attention: Bennett P. Applegate

and

Levine, Staller, Skar, Chan, Brown & Donnelly
 3030 Atlantic Avenue
 Atlantic City, New Jersey 08401
 Attention: Arthur M. Brown

and

FNBC Leasing Corporation
 21 South Clark, 12th Floor
 Mail Code IL1-0502
 Chicago, IL 60603
 Attention: Mark McCann

Such addresses may be changed by notice to the other parties given in the same manner as above provided. Any notice, demand or request sent pursuant to either clause (a) or (b) above shall be deemed received upon such personal service or upon dispatch by electronic means with confirmation of receipt. Any notice, demand or request sent pursuant to clause (c) above shall be deemed received on the Business Day immediately following deposit with the overnight courier and, if sent pursuant to clause (d) above, shall be deemed received two (2) Business Days following deposit in the mail.

24. **Time.** Time is of the essence with respect to the Loan Documents.

UNOFFICIAL COPY

25. **Modifications.** This Mortgage may not be altered, amended, modified, cancelled, changed or discharged except by written instrument signed by Mortgagor and Mortgagee or their respective successors and assigns.

26. **Headings.** The headings of articles, sections, paragraphs and subparagraphs in this Mortgage are for convenience of reference only and shall not be construed in any way to limit or define the content, scope or intent of the provisions hereof.

27. **Construction of Mortgage.** This Mortgage shall be construed and enforced according to the internal law of the State of Illinois without regard to its conflict of laws principles.

28. **Severability.** If any provision of this Mortgage, or any paragraph, sentence, clause, phrase or word, or the application thereof, in any circumstance, is held invalid, the remainder of this Mortgage shall be construed as if such invalid part were never included herein and this Mortgage shall be and remain valid and enforceable to the fullest extent permitted by law.

29. **Grammar.** As used in this Mortgage, the singular shall include the plural, and masculine, feminine and neuter pronouns shall be fully interchangeable, where the context so requires.

30. **Successors and Assigns.** This Mortgage and each and every covenant, agreement and other provision hereof shall be binding upon Mortgagor and its successors and assigns (including, without limitation, each and every record owner of the Premises or any other person having an interest therein), and shall inure to the benefit of Mortgagee and its successors and assigns. Whenever Mortgagee is referred to herein, such reference shall also include the Holder of the Note, whether so expressed or not.

31. **Further Assurances.** Mortgagor will perform, execute, acknowledge and deliver every act, deed, conveyance, transfer and assurance necessary or proper, in the sole judgment of Mortgagee, for assuring, conveying, mortgaging, assigning and confirming to Mortgagee all property mortgaged hereby or property intended so to be, whether now owned or hereafter acquired by Mortgagor, and for creating, maintaining and preserving the lien and security interest created hereby on the Premises. Upon any failure by Mortgagor to do so, Mortgagee may make, execute and record any and all such documents for and in the name of Mortgagor, and Mortgagor hereby irrevocably appoints Mortgagee and its agents as attorney-in-fact for that purpose. Mortgagor will reimburse Mortgagee for any sums expended by Mortgagee in making, executing and recording such documents including attorneys' fees and court costs.

32. **Indemnification.** In addition to all other indemnities in favor of Mortgagee specifically provided in this Mortgage, Mortgagor and Manager shall indemnify Mortgagee and save Mortgagee harmless from and against any and all loss, cost, damage, claim, liability or expenses ("Loss") incurred by Mortgagee in connection with any and all claims, demands, actions, proceedings ("Claim") in connection with the Loan excluding, however: (1) any loss arising out of Mortgagee's gross negligence or willful misconduct in connection with the Loan; (2) any loss arising after Mortgagee's acquisition of title to or control of the Premises; and (3) any liabilities for environmental conditions on or about the Premises for which Mortgagee has retained liability pursuant to the Remediation Agreement.

33. **Subordinate Mortgage.** This is a subordinate and junior mortgage on the Premises and is subject and subordinate in each and every respect to any and all rights of any kind created by that certain Mortgage dated of even date herewith from Mortgagor to Senior Lender, and recorded prior hereto in the Office of the Cook County Recorder of Deeds, and any and all modifications, extensions, amendments, restatements and replacements thereof, securing a note of even date therewith in the principal amount of \$9,520,000.00 in favor of JPMorgan Chase Bank, N.A. (the "Senior Lender").

UNOFFICIAL COPY

34. **Security Agreement.** This Mortgage shall be construed as a "security agreement" within the meaning of and shall create a security interest under the Uniform Commercial Code as adopted by the State of Illinois with respect to any part of the Premises which constitutes fixtures or personal property. Mortgagee shall have all the rights with respect to such fixtures or personal property afforded to it by said Uniform Commercial Code in addition to, but not in limitation of, the other rights afforded Mortgagee by this Mortgage or any other agreement. Upon the recording hereof, this Mortgage shall constitute a financing statement under the Uniform Commercial Code. This Mortgage is a "construction mortgage" as that term is defined in Section 9-313(1)(c) of said Uniform Commercial Code. In connection with the Loan, Mortgagor hereby authorizes Mortgagee to file one or more financing statements, continuation statements, amendments or other documents, with or without the signature of Mortgagor or Mortgagee, and to name therein Mortgagor as debtor and Mortgagee as secured party, and to correct or complete any financing statements, continuation statements, amendments or other documents naming Mortgagor as debtor and Mortgagee as secured party.

35. **No Merger.** It being the desire and intention of the parties hereto that this Mortgage and the lien thereof do not merge in fee simple title, it is hereby understood and agreed that should Mortgagee acquire any additional or other interests in or to the Premises or the ownership thereof, then, unless a contrary interest is manifested by Mortgagee, as evidenced by an appropriate document duly recorded, this Mortgage and the lien thereof shall not merge in the fee simple title, toward the end that this Mortgage may be foreclosed as if owned by a stranger to the fee simple title.

36. **Protective Advances; Maximum Amount of Indebtedness.** All advances, disbursements and expenditures made by Mortgagee before and during a foreclosure, and before and after judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by this Mortgage or by the Act collectively ("Protective Advances"), shall have the benefit of all applicable provisions of the Act, including those provisions of the Act hereinbelow referred to:

- (a) all advances by Mortgagee in accordance with the terms of this Mortgage to:
 - (i) preserve or maintain, repair, restore or rebuild the improvements upon the Premises;
 - (ii) preserve the lien of this Mortgage or the priority thereof; or (iii) enforce this Mortgage, as referred to in Subsection (b)(5) of Section 5/15-1302 of the Act;
- (b) payments by Mortgagee of: (i) when due, installments of principal, interest or other obligations in accordance with the terms of the Senior Mortgage, if any, or other prior lien or encumbrance; (ii) when due, installments of real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Premises or any part thereof; (iii) other obligations authorized by this Mortgage; or (iv) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, as referred to in Section 5/15-1505 of the Act;
- (c) advances by Mortgagee in settlement or compromise of any claims asserted by claimants under senior mortgages or any other liens;
- (d) attorneys' fees and other costs incurred: (i) in connection with the foreclosure of this Mortgage as referred to in Sections 5/15-1504(d)(2) and 5/15-1510 of the Act; (ii) in connection with any action, suit or proceeding brought by or against Mortgagee for the enforcement of this Mortgage or arising from the interest of Mortgagee hereunder; or (iii) in the preparation for the commencement or defense of any such foreclosure or other action;

UNOFFICIAL COPY

(e) Mortgagee's fees and costs, including attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearing as referred to in Subsection (b)(1) of Section 5/15-1508 of the Act;

(f) advances of any amount required to make up a deficiency in deposits for installments of taxes and assessments and insurance premiums as may be authorized by this Mortgage;

(g) expenses deductible from proceeds of sale as referred to in Subsections (a) and (b) of Section 5/15-1512 of the Act; and

(h) expenses incurred and expenditures made by Mortgagee for any one or more of the following: (i) if the Premises or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit and/or the unit owner thereof; (ii) if any interest in the Premises is a leasehold estate under a lease or sublease, rentals or other payments required to be made by the lessee under the terms of the lease or sublease; (iii) premiums for casualty and liability insurance paid by Mortgagee whether or not Mortgagee or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining of existing insurance in effect at the time any receiver or mortgagee takes possession of the Premises imposed by Subsection (c)(1) of Section 5/15-1704 of the Act; (iv) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (v) payments required or deemed by Mortgagee to be for the benefit of the Premises or required to be made by the owner of the Premises under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Premises; and (vi) pursuant to any lease or other agreement for occupancy of the Premises and/or any portion thereof; (vii) shared or common expense assessments payable to any association or corporation in which the owner of the Premises is a member in any way affecting the Premises; (viii) costs incurred by Mortgagee for demolition, preparation for and completion of construction, as may be authorized by the applicable commitment or loan agreement; and (ix) pursuant to any lease or other agreement for occupancy of the Premises.

All Protective Advances shall be so much additional indebtedness secured by this Mortgage, and shall become immediately due and payable without notice and with interest, if any, thereon from the date of the advance until paid at the rate of interest payable after default under the terms of the Note.

This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b) (1) of Section 5/15-1302 of the Act.

All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in:

- (1) the determination of the amount of indebtedness secured by this Mortgage at any time;
- (2) the indebtedness found due and owing to Mortgagee in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;
- (3) if the right of redemption has not been waived by this Mortgage, computation of

UNOFFICIAL COPY

amount required to redeem, pursuant to Subsections (d) (2) and (e) of Section 5/15-1603 of the Act;

(4) the determination of amounts deductible from sale proceeds pursuant to Section 5/15-1512 of the Act;

(5) the application of income in the hands of any receiver or mortgagee in possession; and

(6) the computation of any deficiency judgment pursuant to Subsections (b) (2) and (e) of Sections 5/15-1508 and Section 5/15-1511 of the Act.

The maximum amount of indebtedness secured by this Mortgage shall be Twelve Million Seven Hundred Ninety Five Dollars (\$12,795,000.00) plus interest under the Note, plus any disbursements for the payment of taxes and insurance on the Premises, plus interest thereon if applicable, and any other sums advanced in accordance with the terms hereof or any of the other Loan Documents to protect the security of this Mortgage, or any of the other Loan Documents, plus interest thereon.

All obligations of Mortgagor hereunder shall terminate upon the discharge of all indebtedness secured by this Mortgage. Upon that discharge, Mortgagee shall execute, record and deliver to Mortgagor a Release of this Mortgage.

37. **Non-Recourse Loan.** (a) Subject to the terms of the Note, and notwithstanding any provision herein to the contrary, the indebtedness secured hereunder shall be non-recourse and in the event of an Event of Default hereunder, Mortgagee's sole source of satisfaction of repayment of the amounts due to Mortgagee hereunder or under any of the other Loan Documents shall be limited to Mortgagee's rights with respect to the collateral pledged and assigned hereunder, if any or under the Assignment of Rents and Leases, the Assignment of Contracts or any of the other Loan Documents.

(b) Nothing herein or in any of the other Loan Documents shall limit the rights of Mortgagee, following any of the events hereinafter described to take any action as may be necessary or desirable to pursue Mortgagor or its Manager for any and all Losses incurred by Mortgagee arising from: (i) a material misrepresentation, fraud made in writing or misappropriation of funds by Mortgagor or its Manager; (ii) intentional or material waste to the Premises; (iii) use of proceeds of the indebtedness evidenced by the Note for costs other than Eligible Costs; (iv) the occurrence of a Prohibited Transfer without Mortgagee's prior written consent, to the extent such Prohibited Transfer results from the intentional, willful, voluntary and/or negligent acts or omissions of Mortgagor or its Manager; (v) any breach of Mortgagor's representations, warranties or covenants regarding Hazardous Materials or Environmental Laws contained in any of the Loan Documents (giving effect to the provisions of Article XVII of the Ground Lease, including any limitations on Mortgagor's liability thereunder); (vi) the occurrence of any uninsured casualty to the Premises or other collateral or security provided under any of the Loan Documents for which there has been a failure to maintain insurance coverage as required by the terms and provisions of the Loan Documents; (vii) the misappropriation or misapplication of insurance proceeds or condemnation awards relating to the Premises or other collateral or security, if any, provided under any of the Loan Documents; or (viii) any inaccuracy in the statements in affidavits, if any, provided to Mortgagee in conjunction with the credit given and transaction evidenced or secured by this Mortgage.

(c) Mortgagee waives any and all right to seek or demand any personal deficiency judgment against Mortgagor or its members, in conjunction with a foreclosure proceeding, under or by reason of any of the non-recourse monetary obligations of Mortgagor; provided, however, that the foregoing shall not limit or affect Mortgagee's right to sue or otherwise seek recourse against Mortgagor or its Manager in any separate action or proceeding for all Losses incurred by Mortgagee arising from any of the matters

UNOFFICIAL COPY

described in the foregoing subparagraph (b).

38. Investor Notice and Cure. So long as FNBC Leasing Corporation, a Delaware corporation, or any affiliate thereof (the "Investor"), is a member of Mortgagor and has notified Mortgagee in writing of its name and address, Mortgagee agrees, simultaneously with the giving of each notice hereunder, to give a duplicate copy thereof to the Investor; provided that a failure on the part of Mortgagee to give such notice to the Investor shall not affect the effectiveness of the notice of Mortgagor. The Investor shall have the same cure period after the giving of notice as provided to Mortgagor. Mortgagee agrees to accept such performance on the part of the Investor as though the same had been done or performed by Mortgagor.

[Signatures appear on the following page.]

Property of Cook County Clerk's Office

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has caused these presents to be signed and attested to on the day and year first above written.

WHP-IIB, LLC,
an Illinois limited liability company

By: WHP-IIB MANAGER, LLC,
an Illinois limited liability company
its Manager

By: Brinshore Holding, LLC,
an Illinois limited liability company,
a member

By: Brinshore Development, L.L.C.,
an Illinois limited liability company,
its sole member

By: RJS Real Estate Services, Inc.,
an Illinois corporation, a member

By: _____
Name: Richard Sciortino
Title: President

By: Michaels Chicago Holding Company, LLC,
an Illinois limited liability company,
a member

By: _____
Name: John O'Donnell
Title: Vice President

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has caused these presents to be signed and attested to on the day and year first above written.


WHP-IIB, LLC,
an Illinois limited liability company

By: WHP-IIB MANAGER, LLC,
an Illinois limited liability company
its Manager

By: Brinshore Holding, LLC,
an Illinois limited liability company,
a member

By: Brinshore Development, L.L.C.,
an Illinois limited liability company,
its sole member

By: RJS Real Estate Services, Inc.,
an Illinois corporation, a member

By: 
Name: Richard Sciortino
Title: President

By: Michaels Chicago Holding Company, LLC,
an Illinois limited liability company,
a member

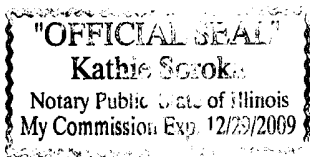
By: _____
Name: _____
Title: _____

UNOFFICIAL COPY

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that Richard Sciortino, personally known to me to be the president of RJS Real Estate Services, Inc., a member of Brinshore Development, L.L.C., an Illinois limited liability company, the sole member of Brinshore Holding, LLC, an Illinois limited liability company, a member of WHP-IIB MANAGER, LLC, an Illinois limited liability company (the "Manager"), the sole Manager of WHP-IIB, LLC, an Illinois limited liability company, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such officer, he signed and delivered the said instrument, pursuant to authority given by the members of the Manager as the free and voluntary act of such person, and as the free and voluntary act and deed of the Manager and WHP-IIB, LLC, for the uses and purposes therein set forth.

Given under my hand and official seal this 26 day of October, 2006.



Kathie Sorok
Notary Public

STATE OF)
) ss
COUNTY OF)

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that _____, personally known to me to be the _____ of Michaels Chicago Holding Company, LLC, an Illinois limited liability company, a member of WHP-IIB Manager, LLC, an Illinois limited liability company (the "Manager"), the Manager of WHP-IIB, LLC, an Illinois limited liability company, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such _____, he signed and delivered the said instrument, pursuant to authority given by the members of the Manager as the free and voluntary act of such person, and as the free and voluntary act and deed of the Manager and WHP-IIB, LLC, for the uses and purposes therein set forth.

Given under my hand and official seal this ____ day of _____, 2006.

Notary Public

UNOFFICIAL COPY

Exhibit A
LEGAL DESCRIPTION
Westhaven Park Phase IIB

PARCEL 1:

LEASEHOLD ESTATE CREATED BY GROUND LEASE DATED AS OF OCTOBER 1, 2006 BETWEEN CHICAGO HOUSING AUTHORITY, AN ILLINOIS MUNICIPAL CORPORATION, LANDLORD, AND WHP-IIB, LLC, AN ILLINOIS LIMITED LIABILITY COMPANY, TENANT, RECORDED ~~0630442186~~, 2006 AS DOCUMENT NUMBER 103104, DEMISING AND LEASING FOR A TERM OF 99 YEARS EXPIRING ON SEPTEMBER 30, 2105, THE FOLLOWING DESCRIBED PARCEL, TO WIT:

LOTS 1, 14 AND 17 IN BLOCK 1 AND LOTS 1, 5, 6, 8, 10 AND OUT LOT 1 IN BLOCK 2 OF THE WESTHAVEN PARK RESUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED SEPTEMBER 8, 2006, AS DOCUMENT NUMBER 0625145094, IN COOK COUNTY, ILLINOIS, BEING A RESUBDIVISION AND CONSOLIDATION IN THOMAS' SUBDIVISION OF THE WEST 152 FEET OF BLOCK 51 IN CANAL TRUSTEES' SUBDIVISION OF SECTION 7, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, AND IN ASSESSOR'S DIVISION OF 146.98 FEET EAST OF AND ADJOINING THE WEST 152 FEET OF SAID BLOCK 51, AND IN THE SUBDIVISION BY TAYLOR OF THE EAST ½ OF SAID BLOCK 51, INCLUDING ALL OF THE VACATED EAST-WEST AND NORTH-SOUTH ALLEYS AND VACATED WEST MAYPOLE AVENUE IN SAID BLOCK 51, TOGETHER WITH THAT PART OF THE WEST ½ OF THE SOUTHEAST ¼ OF SECTION 7, AFORESAID, LYING EAST OF THE EAST LINE OF ASSESSOR'S DIVISION AFORESAID, AND LYING WEST OF THE WEST LINE OF THE SUBDIVISION BY TAYLOR AFORESAID, ALL IN COOK COUNTY, ILLINOIS.

PARCEL 2:

ALL BUILDINGS AND IMPROVEMENTS LOCATED, OR TO BE LOCATED AFTER THE DATE OF THE AFORESAID GROUND LEASE, ON THE LEASEHOLD ESTATE HEREINABOVE DESCRIBED AS PARCEL 1.

UNOFFICIAL COPY

Having the following Parcel Identification Numbers (PINs):

17-07-417-032	17-07-422-007	17-07-422-021
17-07-417-033	17-07-422-008	17-07-422-022
17-07-417-036	17-07-422-009	17-07-422-023
17-07-417-037	17-07-422-010	17-07-422-024
17-07-417-038	17-07-422-011	17-07-422-025
17-07-417-039	17-07-422-012	17-07-422-026
	17-07-422-013	17-07-422-027
17-07-422-001	17-07-422-014	17-07-422-028
17-07-422-002	17-07-422-015	
17-07-422-003	17-07-422-016	17-07-422-038
17-07-422-004		
17-07-422-005	17-07-422-018	
17-07-422-006		

Formerly known as the following addresses, all in Chicago, IL:

140 N Wood
 1832 W Washington
 1836 W Washington
 1850 W Washington
 141 N Wolcott
 1847 W Lake

Now currently known as the following addresses, all in Chicago, IL:

110 N Wood	1807 W Maypole	1807 W Lake
122 N Wood	1809 W Maypole	1809 W Lake
156 N Wood	1811 W Maypole	1811 W Lake
	1813 W Maypole	1813 W Lake
1804 W Washington	1817 W Maypole	1817 W Lake
1820 W Washington	1819 W Maypole	1849 W Lake
1822 W Washington	1820 W Maypole	1851 W Lake
1824 W Washington	1826 W Maypole	1853 W Lake
1826 W Washington	1828 W Maypole	
1830 W Washington	1830 W Maypole	
1832 W Washington	1832 W Maypole	
1834 W Washington	1836 W Maypole	
1836 W Washington	1837 W Maypole	
1854 W Washington	1838 W Maypole	
	1839 W Maypole	
103 N Wolcott	1840 W Maypole	
121 N Wolcott	1841 W Maypole	
155 N Wolcott	1845 W Maypole	
	1847 W Maypole	
	1849 W Maypole	
	1851 W Maypole	

UNOFFICIAL COPY

EXHIBIT B

INSURANCE REQUIREMENTS

I. CONSTRUCTION INSURANCE REQUIREMENTS

Mortgagor shall procure and maintain, directly or through the General Contractor at all times the types of insurance specified below in order to protect the Mortgagee, its Commissioners, Board, officers, agents and employees, and the Receiver, in its capacity as Receiver, from the acts, omissions and negligence of the Mortgagee, General Contractor, its officers, officials, subcontractors, joint venture, members, agents or employees with regard to the construction of the Project. The insurance carriers used must be authorized to conduct business in the State of Illinois and shall have a BEST Rating of not less than an "A" except where noted.

A. Required Insurance Coverages for Subcontractors:

1. Workers Compensation and Occupational Disease Insurance in accordance with the laws of the State of Illinois (Statutory) Coverage A, and Employer's Liability, Coverage B, in an amount of not less than \$500,000/\$500,000/\$500,000.
2. Commercial Liability Insurance Commercial Liability Insurance provided is to have a limit of not less than One Million Dollars (\$1,000,000) per occurrence with a Per Project aggregate of not less than Two Million Dollars (\$2,000,000) (i.e. \$1,000,000/\$2,000,000). In addition to the stipulations outlined above, the insurance policy is to include coverage for Contractual Liability, Products-Completed Operations, Personal & Advertising Injury and will also cover injury to Mortgagee's and General Contractor's respective officers, employees, agents subcontractors, invitees and guests and their personal property. The Authority and Receiver are to be endorsed as additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Authority.
3. Automobile Liability Insurance. When any motor vehicles (owned, non-owned and/or hired) are used in connection with the construction to be performed for such Development, Comprehensive Automobile Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence CSL, for bodily injury and property damage. The Mortgagee and Receiver are to be endorsed as additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Authority.
4. Professional Liability (Errors & Omissions). When any architects, engineers, construction managers, lawyers, property managers, security companies or other professional consultants perform work in connection with the Rental Development, Professional Liability insurance covering acts, errors or omissions shall be maintained with limits of not less than Five Million Dollars (\$5,000,000) per occurrence for each professional of record. When policies are renewed or replaced, the policy retroactive date must coincide with, or precede, start of services under the contract. A Claims-made policy which is not renewed or replaced must have an extended reporting period of two (2) years.

UNOFFICIAL COPY

5. Lead/Asbestos Abatement Liability. When any lead and/or asbestos abatement liability work is performed in connection with the contract, the requirements of C.2, below, must be satisfied.)

B. Required Insurance Coverages for General Contractor:

1. Workers Compensation and Occupational Disease Insurance in accordance with the laws of the State of Illinois (Statutory) Coverage A, and Employer's Liability, Coverage B, in an amount of not less than \$500,000/\$500,000/\$500,000.
2. Commercial Liability Insurance. Commercial Liability Insurance provided is to have a limit of not less than One Million Dollars (\$1,000,000) per occurrence with a Per Project aggregate of not less than Two Million Dollars (\$2,000,000) (i.e. \$1,000,000/\$2,000,000). In addition to the stipulations outlined above, the insurance policy is to include coverage for Contractual Liability, Products-Completed Operations, Personal & Advertising Injury and will also cover injury to Mortgagor's and General Contractor's respective officers, employees, agents subcontractors, invitees and guests and their personal property. The Mortgagee and Receiver are to be endorsed as additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee.
3. Automobile Liability Insurance. When any motor vehicles (owned, non-owned and/or hired) are used in connection with the construction to be performed for such Development, Comprehensive Automobile Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence CSL, for bodily injury and property damage. The Mortgagee and Receiver are to be endorsed as additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee.
4. Excess Liability. The General Contractor shall secure Excess Liability insurance in the amount of not less than Ten Million Dollars (\$10,000,000) per occurrence. This coverage will be excess of the General Liability, Auto Liability and Employers Liability coverages. The General Contractor's insurance coverage will be excess of all subcontractors with which it contracts to provide services for this development. The Mortgagee, Receiver, and the Mortgagor are to be endorsed as additional insureds on the General Contractor's Excess Liability policy.

C. Required Insurance Coverages for Mortgagor:

1. Excess Liability. The Mortgagor shall secure Excess Liability insurance in the amount of not less than Ten Million Dollars (\$10,000,000). This coverage will be excess of the General Liability, Auto Liability and Employers Liability coverages. The Mortgagor's excess coverage will include the stipulation of such coverages being excess of the General Contractor and all subcontractors providing service to this development. The Mortgagee and Receiver are to be endorsed as additional insureds on this insurance. Mortgagor shall provide proof of this insurance to Mortgagee.

UNOFFICIAL COPY

2. Contractors Pollution Liability. If the scope of work covers working with or around hazardous materials or pollutants, the General Contractor, or the subcontractor working with or around hazardous materials or pollutants shall purchase Contractor's Pollution Liability insurance policy, on an occurrence basis (claims made is not acceptable), covering any bodily injury, liability, and property damage liability, arising out of pollutants including hazardous materials such as asbestos, lead, etc. or contaminated soil, including while in transit to a permanent disposal facility which may arise from activities under or incidental to the contract, whether such activities be by the Contractor or by any of his subcontractors or by anyone directly or indirectly employed or otherwise contracted by any of them. This policy shall be maintained with limits of not less than Five Million Dollars (\$5,000,000) per occurrence. Mortgagor, General Contractor, such subcontractor, the Mortgagee and the Receiver are all to be named as insureds, either directly, or by endorsement as additional insureds on the policy, and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee. Mortgagor shall provide proof of this insurance to Mortgagee.
 3. Workers Compensation and Employer's Liability. Workers Compensation and Occupational Disease Insurance in accordance with the laws of the State of Illinois (Statutory) Coverage A, and Employer's Liability, Coverage B, in an amount of not less than \$500,000/\$500,000/\$500,000.
 4. Automobile Liability Insurance. When any motor vehicles (owned, non-owned and/or hired) are used in connection with the construction to be performed for the Project, Mortgagor shall provide, directly or through the General Contractor, Comprehensive Automobile Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence CSL, for bodily injury and property damage. The Mortgagee and Receiver are to be endorsed as an additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee.
 5. Builders Risk. The Mortgagor shall provide, directly or through the General Contractor for the Project an All Risk Builders Risk insurance in accordance with HUD's 5370 form (paragraph 36b), covering improvements, betterments, and/or repairs, at replacement cost, for all materials, supplies, equipment, machinery and fixtures that are or will be part of the permanent project.
- D. Evidence of Insurance. Prior to the commencement of construction activities, the Mortgagor directly or through the General Contractor shall furnish the Mortgagee, for record keeping purposes only, with satisfactory evidence that the Mortgagor, General Contractor and subcontractors have the insurance coverages set forth above. The Mortgagor and/or General Contractor shall be required to ensure that all subcontractors comply with the Mortgagee's minimum coverage requirements. It is the responsibility of the Mortgagor, and/or General Contractor to secure and maintain proof of coverage for all entities that it contracts with that provide services to this Development. Proof of insurance records must be available for review by the Mortgagee within twenty-four (24) hours of being requested. Said policies shall not be modified, canceled, non-renewed, or permitted to lapse until final completion and approval of the performance of the General Contractor's contract and shall contain a provision that the policy will not be modified, canceled non-renewed or permitted to lapse until not less than thirty (30) days after the Mortgagee has received written notice, by certified or registered mail, that the modification, cancellation, non-renewal or lapse of such policy is contemplated.

UNOFFICIAL COPY

- E. The Mortgagor shall advise, and cause each General Contractor to advise, all insurers of the contract provisions regarding insurance. The failure of the Mortgagor, or any General Contractor to notify insurers of the contract provisions shall not relieve Mortgagor from its insurance obligations hereunder. Nonfulfillment of the insurance provisions shall constitute a breach of the General Contractor's contract and this Mortgage and the Mortgagee retains the right to stop work until proper evidence of insurance is provided.
- F. Renewal Certificates of Insurance, requested endorsements, or such similar evidence is to be received by the Mortgagee's Risk Management Department, prior to expiration of insurance coverage. At the Mortgagee's option, non-compliance will result in one or more of the following actions: (1) The Receiver or Mortgagee will purchase insurance on behalf of Mortgagor and will charge back all costs to Mortgagor; (2) the General Contractor will be immediately removed from the property and its contract revoked; or (3) all payments due Mortgagor and General Contractor will be held until Mortgagor has complied with the contract. The receipt of any certificate by the Mortgagee or the Receiver does not constitute agreement by the Mortgagee or the Receiver that the insurance requirements in the Agreement have been fully met or that the insurance policies indicated on the certificate are in compliance with the requirements of the Agreement. The Mortgagor, and/or General Contractor shall be required to ensure that all subcontractors comply with the Mortgagee's minimum coverage requirements. It is the responsibility of the Mortgagor and/or General Contractor to secure and maintain proof of coverage for all entities that it contracts with that provide services to the Project. Proof of insurance records must be available for review by the Mortgagee within twenty-four (24) hours of being requested.
- G. If any of the required insurance is underwritten on a claims made basis, the retroactive date shall be prior to or coincident with the date of the General Contractor's contract, and the Certificate of Insurance shall state the coverage is "claims-made" and also the Retroactive Date. Any extended reporting period premium (tail coverage) shall be paid by Mortgagor, directly or through the General Contractor for the Development. It is further agreed that all insurance policies required hereunder shall provide the Mortgagee with not less than a thirty (30) days notice in the event of the occurrence of any of the following conditions: aggregate erosion in advance of the Retroactive Date, cancellation and/or non renewal.
- H. The Mortgagor shall provide to the Mortgagee, prior to commencement of construction and upon each renewal or replacement of a policy required hereunder, and in any event not less than annually, a certified copy of the insurance policies required hereunder and all endorsements.
- I. The Mortgagor shall require, directly or through the General Contractor, that all subcontractors performing work for the Project carry the insurance required herein or the Mortgagor or the General Contractor may provide the coverage for any or all of its subcontractors, and if so, the evidence of insurance submitted shall so stipulate and adhere to the same requirements and conditions as outlined in Section "A" above. Evidence of such coverage must be submitted to Mortgagee for record keeping purposes only.

II. MORTGAGOR'S INSURANCE REQUIREMENTS AT ALL TIMES

The Mortgagor agrees to procure and maintain at all times the types of insurance specified below in order to protect the Mortgagee from the acts, omissions and negligence of the selected respondent, its

UNOFFICIAL COPY

officers, officials, subcontractors, joint venture, members, agents or employees. The insurance carriers used by the Mortgagor must be authorized to conduct business in the State of Illinois and shall have a BEST Rating of not less than an "A". The insurance provided shall cover all operations under the Agreement, whether performed by the Mortgagor and/or subcontractor(s).

A. Required Insurance Coverages:

1. Workers Compensation and Occupational Disease Insurance in accordance with the laws of the State of Illinois (Statutory) Coverage A, and Employer's Liability, Coverage B, in an amount of not less than \$500,000/\$500,000/\$500,000.
2. Commercial Liability Insurance. Commercial Liability Insurance provided is to have a limit of not less than One Million Dollars (\$1,000,000) per occurrence with a Per Project aggregate of not less than Two Million Dollars (\$2,000,000) (i.e. \$1,000,000/\$2,000,000). In addition to the stipulations outlined above, the insurance policy is to include coverage for Contractual Liability, Products-Completed Operations, Personal & Advertising Injury and will also cover injury to Mortgagor's officers, employees, agents, subcontractors, invitees and guests and their personal property. The Mortgagee and Receiver are to be endorsed as additional insureds on the policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee.
3. Automobile Liability Insurance. When any motor vehicles (owned, non-owned and hired) are used in connection with the Services to be performed, the Mortgagor shall provide Comprehensive Automobile Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence CSL, for bodily injury and property damage. The Mortgagee and Receiver are to be endorsed as additional insureds on the Mortgagor's policy and such insurance will be endorsed as primary and non-contributory with any other insurance available to the Mortgagee.
4. Professional Liability. When any architects, engineers, construction managers, property managers or other professional consultants perform work in connection with this contract, Professional Liability insurance covering acts, errors or omissions shall be maintained with limits of not less than Five Million Dollars (\$5,000,000) per occurrence for each professional of record. Coverage extensions shall include Blanket Contractual Liability. When policies are renewed or replaced, the policy retroactive date must coincide with or precede, start of Services under this Agreement. A Claims-made policy which is not renewed or replaced must have an extended reporting period of two (2) years.
5. Blanket Crime. When the Mortgagor's service agreement requires the handling of funds or valuable papers, Mortgagor shall provide Blanket Crime coverage covering all persons liable under this Agreement, against loss by dishonesty, robbery, burglary, theft, destruction or disappearance, computer fraud, credit card forgery and other related crime risks. The policy limit shall be written to cover losses in the amount of the maximum monies collected, received and/or in the Mortgagor's care at any given time.
6. Excess Liability coverage, if applicable, is to follow form of the Primary Insurance requirements outlined above.

B. Related Requirements

UNOFFICIAL COPY

1. The Mortgagor shall advise all insurers of the contract provisions regarding insurance. The failure of the Mortgagor to notify insurers of the contract provisions shall not relieve Mortgagor from its insurance obligations under this contract. Nonfulfillment of the insurance provisions shall constitute a breach of the contract and the Mortgagee retains the right to stop work until proper evidence of insurance is provided.
2. The Mortgagor shall furnish the Mortgagee, Risk Management Department, 626 West Jackson Boulevard., Fifth Floor, Chicago, Illinois 60661, original Certificates of Insurance evidencing the required coverages to be in force on the Effective Date of this Agreement. In addition, copies of the endorsement(s) adding the Mortgagee and Receiver to your policy as an additional insureds is required.
3. Renewal Certificates of Insurance, requested endorsements, or such similar evidence is to be received by the Risk Management Department prior to expiration of insurance coverage. At the Mortgagee's option, non-compliance will result in one or more of the following actions: (1) The Mortgagee will purchase insurance on behalf of Mortgagor and will charge back all costs to Mortgagor; (2) Mortgagor will be immediately removed from Mortgagee property and contract revoked; (3) all payments due Mortgagor will be held until Mortgagor has complied with the contract; or (4) Mortgagor will be assessed Five Hundred Dollars (\$500) for every day of non-compliance. The receipt of any certificate does not constitute agreement by the Mortgagee that the insurance requirements in the Agreement have been fully met or that the insurance policies indicated on the certificate are in compliance with the requirements of the Agreement. The insurance policies shall provide for thirty (30) days written notice to be given to the Mortgagee in the event coverage is substantially changed, canceled or non-renewed.
4. If any of the required insurance is underwritten on a claims made basis, the retroactive date shall be prior to or coincident with the date of this Agreement and the Certificate of Insurance shall state the coverage is "claims made" and also the Retroactive Date. The Mortgagor shall maintain coverage for the duration of this Agreement. Any extended reporting period premium (tail coverage) shall be paid by Mortgagor. The Mortgagor shall provide to the Mortgagee, annually, a certified copy of the insurance policies obtained pursuant hereto. It is further agreed that the Mortgagor shall provide the Mortgagee a thirty (30) days notice in the event of the occurrence of any of the following conditions: aggregate erosion in advance of the Retroactive Date, cancellation and/or non renewal.
5. The Mortgagor shall require all subcontractors to carry the insurance required herein or the Mortgagor may provide the coverage for any or all of its subcontractors, and if so, the evidence of insurance submitted shall so stipulate and adhere to the same requirements and conditions as outlined in Section "A" above.

UNOFFICIAL COPY

EXHIBIT C TO MORTGAGE PERMITTED EXCEPTIONS

1. General real estate taxes not delinquent
2. Terms, provisions and conditions contained in Ground Lease:
By and between: Chicago Housing Authority and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
3. Terms, provisions and conditions contained in Declaration of Restrictive Covenants (Horner IIB Rental)
By and between: Chicago Housing Authority and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
4. Terms, provisions and conditions contained in Right of First Refusal Agreement (Rental Development):
By and among: WHP-IIB, LLC, WHP-IIB Manager, LLC, and Chicago Housing Authority
Dated: October 1, 2006
Recorded: Concurrently herewith
5. Regulatory and Operating Agreement:
By and between: Chicago Housing Authority and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
6. Regulatory Agreement:
By and between: City of Chicago and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
7. Extended Use Agreement:
By and between: Illinois Housing Development Authority and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
8. A Mortgage to secure an indebtedness in the amount stated herein:
Mortgagor: WHP-IIB, LLC
Mortgagee: JPMorgan Chase Bank, N.A.
Dated: October 1, 2006
Recorded: Concurrently herewith
Original Amount: \$9,520,000.00
9. Financing Statement:
Debtor: WHP-IIB, LLC
Secured Party: JPMorgan Chase Bank, N.A.
Filed: Concurrently herewith

UNOFFICIAL COPY

The following are additional permitted exceptions that are subordinate to this Mortgage and the other Loan Documents:

1. Retention/Repayment Agreement for Rental Projects Using Low Income Housing Tax Credits (LIHTCs) Affordable Housing Program Repayment Agreement
By and among: One Mortgage Partners Corp., WHP-IIB Manager, LLC, and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
2. A Junior Mortgage, Assignment of Rents and Security Agreement to secure an indebtedness in the amount stated herein:
Mortgagor: WHP-IIB, LLC
Mortgagee: One Mortgage Partners Corp.
Dated: October 1, 2006
Recorded: Concurrently herewith
Original Amount: \$533,500.00
3. Financing Statement:
Debtor: WHP-IIB, LLC
Secured Party: One Mortgage Partners Corp.
Filed: Concurrently herewith
4. A Rate Lock Assurance Fee Multifamily Mortgage, Assignment of Rents and Security Agreement to secure an indebtedness in the amount stated herein:
Mortgagor: WHP-IIB, LLC
Mortgagee: JPMorgan Chase Bank, N.A.
Dated: October 1, 2006
Recorded: Concurrently herewith
Original Amount: \$24,000.00
5. Subordination Agreement (Construction Period):
By and among: JPMorgan Chase Bank, N.A., City of Chicago, Chicago Housing Authority and WHP-IIB, LLC
Dated: October 1, 2006
Recorded: Concurrently herewith
6. A Junior Leasehold Mortgage, Security Agreement and Financing Statement to secure an indebtedness in the amount stated herein:
Mortgagor: WHP-IIB, LLC
Mortgagee: City of Chicago
Dated: October 1, 2006
Recorded: Concurrently herewith
Original Amount: \$7,250,000.00
7. An Assignment of Rents and Leases to further secure an indebtedness:
Assignor: WHP-IIB, LLC
Assignee: City of Chicago
Dated: October 1, 2006
Recorded: Concurrently herewith

UNOFFICIAL COPY

8. Financing Statement:
Debtor: WHP-IIB, LLC
Secured Party: City of Chicago
Filed: Concurrently herewith

9. Subordination Agreement:
By: One Mortgage Partners Corp.
Dated: October 1, 2006
Recorded: Concurrently herewith

Property of Cook County Clerk's Office