



Doc#: 0701642002 Fee: \$44.00
Eugene "Gene" Moore RHSP Fee:\$10.00
Cook County Recorder of Deeds
Date: 01/16/2007 08:12 AM Pg: 1 of 11

20196138.2
12-18-06

8289274 D2 ecm

SECOND MODIFICATION AGREEMENT

THIS SECOND MODIFICATION AGREEMENT dated as of December 21, 2006, by and among OPUS BRIARWOOD, L.L.C., a Delaware limited liability company (the "Mortgagor"), OPUS NORTH CORPORATION, an Illinois corporation (the "Guarantor," and the Mortgagor and the Guarantor being sometimes referred to herein collectively as the "Borrower/Guarantor Parties"), and JPMORGAN CHASE BANK, N.A., a national banking association (the "Bank");

WITNESSETH:

WHEREAS, the Borrower/Guarantor Parties and the Bank heretofore entered into the following documents (collectively, the "Documents"):

- (i) Amended and Restated Loan Agreement (Construction Loan) dated as of August 1, 2006 (the "Loan Agreement"), by and between the Mortgagor and the Bank;
- (ii) Amended and Restated Mortgage Note (Construction Loan) dated August 1, 2006 (the "Note"), from the Mortgagor to the Bank in the principal amount of \$28,750,000;
- (iii) Mortgage and Security Agreement dated as of November 15, 2005 (the "Mortgage"), from the Mortgagor to the Bank, recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on November 30, 2005, as Document No. 0533441110;

Permanent Tax Index Numbers and Address:

This Instrument Prepared by and to be Returned After Recording to:

See Exhibit A

Elizabeth Pfeiler Foley
Seyfarth Shaw LLP
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603

11/8

Box 400-CTCC

UNOFFICIAL COPY

(iv) Assignment of Rents and Leases dated as of November 15, 2005, from the Mortgagor to the Bank, recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on November 30, 2005, as Document No. 0533441111;

(v) Indemnity Agreement dated as of November 15, 2005 (the "Indemnity Agreement"), from the Mortgagor and the Guarantor to the Bank; and

(vi) Guaranty of Payment and Performance dated as of November 15, 2005 (the "Guaranty"), from the Guarantor to the Bank; and

WHEREAS, the Loan Agreement and the Note were executed and delivered pursuant to, and the other Documents were previously modified and amended by, the Modification Agreement dated as of August 1, 2006, by and among the Borrower/Guarantor Parties and the Bank, recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on August 4, 2006, as Document No. 0621639002 (the "Previous Modification"); and

WHEREAS the Documents, as executed and delivered pursuant to, or as modified and amended by, the Previous Modification, encumber the real estate described in Exhibit A attached hereto and the personal property located thereon; and

WHEREAS, the parties desire to make certain modifications and amendments to the Documents, as modified and amended by the Previous Modification, as more fully provided for herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

Section 1. Recitals Part of Agreement; Defined Terms, References to Documents. (a) The foregoing recitals are hereby incorporated into and made a part of this Agreement.

(b) All capitalized terms used and not otherwise defined in this Agreement shall have the meanings set forth in the Loan Agreement.

(c) Except as otherwise stated herein, all references in this Agreement to any one or more of the Documents shall be deemed to include the previous modifications and amendments to the Documents provided for in the Previous Modification, whether or not express reference is made to such previous modifications and amendments.

Section 2. Letters of Credit. (a) Subject to the provisions of this Section 2, the Bank will issue standby letters of credit, in each case containing such terms and conditions as are reasonably satisfactory to the Bank (each a "Letter of Credit" and collectively, the "Letters of Credit"), at the request of and for the account of the Mortgagor from time to time; provided, however, that the aggregate stated amount of all outstanding Letters of Credit shall not at any time exceed \$1,489,720. Each Letter of Credit shall be issued to a public body as beneficiary for the purpose of ensuring the completion of work which is a part of the Improvements and the costs of which constitute Costs of the Improvements that are included in the Budget. From the date of the issuance of any Letter of Credit issued under this Agreement until the date on which such Letter of Credit shall be returned to the Bank for cancellation without having been drawn

UNOFFICIAL COPY

upon, the undisbursed proceeds of the Loan that are available to be drawn by the Mortgagor at any time shall be reduced by the stated amount of such Letter of Credit.

(b) Each Letter of Credit shall be issued pursuant to an application duly executed by the Mortgagor and in all respects satisfactory to the Bank, together with such other documentation as the Bank may request in support thereof (collectively, the "Letter of Credit Documents"), it being understood that each such application shall specify, among other things, the date on which the proposed Letter of Credit is to be issued, the expiration date of such Letter of Credit (which shall not be later than the earlier to occur of (i) one year after the date of issuance thereof and (ii) 30 days prior to the maturity date of the Loan) and whether such Letter of Credit is to be transferable in whole or in part. Each of the Letter of Credit Documents shall be a Loan Document, and all references in the Documents to the "Loan Documents" shall be deemed to include a reference to the Letter of Credit Documents. In addition, the Costs of the Improvements shall include all costs and expenses incurred by the Mortgagor in connection with the Letter of Credit Documents and the Letters of Credit, and all references in the Documents to the "Costs of the Improvements" shall be deemed to include reference to such costs and expenses.

(c) The Bank shall not be obligated to issue any Letter of Credit unless and until the following conditions have been satisfied:

(i) No Default or Event of Default shall have occurred and be continuing under any of the Loan Documents, and

(ii) The Bank shall have received executed copies of the Letter of Credit Documents in form and content acceptable to the Bank.

(d) Any amounts drawn on the Letters of Credit shall be evidenced by the Letter of Credit Documents and the Note and shall be deemed to be amounts disbursed and outstanding thereunder as of the date such amounts are drawn. Notwithstanding anything to the contrary contained in the Loan Agreement or the Note, amounts drawn on the Letter of Credit shall bear interest at the rate provided in the Letter of Credit Documents, and shall be payable by the Mortgagor on the terms provided in the Letter of Credit Documents.

(e) The Letter of Credit Documents shall be secured by the Mortgage and the Assignment of Rents, and the obligations of the Mortgagor under the Letter of Credit Documents shall be guaranteed by the Guarantor pursuant to the Guaranty.

(f) The Mortgagor shall pay a non-refundable annual letter of credit fee to the Bank on the date of the issuance of the Letter of Credit, and on each anniversary thereof, in an amount equal to 1% of the amount of the Letter of Credit.

(g) The Mortgagor hereby covenants and agrees with the Bank that the Mortgagor shall promptly pay any amount due under the Letter of Credit Documents as and when the same shall become due and payable.

(h) Without limitation on the generality of the foregoing provisions of this Section, Paragraph (a) on page 3 of the Mortgage is hereby modified and amended in its entirety to read as follows:

UNOFFICIAL COPY

(a) Payment of the indebtedness evidenced by the Note, and including the principal thereof and interest thereon, and reimbursement obligations, fees and expenses for letters of credit issued by the Mortgagee for the account of the Mortgagor, if any, and any and all modifications, extensions and renewals of any of the foregoing, and performance of all obligations of the Mortgagor under the Note, and payment of all amounts due under any application for letters of credit and master letter of credit agreement and performance of all obligations of the Mortgagor under the same; and

(h) All of the Documents are hereby modified and amended to incorporate the foregoing provisions of this Section.

Section 3. Representations and Warranties. In order to induce the Bank to enter into this Agreement, the Borrower/Guarantor Parties hereby represent and warrant to the Bank as follows as of the date of this Agreement and if different, as of the date of the execution and delivery of this Agreement:

(a) The Mortgagor is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, has all necessary power and authority to carry on its present business, and has full right, power and authority to enter into this Agreement and each of the Documents and the Previous Modification to which it is a party and to perform and consummate the transactions contemplated hereby and thereby.

(b) The Guarantor is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois, has all necessary power and authority to carry on its present business, and has full right, power and authority to enter into and to execute and deliver this Agreement and each of the Documents and the Previous Modification to which it is a party and to perform and consummate the transactions contemplated hereby and thereby.

(e) This Agreement and each of the Documents and the Previous Modification has been duly authorized, executed and delivered by such of the Borrower/Guarantor Parties as are parties thereto, and this Agreement and each of the Documents and the Previous Modification constitutes a valid and legally binding obligation enforceable against such of the Borrower/Guarantor Parties as are parties thereto, subject to bankruptcy, insolvency, reorganization and other laws of general application affecting creditors rights. The execution and delivery of this Agreement and the Documents and the Previous Modification and compliance with the provisions thereof under the circumstances contemplated therein do not and will not conflict with or constitute a breach or violation of or default under the certificate of formation or operating agreement of the Mortgagor, the articles of incorporation or bylaws of the Guarantor, or any agreement or other instrument to which either of the Borrower/Guarantor Parties are a party, or by which either of them is bound, or to which any of their respective properties are subject, or any existing law, administrative regulation, court order or consent decree to which either of them is subject.

(f) The Borrower/Guarantor Parties are in full compliance with all of the terms and conditions of the Documents and the Previous Modification to which they are a party, and no Default or Event of Default has occurred and is continuing with respect to any of the Documents and the Previous Modification.

(g) There is no litigation or administrative proceeding pending or, to the best knowledge of the Borrower/Guarantor Parties, threatened to restrain or enjoin the transactions

UNOFFICIAL COPY

contemplated by this Agreement or any of the Documents or the Previous Modification, or questioning the validity thereof, or in any way contesting the existence or powers of either of the Borrower/Guarantor Parties, or in which an unfavorable decision, ruling or finding would materially adversely affect the transactions contemplated by this Agreement or any of the Documents or the Previous Modification, or would result in any material adverse change in the financial condition, properties, business or operations of either of the Borrower/Guarantor Parties.

(h) The statements contained in the recitals to this Agreement are true and correct.

Section 4. Documents to Remain in Effect; Confirmation of Obligations; References. The Documents shall remain in full force and effect as originally executed and delivered by the parties, except as expressly modified and amended by, or amended and restated in their entirety pursuant to, the Previous Modification. The Borrower/Guarantor Parties hereby (i) confirm and reaffirm all of their obligations under the Documents, as modified and amended by, or amended and restated in their entirety pursuant to, the Previous Modification; (ii) acknowledge and agree that the Bank, by entering into this Agreement, does not waive any existing or future default or event of default under any of the Documents, or any rights or remedies under any of the Documents, except as expressly provided for herein; (iii) acknowledge and agree that the Bank has not heretofore waived any default or event of default under any of the Documents, or any rights or remedies under any of the Documents; and (iv) acknowledge that they do not have any defense, set-off or counterclaim to the payment or performance of any of their obligations under the Documents, as modified and amended by or amended and restated in their entirety pursuant to the Previous Modification. All references in the Documents to any one or more of the Documents, or to the "Loan Documents," shall be deemed to refer to such Document, Documents or Loan Documents, as the case may be, as previously modified and amended by, or amended and restated in their entirety pursuant to, the Previous Modification, and as modified and amended by this Agreement.

Section 5. Certifications, Representations and Warranties. In order to induce the Bank to enter into this Agreement, the Borrower/Guarantor Parties hereby certify, represent and warrant to the Bank that all certifications, representations and warranties contained in the Documents and the Previous Modification and in all certificates heretofore delivered to the Bank are true and correct as of the date of this Agreement and if different, as of the date of the execution and delivery of this Agreement, and all such certifications, representations and warranties are hereby remade and made to speak as of the date of this Agreement and if different, as of the date of the execution and delivery of this Agreement.

Section 6. Entire Agreement; No Reliance. This Agreement sets forth all of the covenants, promises, agreements, conditions and understandings of the parties relating to the subject matter of this Agreement, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them relating to the subject matter of this Agreement other than as are herein set forth. The Borrower/Guarantor Parties acknowledge that they are executing this Agreement without relying on any statements, representations or warranties, either oral or written, that are not expressly set forth herein.

Section 7. Successors. This Agreement shall inure to the benefit of and shall be binding upon the parties and their respective successors, assigns and legal representatives.

UNOFFICIAL COPY

Section 8. Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 9. Amendments, Changes and Modifications. This Agreement may be amended, changed, modified, altered or terminated only by a written instrument executed by all of the parties hereto.

Section 10. Construction. (a) The words "hereof," "herein," and "hereunder," and other words of a similar import refer to this Agreement as a whole and not to the individual Sections in which such terms are used.

(b) References to Sections and other subdivisions of this Agreement are to the designated Sections and other subdivisions of this Agreement as originally executed.

(c) The headings of this Agreement are for convenience only and shall not define or limit the provisions hereof.

(d) Where the context so requires, words used in singular shall include the plural and vice versa, and words of one gender shall include all other genders.

(e) The Borrower/Guarantor Parties and the Bank, and their respective legal counsel, have participated in the drafting of this Agreement, and accordingly the general rule of construction to the effect that any ambiguities in a contract are to be resolved against the party drafting the contract shall not be employed in the construction and interpretation of this Agreement.

Section 11. Execution of Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 12. Governing Law. This Agreement is prepared and entered into with the intention that the law of the State of Illinois shall govern its construction and enforcement.

[SIGNATURE PAGE(S) AND EXHIBIT(S),
IF ANY, FOLLOW THIS PAGE]

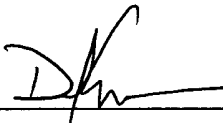
UNOFFICIAL COPY

IN WITNESS WHEREOF, the parties have executed this instrument as of the date first above written.

OPUS BRIARWOOD, L.L.C.

By Ret A. Gelle
Title: TREASURER

OPUS NORTH CORPORATION

By 
Title: **David Everson**
Vice President, Sales and Finance

JPMORGAN CHASE BANK, N.A.

By _____
Title: _____

Property of Cook County Clerk's Office

UNOFFICIAL COPY

IN WITNESS WHEREOF, the parties have executed this instrument as of the date first above written.


OPUS BRIARWOOD, L.L.C.

By _____
Title:

OPUS NORTH CORPORATION

By _____
Title:

JPMORGAN CHASE BANK, N.A.

By  _____
Title: Shannon P. Chagnot
Assistant Vice President

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION OF THE PREMISES

PARCEL 1:

THE WEST 800 FEET OF LOT 2 (EXCEPT THE WEST 363 FEET THEREOF) IN LINNEMAN'S DIVISION OF PART OF THE NORTHEAST 1/4 OF SECTION 23, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN AND PART OF THE SOUTH EAST 1/4 OF SECTION 14, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED SEPTEMBER 10, 1953 IN THE OFFICE OF THE RECORDER OF DEEDS OF COOK COUNTY, ILLINOIS AS DOCUMENT 15716544 IN COOK COUNTY, ILLINOIS;

PARCEL 2:

THE NORTH 537 FEET OF THE WEST 811.30 FEET, AS MEASURED ON THE WEST AND NORTH LINES THEREOF, OF LOT 3 (EXCEPT THE NORTH 120 FEET OF THE WEST 363 FEET OF SAID LOT 3) IN LINNEMAN'S DIVISION OF THE SOUTH 3/4 OF THE EAST 1/2 OF THE NORTHEAST 1/4 AND THE WEST 1/2 OF THE NORTHEAST 1/4 OF SECTION 14, TOWNSHIP 41 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS ACCORDING TO THE PLAT THEREOF RECORDED SEPTEMBER 10, 1953 IN THE OFFICE OF THE RECORDER OF DEEDS OF COOK COUNTY, ILLINOIS AS DOCUMENT 15716544, IN COOK COUNTY, ILLINOIS.

PARCEL 3:

LOT 12, 13, 14, 15, 16 AND THE WESTERLY 141 FEET OF LOTS 6 AND 7 IN ELMHURST ALGONQUIN INDUSTRIAL PARK, UNIT NO. 1 BEING A RESUBDIVISION OF PART OF LOT 3 IN LINNEMAN'S DIVISION IN SECTION 23, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 20, 1967, IN THE OFFICE OF THE RECORDER OF DEEDS OF COOK COUNTY, ILLINOIS AS DOCUMENT 20409120, IN COOK COUNTY, ILLINOIS.

Permanent Tax Index Numbers:

08-23-200-049-0000; 08-23-200-050-0000;
08-23-202-048-0000 and 08-23-202-049-0000

Address of Premises

Northeast Corner of Algonquin and Linneman Roads
Elk Grove Township, Illinois