

UNOFFICIAL COPY



Doc#: 0735103077 Fee: \$912.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 12/17/2007 04:10 PM Pg: 1 of 445

This space reserved for Recorder's use only.

**310 SOUTH MICHIGAN AVENUE BUILDING AND
318 SOUTH MICHIGAN AVENUE BUILDING
CHICAGO, ILLINOIS**

RECIPROCAL EASEMENT AGREEMENT

BY AND AMONG

**310 SOUTH MICHIGAN AVENUE, L.L.C.,
an Illinois limited liability company,**

**310 RETAIL, L.L.C.,
an Illinois limited liability company,**

**318 SOUTH MICHIGAN AVENUE, L.L.C.,
an Illinois limited liability company, AND**

**318 RETAIL, L.L.C.,
an Illinois limited liability company**

**THIS INSTRUMENT WAS PREPARED
BY AND SHOULD BE RETURNED
AFTER RECORDATION TO:**

Adam T. Berkoff, Esq.
Brian A. Cohen, Esq.
DLA Piper US LLP
203 North LaSalle Street
Chicago, IL 60601
Box 416

Permanent Tax Numbers:
17-15-107-051 through 069

CHGO2\40095798.10

0735103077

Property of Cook County Clerk's Office

UNOFFICIAL COPY

TABLE OF CONTENTS

<u>ARTICLE</u>	<u>PAGE</u>
ARTICLE 1 DEFINITIONS.....	3
1.1 Definitions.....	3
1.2 Construing Various Words and Phrases	13
ARTICLE 2 EASEMENTS GRANTED BY 310 RESIDENTIAL	13
2.1 In General.....	13
2.2 Grant of Easements	15
ARTICLE 3 EASEMENTS GRANTED BY 318 RESIDENTIAL	20
3.1 In General.....	20
3.2 Grant of Easements	22
ARTICLE 4 EASEMENTS GRANTED BY 310 RETAIL	26
4.1 In General.....	26
4.2 Grant of Easements	27
ARTICLE 5 EASEMENTS GRANTED BY 318 RETAIL	30
5.1 In General.....	30
5.2 Grant of Easements	31
ARTICLE 6 STRUCTURAL SUPPORT	33
6.1 Structural Safety and Integrity	33
6.2 Construction of Support.....	33
6.3 Effect of Delay	34
ARTICLE 7 SERVICES.....	34
7.1 Services Provided by 310 Residential to 310 Retail, 318 Residential and 318 Retail	34
7.2 Other Services.....	35
7.3 Obligation to Furnish Services.....	36
7.4 Payment for Services	37
7.5 Owner's Failure to Perform Services.....	37
7.6 Data Unavailable from Metering	37
7.7 Discontinuance of Services.....	38
7.8 Replacement of Facilities.....	38

UNOFFICIAL COPY

ARTICLE 8	INDEMNIFICATIONS; LIENS; COMPLIANCE WITH LAWS; ZONING; USE; SIGNAGE; ENVIRONMENTAL AND ENGINEERING REVIEW	38
8.1	Indemnity by Owners.....	38
8.2	Liens.....	39
8.3	Compliance With Laws.....	40
8.4	Zoning.....	40
8.5	Use	41
8.6	Exterior Building Signage/Visible Window Treatments	42
8.7	Environmental and Engineering Review	43
ARTICLE 9	INTENTIONALLY OMITTED	44
ARTICLE 10	INSURANCE.....	44
10.1	Insurance Required	44
10.2	Insurance Companies.....	46
10.3	Insurance Provisions.....	47
10.4	Limits of Liability.....	47
10.5	Renewal Policies.....	48
10.6	Waiver.....	48
10.7	Self-Insurance	49
ARTICLE 11	MAINTENANCE AND REPAIR; DAMAGE TO EITHER BUILDING.....	49
11.1	Maintenance of Property.....	49
11.2	Damage Affecting Only 310 Residential Property, 310 Retail Property, 318 Residential Property or 318 Retail Property	50
11.3	Joint Damage	50
11.4	Cost of Repairs.....	51
11.5	Deposit of Costs.....	52
11.6	Excess Insurance Proceeds	52
11.7	Agreement Not to Repair	53
11.8	Costs Defined.....	54
11.9	Restoration of Condominium Property	54
11.10	Common Walls and Doors.....	56
ARTICLE 12	LIENS, DEBTS, INTEREST AND REMEDIES	56
12.1	Failure to Perform	56
12.2	No Diminution of Lien.....	57

UNOFFICIAL COPY

12.3	Mortgagee's Subrogation.....	58
12.4	Interest Rate	58
12.5	Cumulative Remedies	58
12.6	No Set Off.....	58
12.7	Period of Limitation.....	59
12.8	Attorneys' Fees	59
12.9	Self-Help.....	59
ARTICLE 13	ARBITRATION	59
13.1	Disputes Subject to Arbitration; Arbitration Procedure.....	59
13.2	Monetary Adjustment (Equivalent Dollars).....	60
ARTICLE 14	UNAVOIDABLE DELAYS.....	61
ARTICLE 15	CONDEMNATION.....	61
15.1	In General.....	61
15.2	Payment of Award to Depositary; Temporary Taking Awards.....	62
15.3	Taking of Only One Parcel	62
15.4	Repair and Restoration by All Owners	63
15.5	Excess Award.....	64
15.6	Demolition	64
15.7	Allocation of Award	64
15.8	Condominium	64
ARTICLE 16	ALTERATIONS	65
16.1	Permitted Alterations	65
16.2	Building Permits	68
16.3	No Liens.....	69
ARTICLE 17	ESTOPPEL CERTIFICATES	69
17.1	Estoppel Certificates	69
ARTICLE 18	DEPOSITARY.....	71
18.1	Appointment of Depositary.....	71
18.2	Liability of Depositary.....	71
18.3	Interest on Deposited Funds.....	71
18.4	Indemnification of Depositary	72
18.5	Resignation of Depositary.....	72
ARTICLE 19	DISBURSEMENTS OF FUNDS BY DEPOSITARY	73

UNOFFICIAL COPY

19.1	Disbursement Requests.....	73
19.2	No Lien or Consent by Contractor.....	74
ARTICLE 20	ARCHITECT.....	74
20.1	Appointment of Architect.....	74
20.2	Notice of Submission of Dispute to Architect.....	75
20.3	Replacement of Architect.....	75
20.4	Architect's Fees.....	76
ARTICLE 21	NOTICES AND APPROVALS.....	76
21.1	Notice to Parties.....	76
21.2	Multiple Owners.....	78
ARTICLE 22	GENERAL.....	78
22.1	Cooperation of Owners.....	78
22.2	Severability.....	79
22.3	Headings.....	79
22.4	Amendments to Agreement.....	79
22.5	Perpetuities and Other Invalidity.....	79
22.6	Condominium Associations Acting for Unit Owners.....	79
22.7	Abandonment of Easements.....	81
22.8	Applicable Laws.....	81
22.9	Licenses.....	81
22.10	No Third Party Beneficiary.....	81
22.11	Incorporation.....	81
22.12	Notice to Mortgagees; Rights of Mortgagee.....	81
22.13	Coordination with Tenants.....	83
22.14	Waiver of Mechanic's Liens by Owners.....	83
22.15	Binding Effect.....	83
22.16	Special Amendment by Developer.....	83
22.17	Alley.....	84
22.18	Field Changes.....	84
22.19	Tax Parcels.....	84
ARTICLE 23	LIMITATION OF LIABILITY.....	84
23.1	Limitation of Liability.....	84
23.2	Transfer of Ownership.....	85

UNOFFICIAL COPY

LIST OF EXHIBITS TO DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS

<u>EXHIBIT LETTER OR NUMBER</u>	<u>TITLE OR DESCRIPTION</u>	<u>PAGE</u>
A	310 Property Legal Description	A-1
B	318 Property Legal Description	B-1
C	310 Residential Property Legal Description	C-1
D	310 Retail Property Legal Description	D-1
E	318 Residential Property Legal Description	E-1
F	318 Retail Property Legal Description	F-1
G	Project Diagram	G-1
H	310 Residential Owned Facilities	H-1
I	318 Residential Owned Facilities	I-1
J	310 Retail Owned Facilities	J-1
K	Retail Owned Facilities	K-1
L	310 Façade and 318 Façade	L-1
M	Black Iron Grill Venting Locations	M-1
N	Tax Parcel Depictions	N-1
7.1(A)	Domestic (City) Water Supply System	7.1(A)-1
7.1(B)	Fire Pumps and Combination Standpipe System	7.1(B)-1
7.1(C)	Storm Water Drainage	7.1(C)-1
7.1(D)	Fire and Life Safety Systems and Fire Control Panel	7.1(D)-1
7.1(E)	Electrical Service	7.1(E)-1
7.1(F)	Loading Dock Area and 310 Service Elevator	7.1(F)-1

UNOFFICIAL COPY

EXHIBIT LETTER OR NUMBER	<u>TITLE OR DESCRIPTION</u>	<u>PAGE</u>
7.1(G)	Sidewalk Exterior Maintenance and Snow Removal	7.1(G)-1
7.1(H)	Maintenance of 310 Façade	7.1(H)-1
7.1(I)	Expansion Joints	7.1(I)-1
7.1(J)	Exterior Window Washing	7.1(J)-1
7.1(K)	Exterior Lighting	7.1(K)-1
7.1(M)	Security System	7.1(M)-1
7.1(N)	Gas	7.1(N)-1
7.2(B)	Roof Maintenance	7.2(B)-1
7.4	Billing and Payment	7.4-1
18.1	Depository Agreement	18.1-1
22.9(A)	Metropolitan Towers Logo	22.9(A)-1
22.9(B)	Richelieu Flats Logo	22.9(B)-1

UNOFFICIAL COPY

310 SOUTH MICHIGAN AVENUE BUILDING
AND
318 SOUTH MICHIGAN AVENUE BUILDING
CHICAGO, ILLINOIS

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS

THIS RECIPROCAL EASEMENT AGREEMENT is made and entered into as of the 17th day of December, 2007 by and among **310 SOUTH MICHIGAN AVENUE, L.L.C.**, an Illinois limited liability company ("**310 Residential LLC**"), **310 RETAIL, L.L.C.**, an Illinois limited liability company ("**310 Retail LLC**"), **318 SOUTH MICHIGAN AVENUE, L.L.C.**, an Illinois limited liability company ("**318 Residential LLC**") and **318 RETAIL, L.L.C.**, an Illinois limited liability company ("**318 Retail LLC**").

RECITALS:

- A. The terms used in the Recitals, if not otherwise defined in the Recitals or in the immediately foregoing paragraphs, shall have the meanings set forth in Article 1 of this Agreement.
- B. 310 Residential LLC owned the property described on Exhibit A attached hereto (the "**310 South Michigan Property**"), upon which the building commonly known as 310 South Michigan Avenue (the "**310 Building**") is located. 310 Residential LLC conveyed (i) the retail, façade and air rights portions of the 310 South Michigan Property to 310 Retail LLC and (ii) an undivided 5% interest in the land portion of the 310 South Michigan Property to 310 Retail LLC.
- C. 318 Residential LLC owned the property described on Exhibit B attached hereto (the "**318 South Michigan Property**"), upon which the building commonly known as 318 South Michigan Avenue (the "**318 Building**") is located. 318 Residential LLC conveyed (i) the retail and air rights portions of the 318 South Michigan Property to 318 Retail LLC, (ii) the garage portion of the 318 South Michigan Property to 310 Residential LLC and (iii) an undivided 3% interest in the land portion of the 318 South Michigan Property to 318 Retail LLC.
- D. As of the date hereof, (i) 310 Residential LLC owns the property described in Exhibit C (the "**310 Residential Property**"), (ii) 310 Retail LLC owns the property described in Exhibit D (the "**310 Retail Property**"), (iii) 318 Residential LLC owns the property described in Exhibit E (the "**318 Residential Property**"), and (iv) 318 Retail LLC owns the property described in Exhibit F (the "**318 Retail Property**").
- E. 310 Residential LLC will complete the redevelopment and renovation of the 310 Residential Property, which, when completed, will consist generally of (i) approximately two hundred forty-two (242) residential dwelling units (or fewer if units are combined) located on floors three (3) through thirty (30) of the 310 Building, together with approximately two hundred and fifty (250) unit parking spaces to be located within the 310 Building and the 318 Building

UNOFFICIAL COPY

(fifty-two (52) of which are tandem unit parking spaces), storage areas located on various floors within the 310 Building, lobby facilities, elevators (both passenger and service), stairwells, balconies, terraces and certain other common elements and facilities located within the 310 Building and (ii) a loading dock area in the 318 Building.

F. 318 Residential LLC will complete the redevelopment and renovation of the 318 Residential Property, which, when completed, will consist generally of approximately five (5) residential dwelling units located on floors three (3) through eight (8) of the 318 Building, lobby facilities, two (2) passenger elevators, stairwells, a terrace and certain other common elements and facilities located within the 318 Building.

G. The remaining portions of the 310 Building are the 310 Retail Property, which is owned by 310 Retail LLC. The 310 Retail Property consists generally of portions of the basement and the first (1st) floor of the 310 Building, the 310 Building stairways and service corridors, the 310 Façade, the air space above the 310 Building and an undivided 5% interest in the land upon which the 310 Building is located.

H. The remaining portions of the 318 Building are the 318 Retail Property, which is owned by 318 Retail LLC. The 318 Retail Property consists generally of portions of the basement, first (1st) floor and second (2nd) floor of the 318 Building, the air space above the 318 Building and an undivided 3% interest in the land upon which the 318 Building is located.

I. Since none of the 310 Residential Property, the 310 Retail Property, the 318 Residential Property or the 318 Retail Property will be functionally independent of the other and each will depend upon the others, to some extent, for structural support, enclosure, ingress and egress, utility services and other facilities and components necessary to the efficient operation and intended use of the 310 Residential Property, the 310 Retail Property, the 318 Residential Property and the 318 Retail Property, the Owners intend to provide for the efficient operation of each respective portion, estate and interest in the Project, to assure the harmonious relationship of the Owners of each such respective portion, estate or interest in the Project, and to protect the respective values of each such portion, estate and interest in the Project, by providing for, declaring and creating (i) certain easements, covenants and restrictions against and affecting the 310 Residential Property which will be binding upon each present and future Owner of the 310 Residential Property, or of any portion thereof or interest or estate therein, and which will inure to the benefit of each of the present and future Owners of one or more of the 310 Retail Property, the 318 Residential Property and the 318 Retail Property, (ii) certain easements, covenants and restrictions against and affecting the 310 Retail Property which will be binding upon each present and future Owner of the 310 Retail Property, or of any portion thereof or interest or estate therein, and which will inure to the benefit of each of the present and future Owners of one or more of the 310 Residential Property, the 318 Residential Property and the 318 Retail Property, (iii) certain easements, covenants and restrictions against and affecting the 318 Residential Property which will be binding upon each present and future Owner of the 318 Residential Property, or of any portion thereof or interest or estate therein, and which will inure to the benefit of each of the present and future Owners of one or more of the 310 Residential Property, the 310 Retail Property and the 318 Retail Property, and (iv) certain easements, covenants and restrictions against and affecting the 318 Retail Property which will be binding

UNOFFICIAL COPY

upon each present and future Owner of the 318 Retail Property, or of any portion thereof or interest or estate therein, and which will inure to the benefit of each of the present and future Owners of one or more of the 310 Residential Property, the 310 Retail Property and the 318 Residential Property.

NOW, THEREFORE, in consideration of the Recitals and the covenants contained herein, as of the Effective Date of this Reciprocal Easement Agreement, the parties, intending to be legally bound, hereby agree as follows:

ARTICLE 1

DEFINITIONS

1.1 Definitions. Whenever used in this Agreement, the following terms shall have the respective meanings specified below:

310 Building - All improvements situated within and upon the 310 South Michigan Property, including the 310 Condominium Property (other than those portions of the Garage located in the 318 Building) and the 310 Retail Property.

318 Building - All improvements situated within and upon the 318 South Michigan Property, including the 318 Condominium Property, the 318 Retail Property, the Loading Dock Area and a portion of the Garage.

310 Condominium - The condominium to be created in the 310 Condominium Property.

318 Condominium - The condominium to be created in the 318 Condominium Property.

310 Condominium Declaration - Any declaration of condominium ownership and of easements, restrictions, covenants and by-laws which submits any portion of the 310 Residential Property and any portion of the 310 Future Development Parcel to the provisions of the Act.

318 Condominium Declaration - Any declaration of condominium ownership and of easements, restrictions, covenants and by-laws which submits any portion of the 318 Residential Property and any portion of the 318 Future Development Parcel to the provisions of the Act.

310 Condominium Property - Any portion of the 310 Residential Property and the 310 Future Development Parcel from and after its submission to the Act and so long as it has not been withdrawn from the Act.

318 Condominium Property - Any portion of the 318 Residential Property and the 318 Future Development Parcel from and after its submission to the Act and so long as it has not been withdrawn from the Act.

310 Condominium Association - An Illinois not-for-profit corporation to be formed for the purpose of administering the 310 Condominium Property pursuant to Act.

UNOFFICIAL COPY

318 Condominium Association - An Illinois not-for-profit corporation to be formed for the purpose of administering the 318 Condominium Property pursuant to Act.

310 Façade - The façade of the 310 Building, consisting of the elements described in Exhibit L attached hereto, including without limitation, the bells, ziggurat, four (4) bison and glass beacon located thereon. The 310 Façade is owned by 310 Retail and is subject to the Preservation Easement.

318 Façade - The façade of the 318 Building, which is owned by 318 Retail.

310 Future Development Parcel - That portion of the 310 Residential Property which may be submitted to the Act and added on to the 310 Condominium Property.

318 Future Development Parcel - That portion of the 318 Residential Property which may be submitted to the Act and added on to the 318 Condominium Property.

310 Residential - The person or persons or entity or entities (excluding occupants or tenants and the holders of any mortgage [whether a mortgage of the 310 Residential Property or of a condominium unit] whose estates or interests, individually or collectively, aggregate, from time to time, fee simple ownership of the 310 Residential Property, are hereinafter collectively referred to as "310 Residential." If and so long as the 310 Residential Property or any portion thereof has been submitted to and remains subject to the provisions of the Act, 310 Residential shall mean collectively all of the 310 Unit Owners in and to the 310 Residential Property and not individually. The initial 310 Residential is 310 South Michigan Avenue, L.L.C.

318 Residential - The person or persons or entity or entities (excluding occupants or tenants and the holders of any mortgage [whether a mortgage of the 318 Residential Property or of a condominium unit] whose estates or interests, individually or collectively, aggregate, from time to time, fee simple ownership of the 318 Residential Property, are hereinafter collectively referred to as "318 Residential." If and so long as the 318 Residential Property or any portion thereof has been submitted to and remains subject to the provisions of the Act, 318 Residential shall mean collectively all of the 318 Unit Owners in and to the 318 Residential Property and not individually. The initial 318 Residential is 318 South Michigan Avenue, L.L.C.

310 Residential Fitness Center - The room located in the seventh (7th) floor of the 310 Building, comprising a portion of the 310 Residential Property, intended for use for physical exercise.

310 Residential Improvements - All improvements constructed upon and within the 310 Residential Property by 310 Residential, its successors, grantees or assigns, at its sole cost and expense. When the 310 Residential Property is submitted to the Act, the 310 Residential Improvements shall become part of the 310 Condominium.

318 Residential Improvements - All improvements constructed upon and within the 318 Residential Property by 318 Residential, its successors, grantees or assigns, at its sole cost and expense. When the 318 Residential Property is submitted to the Act, the 318 Residential Improvements shall become part of the 318 Condominium.

UNOFFICIAL COPY

310 Residential Owned Facilities – The Facilities owned by 310 Residential and now located (or which may, pursuant to this Agreement or other agreement of the Owners, hereafter be located) in the 310 Retail Property, the 318 Residential Property or the 318 Retail Property including, without limitation, those Facilities identified in Exhibit H as “310 Residential Owned Facilities”.

318 Residential Owned Facilities – The Facilities owned by 318 Residential and now located (or which may, pursuant to this Agreement or other agreement of the Owners, hereafter be located) in the 310 Residential Property, the 310 Retail Property or the 318 Retail Property including, without limitation, those Facilities identified in Exhibit I as “318 Residential Owned Facilities”.

310 Residential Property - The real property legally described on Exhibit C, located in the City of Chicago, County of Cook and State of Illinois, and all improvements thereto.

318 Residential Property - The real property legally described on Exhibit E, located in the City of Chicago, County of Cook and State of Illinois, and all improvements thereto.

310 Residential Passenger Elevators - The five (5) passenger elevators numbered 1, 2, 4, 5 and 6 located within the 310 Building, including the passenger cab, doors, wires, cables, motors, electrical service, machinery, equipment, pit and machine rooms, but excluding the elevator panels and cab doors of the passenger cab.

318 Residential Passenger Elevator Number 2 - The eastern passenger elevator numbered 2 located within the 318 Building, including the passenger cab, doors, wires, cables, motors, electrical service, machinery, equipment, pit and machine rooms, but excluding the elevator panels and cab doors of the passenger car.

310 Retail - The person or persons or entity or entities (excluding occupants or tenants and excluding the holders of any mortgage) whose estates or interests, individually or collectively, aggregate, from time to time, fee simple ownership of the 310 Retail Property, are hereinafter collectively referred to as “310 Retail.” The initial 310 Retail is 310 Retail, L.L.C.

318 Retail - The person or persons or entity or entities (excluding occupants or tenants and excluding the holders of any mortgage) whose estates or interests, individually or collectively, aggregate, from time to time, fee simple ownership of the 318 Retail Property, are hereinafter collectively referred to as “318 Retail.” The initial 318 Retail is 318 Retail, L.L.C.

310 Retail Building - That portion of the 310 Building located within the 310 Retail Property (or within public or private space immediately adjoining the 310 Retail Property or the 310 Vault) containing Improvements which exclusively serve the 310 Retail Property, other than the 310 Retail Owned Facilities, which consist generally of street level commercial space and space below grade for storage, Facilities used by and exclusively serving retail Occupants, the 310 Façade and the bells, ziggurat, four (4) bison and glass beacon located thereon.

318 Retail Building - That portion of the 318 Building located within the 318 Retail Property (or within public or private space immediately adjoining the 318 Retail Property or the

UNOFFICIAL COPY

318 Vault) containing Improvements which exclusively serve the 318 Retail Property, other than the 318 Retail Owned Facilities, which consist generally of street level and second (2nd) floor commercial space and space below grade for storage and Facilities used by and exclusively serving retail Occupants.

310 Retail Owned Facilities - The Facilities owned by 310 Retail and now located (or which may, pursuant to this Agreement or other agreement of the Owners, hereafter be located) in the 310 Retail Property or the 310 Residential Property including, without limitation, those Facilities identified in Exhibit J as "310 Retail Owned Facilities".

318 Retail Owned Facilities - The Facilities owned by 318 Retail and now located (or which may, pursuant to this Agreement or other agreement of the Owners, hereafter be located) in the 318 Retail Property or the 318 Residential Property including, without limitation, those Facilities identified in Exhibit K as "318 Retail Owned Facilities".

310 Retail Property - The real property legally described on Exhibit D, located in the City of Chicago, County of Cook and State of Illinois, and all improvements thereto.

318 Retail Property - The real property legally described on Exhibit F, located in the City of Chicago, County of Cook and State of Illinois, and all improvements thereto.

310 Roof - The 310 Roof, for purposes of this Agreement, unless otherwise specifically defined, shall mean the roof of the 310 Building, including, without limitation, the membrane, roof covering, roof structure and improvements located on the 310 Roof such as machine rooms, equipment rooms, penthouses, stair rooms and parapets (but excluding the stone comprising the cornice but including the flashing and membrane and other weatherproofing material over and/or under the cornice), all within the area of the Project at the top of the 310 Building.

318 Roof - The 318 Roof, for purposes of this Agreement, unless otherwise specifically defined, shall mean the roof of the 318 Building, including, without limitation, the membrane, roof covering, roof structure and improvements located on the 318 Roof such as machine rooms, equipment rooms, penthouses, stair rooms and parapets (but excluding the stone comprising the cornice but including the flashing and membrane and other weatherproofing material over and/or under the cornice), all within the area of the Project at the top of the 318 Building.

310 Service Elevator - Service elevator number 3 in the 310 Building, including, the cab, doors, motors, wires, cables, electrical service, equipment, machinery, machine pit and machine room.

310 South Michigan Property - The property described on Exhibit A attached hereto, upon which the building commonly known as 310 South Michigan Avenue is located.

318 South Michigan Property - The property described on Exhibit B attached hereto, upon which the building commonly known as 318 South Michigan Avenue is located.

310 Structural Supports - All construction elements (including, without limitation, structural members, footings or foundations, slabs, caissons, columns, beams, braces and trusses)

UNOFFICIAL COPY

which are load bearing or which are necessary for the structural integrity of any portion of the 310 Building, and all subsurface support.

318 Structural Supports - All construction elements (including, without limitation, structural members, footings or foundations, slabs, caissons, columns, beams, braces and trusses) which are load bearing or which are necessary for the structural integrity of any portion of the 318 Building, and all subsurface support.

310 Unit – Any portion of the 310 Condominium Property described as a “Unit” in the 310 Condominium Declaration.

318 Unit – Any portion of the 318 Condominium Property described as a “Unit” in the 318 Condominium Declaration.

310 Unit Owner - The person or persons, entity or entities whose estates or interests, individually or collectively, aggregate fee simple ownership of a 310 Unit Ownership.

318 Unit Owner - The person or persons, entity or entities whose estates or interests, individually or collectively, aggregate fee simple ownership of a 318 Unit Ownership.

310 Unit Ownership - Any portion of the 310 Condominium Property consisting of one unit and the undivided interest in the Common Elements attributable thereto.

318 Unit Ownership - Any portion of the 318 Condominium Property consisting of one unit and the undivided interest in the Common Elements attributable thereto.

310 Vault - The vaulted sidewalk space adjacent to and to the north and east of the 310 Building owned by the City.

310 Vault Permit - Permit Number 1022879 issued by the City of Chicago, Illinois allowing the use and requiring the maintenance of the 310 Vault.

Act - The Condominium Property Act of the State of Illinois in effect as of the date hereof, as the same may be amended from time to time.

Agreement - This Reciprocal Easement Agreement, together with all Exhibits, amendments and supplements hereto.

Alterations - As defined in Section 16.1(A).

Altering Owner - As defined in Section 16.1(A).

Approving Party - The Owner designated from time to time to make certain decisions or give certain approvals pursuant to the terms of this Agreement. There shall be one Approving Party representing each Parcel. Each Approving Party shall have absolute discretion to make the decisions or amend or terminate this Agreement pursuant to Section 20.4 or give the approvals expressly designated to be made or given on behalf of the Project represented by such position

UNOFFICIAL COPY

regardless of whether the Approving Party then owns all or less than all of the 310 Residential Property, 310 Retail Property, 318 Residential Property or 318 Retail Property, as the case may be. The holder of the Approving Party position shall have the right to assign, in writing, such position to any other Person owning a portion of the Project represented by the Approving Party position. 310 Residential shall be the initial Approving Party for the 310 Residential Property, 310 Retail shall be the initial Approving Party for the 310 Retail Property, 318 Residential shall be the initial Approving Party for the 318 Residential Property and 318 Retail shall be the initial Approving Party for the 318 Retail Property. Once the 310 Condominium is created by submission of the 310 Residential Property to the Act, the Approving Party position for the 310 Residential Property shall be held and exercised by the 310 Condominium Association. Once the 318 Condominium is created by submission of the 318 Residential Property to the Act, the Approving Party position for the 318 Residential Property shall be held and exercised by the 318 Condominium Association.

Arbitrable Dispute - Any dispute arising under this Agreement which is expressly made subject to arbitration under the provisions of Article 13 hereof or designated as an Arbitrable Dispute.

Architect - As defined in Section 16.1.

Assessor - As defined in Section 9.1.

Award - As defined in Section 15.1.

Benefited Owner - As defined in Paragraph 2 of Exhibit 7.4.

Building - The 310 Building or the 318 Building.

City - The City of Chicago, Illinois, a municipal corporation.

Common Walls, Floors And Ceilings - All common structural and partition walls, floors and ceilings situated on or adjoining two Parcels, or located on one Parcel but forming the walls, floors or ceilings of an adjoining Parcel.

Consumer Price Index - As defined in Section 13.2.

Contributing Party - As defined in Paragraph 1(a) of Exhibit 7.4.

Creditor Owner - An Owner (A) to whom payment of money or other duty or obligation is owed under this Agreement by another Owner who has failed to make such payment or to perform such duty or obligation as and when required by this Agreement or (B) who has exercised any self help remedy provided for in this Agreement. (An Owner may be a Creditor Owner notwithstanding that the term "Creditor Owner" is not specifically stated in a particular provision of this Agreement.)

Default Amount - As defined in Section 12.1.

UNOFFICIAL COPY

Defaulting Owner - An Owner who has failed to perform any of its duties or obligations as and when required under this Agreement or to make payment of money owed under this Agreement to another Owner. (An Owner may be a Defaulting Owner notwithstanding that the term "Defaulting Owner" is not specifically stated in a particular provision of this Agreement.)

Depository - The person or entity from time to time acting pursuant to Article 18.

Developer - 310 Met Tower, L.L.C., its successors in interest, grantees or assigns.

Easements - All easements declared, granted or created pursuant to the terms and provisions of this Agreement.

Effective Date - The date specified in the Preamble on Page 1 of this Agreement.

Emergency Situation - A situation (i) impairing or imminently likely to impair structural support of the 310 Building or 318 Building, as the case may be; (ii) causing or imminently likely to cause bodily injury to persons or substantial physical damage to the 310 Building or 318 Building, as the case may be or any property in, on, under, within, upon or about the 310 Building or 318 Building, as the case may be; (iii) causing or imminently likely to cause substantial economic loss to an Owner; or (iv) substantially disrupting or imminently likely to substantially disrupt business operations in the 310 Retail Property, the 318 Retail Property or use of the 310 Residential Property or 318 Residential Property for its intended purposes. The duration of an Emergency Situation shall be deemed to include the time reasonably necessary to remedy the Emergency Situation.

Estoppel Certificate - As defined in Section 17.1.

Existing Zoning - DX-16, pursuant to the Chicago Zoning Ordinance.

Facilities - Any facilities, fixtures, machinery and equipment, including without limitation, annunciators, antennae, boilers, boxes, brackets, cabinets, cables, chillers, closets (for facilities and risers) coils, computers, conduits, controls, control centers, condensers, cooling towers, couplers, devices, ducts, equipment (including, without limitation, heating, ventilating, air conditioning and plumbing equipment), fans, fixtures, generators, hangers, heat traces, indicators, junctions, lines, light fixtures, machines, meters, motors, outlets, panels, pipes, pumps, radiators, risers, sprinklers, starters, steam heating systems (including steam and condensate supply and return risers) switches, switchboards, systems, tanks, telecommunication equipment, transformers, vacuum pipe valves, wiring, and the like used in providing services from time to time in any part of the 310 Building or 318 Building, as the case may be, including, without limitation, air conditioning, alarm, antenna, circulation, cleaning, communication, cooling, electric, elevator, exhaust, heating, lightning protection, natural gas, plumbing, radio, recording, sanitary, security, sensing, telephone, television, transportation, ventilation and water service, and any replacements of or additions to any of the items described in this paragraph.

First Mortgagee - iStar FM Loans LLC, a Delaware limited liability company, as successor-in-interest to Fremont Investment & Loan, a California investment bank.

UNOFFICIAL COPY

First Mortgage Loan – (i) That certain loan made by First Mortgagee that is secured by Mortgage and Fixture Filing and an Assignment of Rents (and Leases) encumbering the 310 Residential Property, 318 Residential Property and 318 Retail Property, and all other documents and instruments now or hereafter evidencing, securing, guaranteeing and otherwise relating to this loan; and (ii) that certain loan made by First Mortgagee that is secured by Mortgage and Fixture Filing and an Assignment of Rents (and Leases) encumbering the 310 Retail Property, and all other documents and instruments now or hereafter evidencing, securing, guaranteeing and otherwise relating to this loan.

Garage - All improvements now or hereafter constructed for use as a parking facility within the 310 Residential Property, consisting generally of a six (6) level indoor heated facility for parking of passenger vehicles in the 310 Building and the 318 Building.

Hazardous Materials - Any hazardous substance, pollutant, contaminant, or waste regulated under the Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. §9601 et seq.); asbestos and asbestos containing materials; oil and petroleum products and natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel; pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. §136 et seq.); PCBs and other substances regulated under Toxic Substances Control Act, as amended (7 U.S.C. §136 et seq.); source material, special nuclear material, byproduct materials, and any other radioactive materials or radioactive wastes however produced, regulated under the Atomic Energy Act or the Nuclear Waste Policy Act; chemicals subject to the Occupational Safety and Health Act Hazard Communication Standard, 29 C.F.R. §1910.1200 et seq.; industrial process and pollution control wastes whether or not hazardous within the meaning of the Resource Conservation and Recovery Act, as amended (42 U.S.C. §6901 et seq.), and other substances and materials regulated under Laws relating to environmental quality, health, safety, contamination and clean-up.

Impacted Owner - As defined in Section 8.2.

Indemnifying Owner - As defined in Section 8.1.

Indemnitee - As defined in Section 8.1.

Inspecting Owner - As defined in Section 8.5.

Law or Laws - All laws, statutes, codes, acts, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements of all governments, departments, commissions, boards, courts, authorities, agencies, officials and officers, foreseen and unforeseen, ordinary or extraordinary, which now or at any later time may be applicable to the Project, or any parts thereof.

Liening Owner - As defined in Section 8.2.

Loading Dock Area - The platform, dock stairs, doors and adjoining area (including the service elevator) located in the rear of the 310 Building and the 318 Building and owned by 310 Residential.

UNOFFICIAL COPY

Maintenance - Operation, maintenance, repair, removal, reconditioning, refurbishing, reconfiguration, inspection, testing, cleaning, painting, installation, restoration, reconstruction and replacement when necessary or desirable of the Project and includes the right of access to and the right to remove from the 310 Building or 318 Building, as the case may be, portions of such Facilities for any of the above purposes, subject, however, to any limitations set forth elsewhere in this Agreement. As used in Article 7, Maintenance excludes obligations for which another Owner is responsible under Articles 6, 11 or 15. Maintenance costs may include utilities.

Mechanics' Lien Act - As defined in Section 16.3.

Mortgage - As defined in Section 22.12(A).

Mortgagee - As defined in Section 22.12(A).

Net Capitalized Cost Of Replacement - As defined in Paragraph 7 of Exhibit 7.4.

Net Salvage Value Of The Capital Item Being Replaced - As defined in Section 7 of Exhibit 7.4.

2007 Equivalent Dollars - As defined in Paragraph 13.2.

Non-Performing Owner - As defined in Article 14.

Occupant - Any Person from time to time entitled to the use and occupancy of any portion of the 310 Building or 318 Building as an Owner or under any lease, sublease, license, concession or other similar agreement.

Operating Expenses - As defined in Paragraph 7 of Exhibit 7.4.

Operating Owner - As defined in Paragraph 2 of Exhibit 7.4.

Owned Facilities - A collective reference to 310 Residential Owned Facilities, 310 Retail Owned Facilities, 318 Residential Owned Facilities and 318 Retail Owned Facilities.

Owners - 310 Residential, 310 Retail, 318 Residential, 318 Retail or any of them.

Parcel(s) - The 310 Residential Property, the 310 Retail Property, the 318 Residential Property or the 318 Retail Property, or all of them.

Permittees - All Occupants and the officers, directors, members, employees, agents, contractors, customers, vendors, suppliers, visitors, guests, invitees, licensees, subtenants and concessionaires of Occupants insofar as their activities relate to the intended development, use and occupancy of the 310 Building or 318 Building.

UNOFFICIAL COPY

Person - Any individual, partnership, firm, associations, corporation, limited liability company, trust, land trust or any other form of business or not for profit organization or governmental entity.

Preservation Easement - That certain Preservation Easement dated December 30, 2005 by and between 310 Retail and Landmarks Preservation Council of Illinois, which is recorded as Document Number 0536404269 with the Recorder.

Prior Lien - As defined in Section 12.1.

Progress Payment - As defined in Paragraph 2 of Exhibit 7.4.

Project - A collective reference to the 310 Residential Property, 310 Retail Property, 318 Residential Property and 318 Retail Property.

Project Diagram - The drawings attached as Exhibit G, together with any revisions made from time to time. All descriptions of facilities and improvements in the Project Diagram are for illustrative purposes only and do not impose upon the Developer, any party hereto or any of their respective affiliates a duty to construct such facilities or improvements.

Projection Notice - As defined in Paragraph 2(a) Exhibit 7.4.

Projections - As defined in Paragraph 2(a) of Exhibit 7.4.

Recorder - The Recorder of Deeds of Cook County, Illinois.

Replacing Party - As defined in Paragraph 1(A) of Exhibit 7.4.

Review - As defined in Section 8.7.

Shared Facilities - Facilities that are used by, and intended to benefit, more than one (1) Owner.

Statement - As defined in Paragraph 2 of Exhibit 7.4.

Unavoidable Delay - As defined in Article 14.

Unit - Any portion of the 310 Condominium Property or the 318 Condominium Property described as a "Unit" in the 310 Condominium Declaration or 318 Condominium Declaration, as the case may be.

Unit Owner - A 310 Unit Owner or 318 Unit Owner, at the case may be.

Unit Ownership - A 310 Unit Ownership or 318 Unit Ownership, as the case may be.

Utility Company - Any Person, including governmental bodies, furnishing water, chilled water, electricity, sewer, gas, steam, telephone or network television, cable television, satellite

UNOFFICIAL COPY

equipment and microwave signals or internet service or other services or materials generally known as utilities.

Work - As defined in Section 19.1(A).

1.2 **Construing Various Words and Phrases.** Wherever it is provided in this Agreement that a party “may” perform an act or do anything, it shall be construed that party “may, but shall not be obligated to,” so perform or so do. The following words and phrases shall be construed as follows: (i) “At any time” shall be construed as “at any time or from time to time;” (ii) “Any” shall be construed as “any and all;” (iii) “Including” shall be construed as “including but not limited to;” and (iv) “Will” and “shall” shall each be construed as mandatory. Except as otherwise specifically indicated, all references to Article or Section numbers or letters shall refer to Articles and Sections of this Agreement and all references to Exhibits or Appendices shall refer to the Exhibits and Appendices attached to this Agreement. The words “herein,” “hereof,” “hereunder,” “hereinafter” and words of similar import shall refer to this Agreement as a whole and not to any particular Section or subsection. Forms of words in the singular, plural, masculine, feminine or neuter shall be construed to include the other forms as context may require. Captions and the index are used in this Agreement for convenience only and shall not be used to construe the meaning of any part of this Agreement.

ARTICLE 2

EASEMENTS GRANTED BY 310 RESIDENTIAL

2.1 **In General.** For the purposes of this Article 2, the following shall apply:

(A) 310 Residential has granted, reserved, declared and created the Easements described in this Article 2. The term “Granted” or “granted” as hereinafter used in Article 2 describing Easements shall be deemed to mean “granted, reserved, declared and created”. The Easements in this Article 2 shall bind and be enforceable against 310 Residential and its successors, grantees and assigns, including, without limitation, the 310 Condominium and all Unit Owners and the 310 Association if the 310 Residential Property is submitted to the Act.

(B) The Easements granted by this Article 2 shall bind and burden the 310 Residential Property, before and after the 310 Residential Property is submitted to the Act, which shall, for the purpose of this Article 2, be deemed to be the servient tenement. Where only a portion of the 310 Residential Property is bound and burdened by the Easement, only that portion shall be deemed to be the servient tenement.

(C) Each Easement granted by this Article 2 is appurtenant to and shall benefit 310 Retail, 318 Residential or 318 Retail, as the case may be, which shall, for the purpose of this Article 2 with respect to such Easement, be deemed to be the dominant tenement. Where only a portion of the 310 Retail Property, 318 Residential Property or 318 Retail Property, as the case may be, is so benefited, only that portion shall be deemed to be the

UNOFFICIAL COPY

dominant tenement. No property other than the 310 Retail Property, 318 Residential Property or 318 Retail Property shall constitute part of the dominant tenement.

(D) Unless otherwise expressly provided in this Agreement, all Easements granted under this Article 2 are irrevocable and perpetual in nature and bind the 310 Residential Property, 310 Residential and, after the 310 Residential Property is submitted to the Act, the 310 Condominium, all 310 Unit Owners and the 310 Condominium Association.

(E) In exercising an Easement granted under this Article 2, the Owner of the Parcel benefited by the Easement shall minimize the impact of its exercise on the Owner of the Parcel burdened by the Easement, taking into consideration the impact of any disruption, and shall comply with the provisions of Section 16.1(E) whether or not the work being performed or exercise of the Easement constitutes "Alterations".

(F) The Owner of the 310 Residential Property may, (1) in connection with the Maintenance, repair or restoration of the 310 Residential Property, or (2) in an Emergency Situation, or (3) to prevent a dedication of, or an accruing of rights by, the public in and to the use of the 310 Residential Property: temporarily prevent, close off or restrict the flow of pedestrian or vehicular ingress, egress or use in, over, on, across and through any of the Easements, but only to the minimal extent and for the shortest time period reasonably necessary under the circumstances in order to minimize the effect on the user of such Easement. The Owner of the 310 Residential Property may, from time to time, impose (A) reasonable limitations on any other Owner's or any Permittee's use of an Easement providing for ingress and egress in, over, on, across and through the 310 Residential Property described in this Article 2 including, without limitation, establishing paths of ingress and egress and hours of the day or days of the week during which any other Owner or Permittee may use such Easement and (B) reasonable security controls consistent with the use of the 310 Residential Property as a condominium and any overall security system for the Project. In imposing limitations or controls, the Owner of the 310 Residential Property shall take into consideration the reasonable needs and requirements of the users of the Easement as well as the imposing Owner's own needs and requirements.

(G) Any disputes concerning the existence, location, nature, use and scope of any of the Easements granted under this Article 2 shall constitute Arbitrable Disputes.

(H) Any exclusive Easement granted under this Agreement shall in all events be subject to the concurrent use by the Owner of the servient estate as and only to the extent reasonably necessary for Maintenance of the property of the Owner of the servient estate, for exercise of rights of self-help granted under Section 7.5, and its rights under Article 11 or Article 15 or elsewhere in this Agreement and for other uses which do not unreasonably interfere with the exercise of the Easement granted.

(I) Some of the stairways, doors or elevators referenced in this Article by numbers or letters (or a combination thereof) may be shown on the Project Diagram.

UNOFFICIAL COPY

(J) All descriptions of facilities and improvements in this Article 2 are for illustrative purposes only and do not impose upon the Developer, any party hereto or any of their respective affiliates a duty to construct such facilities or improvements.

2.2 **Grant of Easements.** The following Easements in, to, under, over, upon, through and about portions of the 310 Residential Property, in favor of the 310 Retail Property, 318 Residential Property or 318 Retail Property, as the case may be, are hereby granted.

(A) **Ingress and Egress in Favor of 310 Retail.** To 310 Retail, a non exclusive easement for ingress and egress only for Persons, material and equipment in, over, on, across and through such portions of the 310 Residential Property as are reasonably necessary to permit the use and operation or the Maintenance (but only if and when such Maintenance is required or permitted under this Agreement) of (1) the 310 Retail Property, (2) any Facilities located in the 310 Residential Property which provide or are necessary to provide the 310 Retail Property with any utilities or other services necessary to the operation of the 310 Retail Property, including, without limitation, 310 Retail Owned Facilities and (3) any other areas in the 310 Residential Property as to which an Easement for use or Maintenance has been granted to 310 Retail, or the obligation to perform a service has been imposed by Section 7.1.

(B) **Electrical Switch Gear and Low Voltage Equipment Room.** To 310 Retail, 318 Residential, 318 Retail and their respective Permittees, subject to existing or future license or lease agreements impacting such property, a non exclusive easement for access (through the routes shown on Sheet 2.2B of the Project Diagram), use and operation and Maintenance of the electrical switch gear and equipment located on floor B1 of the 310 Building and the telephone and low voltage equipment room located on floor B2 of the 310 Building.

(C) **Retail Property Structural Support.** To 310 Retail, a non exclusive easement in all Structural Supports located in or constituting a part of the 310 Residential Property for the support of (1) the 310 Retail Property, (2) any Facilities or areas located in the 310 Residential Property with respect to which 310 Retail is granted an Easement and (3) 310 Retail Owned Facilities.

(D) **Use of Facilities Benefiting the 310 Retail Property.** To 310 Retail, a non exclusive easement (1) for the intended use of all Facilities which are (i) located in the 310 Residential Property, including 310 Retail Owned Facilities; and (ii) connected to Facilities located in the 310 Retail Property which provide or are necessary to provide the 310 Retail Property with any utilities or other services necessary to the operation of the 310 Retail Property and (2) permitting the exercise of the rights of self-help granted to 310 Retail pursuant to this Agreement or otherwise during any period in which said rights may be exercised.

(E) **Common Walls, Floors and Ceilings.** To each other Owner, a non exclusive easement for support, enclosure, use and Maintenance with respect to Common

UNOFFICIAL COPY

Walls, Floors and Ceilings existing or constructed in and along the common boundaries of the 310 Residential Property and such Owner's Parcel.

(F) **Retail Utilities.** To 310 Retail (and if requested by the applicable Utility Company, to such Utility Company) non exclusive easements for utility purposes required by the 310 Retail Property, in those areas of the 310 Residential Property where such utilities are currently located or to be located as part of the 310 Residential Improvements. If, at any time, it shall become necessary to relocate or add to utility easements (including installation of Facilities) other than where currently located or to be located as part of the 310 Residential Improvements in the 310 Building in order to provide required utility service to the 310 Retail Property, 310 Residential agrees to grant such additional or relocated utility easements (at such location mutually agreed to by 310 Retail and 310 Residential), provided (1) such easements do not unreasonably interfere with the reasonable use and enjoyment of the 310 Residential Property for the purposes for which the 310 Residential Property is used, or if such use and enjoyment would be disturbed, no reasonable alternative is available, (2) 310 Residential shall not be required to grant an easement which would convert otherwise available space for residential occupancy or storage unless such relocation or additional easements are required by Law and no other space is reasonably available, and the affected Owner is equitably compensated for the value of such converted space and (3) 310 Retail shall pay 310 Residential's reasonable costs or expenses in connection with granting such easement.

(G) **Dry Cleaner Dropoff.** To 310 Retail, a non exclusive right of access through the dry cleaner dropoff on the ground floor of the 310 Building, as shown on Sheet 2.2G of the Project Diagram.

(H) **Mechanical Equipment.** To 310 Retail, a non exclusive easement for the use and Maintenance of mechanical equipment located on floor B2 of the 310 Building, along with access thereto in the locations shown on Sheet 2.2H of the Project Diagram.

(I) **Black Iron Grill Venting.** To and for the benefit of 318 Retail, a non exclusive easement for the existence, Maintenance, removal and replacement of black iron kitchen exhaust, make-up-air and all other duct work and conduits serving the 318 Retail Property and located within and penetrating through portions of the Garage, Loading Dock Area and certain shaft openings in the 310 Building as are necessary to properly vent, and provide make-up air intake, in accordance with applicable Laws, as well as a non exclusive easement for ingress, egress and access over, upon, through and across such portions of the Garage, Loading Dock Area and 310 Building as may be necessary or appropriate to perform the work contemplated in this subsection. The locations where such duct work and conduits penetrate the Garage, Loading Dock Area and 310 Building are designated on Exhibit M hereto.

(J) **318 Retail Mechanical Rooms.** To 318 Retail, a non exclusive easement for the use and Maintenance of any existing (or, if constructed as part of the 310 Residential Improvements, future) generator, mechanical, machine, electrical, stair, switchgear, panel meter, equipment or pump rooms, and the pipes serving such facilities,

UNOFFICIAL COPY

which are now located in the Loading Dock Area and floors P3 and P4 of the 310 Residential Property and serve the 310 Retail Property, 318 Residential Property or 318 Retail Property, as the case may be, or as may hereafter be located in the 310 Residential Property in accordance with the provisions of this Agreement or other agreement of the Owners.

(K) **310 Retail Property Encroachments.** To 310 Retail, an easement permitting the existence of encroachments if such encroachments presently exist or are replaced in the same location or result from the construction of the 310 Residential Improvements or the permitted renovation of the 310 Residential Property or if, by reason of settlement or shifting of the Building, any part of the 310 Retail Property or 310 Retail Owned Facilities not currently located within the 310 Residential Property encroaches or shall hereafter encroach upon any part of the 310 Residential Property. This Easement shall exist only so long as the encroaching portion of the 310 Retail Property or such Facilities continues to exist, or replacements are made in the same location which do not materially enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.

(L) **Roof Use and Access for 310 Retail or its Designee.** To 310 Retail or its designee, a non exclusive easement in, over, on and across the 310 Roof for ingress and egress of persons, materials and equipment to the extent reasonably necessary to permit the existence, attachment, installation and Maintenance of any cell phone towers, antennas, microwave dishes, satellite dishes, broadband facilities or other rooftop communications facilities (both revenue-generating and non-revenue generating) (collectively, the "310 Rooftop Communications Facilities"), along with a right to install and access wires serving such 310 Rooftop Communications Facilities in the areas of the 310 Building housing the 310 Building's wiring. 310 Retail or its designee shall install, operate and maintain all 310 Rooftop Communications Facilities in accordance with all applicable laws, ordinances and regulations and shall use commercially reasonable efforts to prevent the 310 Rooftop Communications Facilities from interfering with any communications facilities installed by or on behalf of 310 Residential or with the views of any units in the 310 Condominium. 310 Retail or its designee is permitted to install the Rooftop Communications Facilities in the locations shown on Sheet 2.2L of the Project Diagram without 310 Residential's prior approval; the installation of Rooftop Communications Facilities in any other locations requires 310 Residential's prior approval as to the location. All costs of operating the 310 Rooftop Communications Facilities and all revenues generated from the 310 Rooftop Communications Facilities shall be the sole property of 310 Retail or its designee.

(M) **310 Retail Owned Facilities.** To 310 Retail, an easement permitting the existence, attachment, use and Maintenance of 310 Retail Owned Facilities.

(N) **Communication Services Equipment.** To i5 wireless, LLC ("i5"), Innovative Building Concepts, Inc. and their employees, agents, successors and assigns, a non exclusive easement for access to and Maintenance of equipment and panels pursuant

UNOFFICIAL COPY

to and for the duration of that certain License Agreement for Exclusive Installation and Services by and between i5 and 310 Residential and any other similar agreement with 310 Residential.

(O) **CECO Vault, Meters.** To Commonwealth Edison Company (and any successors-in-interest) and its employees, agents and contractors, the right to use and perform Maintenance of the CECO Vaults, meters and other related equipment on the ground floor and floor B2 of the 310 Building, along with the right to access the ground floor vault, meters and equipment through an access door along the alley on Jackson Boulevard and the right to access the B2 vault, meters and equipment through use of an access panel on Jackson Boulevard and a "drop" on the ground floor and floors B1 and B2 of the 310 Building, each through the routes shown on Sheet 2.2O of the Project Diagram.

(P) **310 Service Elevator.** To 310 Retail, 318 Residential and 318 Retail, a non exclusive easement for pedestrian ingress and egress to and from 310 Service Elevator and use thereof. 310 Retail shall be permitted to access the 310 Service Elevator only through the Loading Dock Area or floor B1 of the 310 Building and not through any other portions of the ground floor of the 310 Building.

(Q) **Refuse Chute.** To 318 Residential, an exclusive easement for use and Maintenance of the refuse chute in the southern portion of the 310 Building, as shown on Sheet 2.2Q of the Project Diagram, as well as a non exclusive easement for access to and from the refuse room located on floor B1 and from the refuse room to and from the 310 Service Elevator using the route shown on Sheet 2.2Q-1 of the Project Diagram.

(R) **Air Shafts.** To 310 Retail, 318 Residential and 318 Retail, a non exclusive easement for the use of the air shafts on floor B1, as shown on Sheet 2.2R of the Project Diagram.

(S) **310 Residential Fitness Center.** To 318 Residential, a non exclusive easement permitting the 318 Unit Owners to pay the required fees to access and use the 310 Residential Fitness Center, subject to such reasonable rules and regulations as may be promulgated from time to time by 310 Residential relating to the use thereof. Notwithstanding anything to the contrary contained in this subsection at any time after December 31, 2010, the 310 Association shall have the right to restrict the use of the 310 Residential Fitness Center solely to the owners of residential condominium units in the 310 Condominium Association.

(T) **Southern Berth of Loading Dock Area.** To 318 Retail, a non exclusive easement for the use of the Loading Dock Area (except for the two northernmost berths) and an exclusive easement for the use of the southern dock within the Loading Dock Area as necessary or desirable for the efficient delivery or dispatch of materials, supplies, goods, furniture, equipment, refuse and the like to and from the 318 Retail Property and for any other similar purposes for which such areas are customarily used, subject to the limitations on use set forth in this Agreement. 318 Retail acknowledges and agrees that

UNOFFICIAL COPY

its use of the Loading Dock Area shall be subject to reasonable rules and regulations promulgated by 310 Residential concerning the use of the Loading Dock Area and the coordination of the use of the Loading Dock Area by 318 Retail, 310 Residential and their Permittees.

(U) **Northern Berths of Loading Dock Area.** To 310 Retail and 318 Residential, a non exclusive easement for the use of the Loading Dock Area (except for the southernmost berth) as necessary or desirable for the efficient delivery or dispatch of materials, supplies, goods, furniture, equipment, refuse and the like to and from the 310 Retail Property and 318 Residential Property, as the case may be, and for any other similar purposes for which such areas are customarily used, subject to the limitations on use set forth in this Agreement. 310 Retail and 318 Residential acknowledge and agree that their use of the Loading Dock Area shall be subject to reasonable rules and regulations promulgated by 310 Residential concerning the use of the Loading Dock Area and the coordination of the use of the Loading Dock Area by 310 Retail, 318 Residential, 310 Residential and their Permittees.

(V) **Trash Dumpster.** To 310 Retail, 318 Residential and 318 Retail, to the extent permitted by the City, an easement for access to, and the use, operation and Maintenance of, a trash dumpster in the Loading Dock Area in the location specified by 310 Residential for trash generated by 310 Retail, 318 Residential and 318 Retail, as the case may be. 310 Residential shall perform all Maintenance, including regular pest control, required to keep this room and the trash dumpster and compactor in a clean, sightly, sanitary and safe condition.

(W) **Emergency Stairway.** To 318 Residential, a non exclusive easement for pedestrian egress in an Emergency from the 318 Residential Property on, over, across and through the fire escape corridor and stairways located within Garage.

(X) **Abandoned Elevator Shafts.** To 318 Retail, an exclusive easement for the use and Maintenance of space within the three abandoned elevator shafts located on the ground floor of the 310 Building, as shown on Sheet 2.2X of the Project Diagram. Such space may be used for any purpose permitted by this Agreement. If such space is to be used as one (1) or more bathrooms, 310 Residential shall reasonably cooperate with 318 Retail to permit the installation of plumbing within the 310 Residential Property in order to serve such bathrooms.

(Y) **Garage.** To 318 Residential, a non exclusive easement for all 318 Unit Owners who own a unit parking space in the 310 Condominium for ingress and egress to and from each such parking space in the Garage.

(Z) **Pedestrian Tunnel.** To 310 Retail, a non exclusive easement across those portions of levels B-1 and B-2 reasonably necessary for ingress and egress from the 310 Retail Property to and from the pedestrian tunnel connecting the 310 Building with the building located at 55 East Jackson, Chicago, Illinois.

UNOFFICIAL COPY

(AA) **Window Display Boxes.** To 310 Retail, an exclusive agreement to use the window display boxes on the northern portion of the second (2nd) and third (3rd) floors of the 310 Building, along with a non exclusive easement to access such window display boxes. 310 Retail shall be permitted to access the window display box adjacent to Unit 200 in the 310 Condominium only upon reasonable prior notice to the owner of such unit. 310 Retail shall have sole control of the content of the window display boxes.

(BB) **Midwest Bank Access.** To the tenant of the portion of the 310 Retail Property presently occupied by Midwest Bank and Trust Company (the "**Midwest Bank Site**") and its Permittees, a non exclusive easement for pedestrian ingress and egress across the portion of the lobby in the 310 Building connecting the Midwest Bank Site with Jackson Boulevard. This easement shall expire at 11:59 P.M. Chicago time on April 30, 2009.

(CC) **310 Vault.** To the City of Chicago, an easement through those portions of the 310 Residential Property necessary to access the 310 Vault, pursuant to the terms and conditions of the 310 Vault Permit.

(DD) **Fire Control Panel.** To each of 310 Retail, 318 Residential and 318 Retail, the right, to supplement, augment or otherwise make improvements, at its sole cost and expense, to the fire control panel located in the 310 Residential Property in order to increase the fire control panel's capacity, provide increased compatibility with certain systems within such Owner's Parcel or make other changes that are reasonably necessary for the operation of such Owner's Parcel.

(EE) **Elevator Installation.** To 310 Retail, the right to construct, install, perform Maintenance of, access and use an elevator and related improvements on the southwest portion of the first floor and basements of the 310 Building in a location reasonably approved by 310 Residential, provided that the construction and installation of such elevator does not unreasonably interfere with the reasonable use and enjoyment of the 310 Residential Property for the purposes for which the 310 Residential Property is used.

(FF) **B2 Restrooms.** To 310 Retail, the right of employees, agents and guests (but not customers) to access (using the route shown on Sheet 2.2FF of the Project Diagram) and use the men's and women's restrooms located on floor B2 of the 310 Building.

ARTICLE 3

EASEMENTS GRANTED BY 318 RESIDENTIAL

3.1 **In General.** For the purposes of this Article 3, the following shall apply:

(A) 318 Residential has granted, reserved, declared and created the Easements described in this Article 3. The term "Granted" or "granted" as hereinafter used in

UNOFFICIAL COPY

Article 3 describing Easements shall be deemed to mean "granted, reserved, declared and created". The Easements in this Article 3 shall bind and be enforceable against 318 Residential and its successors, grantees and assigns, including, without limitation, the 318 Condominium and all Unit Owners and the 318 Association if the 318 Residential Property is submitted to the Act.

(B) The Easements granted by this Article 3 shall bind and burden the 318 Residential Property, before and after the 318 Residential Property is submitted to the Act, which shall, for the purpose of this Article 3, be deemed to be the servient tenement. Where only a portion of the 318 Residential Property is bound and burdened by the Easement, only that portion shall be deemed to be the servient tenement.

(C) Each Easement granted by this Article 3 is appurtenant to and shall benefit 310 Residential, 310 Retail or 318 Retail, as the case may be, which shall, for the purpose of this Article 3 with respect to such Easement, be deemed to be the dominant tenement. Where only a portion of the 310 Residential Property, 310 Retail Property or 318 Retail Property, as the case may be, is so benefited, only that portion shall be deemed to be the dominant tenement. No property other than the 310 Residential Property, 310 Retail Property or 318 Retail Property shall constitute part of the dominant tenement.

(D) Unless otherwise expressly provided in this Agreement, all Easements granted under this Article 3 are irrevocable and perpetual in nature and bind the 318 Residential Property, 318 Residential and, after the 318 Residential Property is submitted to the Act, the 318 Condominium, all 318 Unit Owners and the 318 Condominium Association.

(E) In exercising an Easement granted under this Article 3, the Owner of the Parcel benefited by the Easement shall minimize the impact of its exercise on the Owner of the Parcel burdened by the Easement, taking into consideration the impact of any disruption, and shall comply with the provisions of Section 16.1(E) whether or not the work being performed or exercise of the Easement constitutes "Alterations".

(F) The Owner of the 318 Residential Property may, (1) in connection with the Maintenance, repair or restoration of the 318 Residential Property, or (2) in an Emergency Situation, or (3) to prevent a dedication of, or an accruing of rights by, the public in and to the use of the 318 Residential Property: temporarily prevent, close off or restrict the flow of pedestrian or vehicular ingress, egress or use in, over, on, across and through any of the Easements, but only to the minimal extent and for the shortest time period reasonably necessary under the circumstances in order to minimize the effect on the user of such Easement. The Owner of the 318 Residential Property may, from time to time, impose (A) reasonable limitations on any other Owner's or any Permittee's use of an Easement providing for ingress and egress in, over, on, across and through the 318 Residential Property described in this Article 3 including, without limitation, establishing paths of ingress and egress and hours of the day or days of the week during which any other Owner or Permittee may use such Easement and (B) reasonable security controls consistent with the use of the 318 Residential Property as a condominium and any overall

UNOFFICIAL COPY

security system for the Project. In imposing limitations or controls, the Owner of the 318 Residential Property shall take into consideration the reasonable needs and requirements of the users of the Easement as well as the imposing Owner's own needs and requirements.

(G) Any disputes concerning the existence, location, nature, use and scope of any of the Easements granted under this Article 3 shall constitute Arbitrable Disputes.

(H) Any exclusive Easement granted under this Agreement shall in all events be subject to the concurrent use by the Owner of the servient estate as and only to the extent reasonably necessary for Maintenance of the property of the Owner of the servient estate, for exercise of rights of self-help granted under Section 7.5, and its rights under Article 11 or Article 15 or elsewhere in this Agreement and for other uses which do not unreasonably interfere with the exercise of the Easement granted.

(I) Some of the stairways, doors or elevators referenced in this Article by numbers or letters (or a combination thereof) may be shown on the Project Diagram.

(J) All descriptions of facilities and improvements in this Article 3 are for illustrative purposes only and do not impose upon the Developer, any party hereto or any of their respective affiliates a duty to construct such facilities or improvements.

3.2 **Grant of Easements.** The following Easements in, to, under, over, upon, through and about portions of the 318 Residential Property, in favor of the 310 Residential Property, 310 Retail Property or 318 Retail Property, as the case may be, are hereby granted.

(A) **Ingress and Egress in Favor of 318 Retail.** To 318 Retail, a non exclusive easement for ingress and egress only for Persons, material and equipment in, over, on, across and through such portions of the 318 Residential Property as are reasonably necessary to permit the use and operation or the Maintenance (but only if and when such Maintenance is required or permitted under this Agreement) of (1) the 318 Retail Property, (2) any Facilities located in the 318 Residential Property which provide or are necessary to provide the 318 Retail Property with any utilities or other services necessary to the operation of the 318 Retail Property, including, without limitation, 318 Retail Owned Facilities and (3) any other areas in the 318 Residential Property as to which an Easement for use or Maintenance has been granted to 318 Retail, or the obligation to perform a service has been imposed by Section 7.1.

(B) **Future Development.** To 318 Retail, a perpetual right to install caissons and other structural supports through the locations shown on Sheet 3.2B of the Project Diagram in order to develop the portion of the 318 Retail Property that is located directly above the upper limit of the 318 Residential Property, provided that (1) the installation of such caissons or other structural supports does not unreasonably interfere with the reasonable use and enjoyment of the 318 Residential Property for the purposes for which the 318 Residential Property is used, or if such use and enjoyment would be disturbed, no reasonable alternative is available that would accommodate 318 Retail's development of

UNOFFICIAL COPY

such portion of its Parcel and (2) 318 Residential shall not be required to permit the existence of such caissons or other structural supports in locations that would convert otherwise available space for residential occupancy or storage unless no other space is reasonably available, and the affected Unit Owner or Unit Owners are equitably compensated for the value of such converted space.

(C) **Terraces**. To 310 Residential, a perpetual, exclusive easement permitting the existence of terraces on the roof of the 318 Building in the locations shown on Sheet 3.2C of the Project Diagram. Use, ownership and maintenance of each terrace will be subject to the terms and conditions of the 310 Declaration and this Agreement, as well as all rules and regulations promulgated under such documents. The 318 Association shall have the right, upon reasonable prior notice to the unit owners of the units in the 310 Condominium to which the terraces are appurtenant (the "**Terrace Unit Owners**"), to perform maintenance, repairs and replacements of the portions of the 318 Roof that are located beneath the terraces and, if necessary, to temporarily remove and subsequently restore, at the 318 Association's sole cost and expense, the terrace improvements in order to perform such maintenance, repairs and replacements. Neither the 310 Association nor the Terrace Unit Owners shall be permitted to perform any improvements on or alterations to the terrace or the 318 Roof without the consent of the 318 Association. Notwithstanding anything to the contrary contained herein, in no event shall any invasive improvement (such as a roof penetration, anchoring or any other similar invasive improvement) be permitted on the 318 Roof by a Terrace Unit Owner, the 310 Association, or any of their respective contractors, sub-contractors, employees, agents or representatives. The 318 Association shall have the right to establish reasonable rules and regulations with respect to use of the terraces. In the event of a casualty or condemnation involving the portions of the 318 Roof located underneath the terraces such that physical support of the terraces is no longer possible, the 310 Association shall have the right to construct, at its sole cost and expense, free-standing balconies within the same areas occupied by the existing terraces.

(D) **310 Residential Encroachments**. To 310 Residential, an easement permitting the existence of encroachments, including, without limitation, encroachments by balconies attached to the 310 Building, if such encroachments presently exist or are replaced in the same location or result from the construction of the 310 Residential Improvements or the permitted renovation of the 310 Residential Property. Such Easement permitting encroachments shall exist only so long as the encroachment portion of the 310 Residential Property or such Facilities continues to exist, or replacements are made in the same location which do not enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.

(E) **Second Floor Retail Property**. To 318 Retail, an exclusive easement for use and Maintenance of portions of the 318 Residential Property that are located on the second floor of the 318 Building, as shown on Sheet 3.2E of the Project Diagram.

UNOFFICIAL COPY

- (F) **318 Retail Property Structural Support.** To 318 Retail, a non exclusive easement in all Structural Supports located in or constituting a part of the 318 Residential Property for the support of (1) the 318 Retail Property, (2) any Facilities or areas located in the 318 Residential Property with respect to which 318 Retail is granted an Easement and (3) 318 Retail Owned Facilities.
- (G) **Garage Structural Support.** To 310 Residential, a non exclusive easement in all Structural Supports located in or constituting a part of the 310 Residential Property for the support of the Garage.
- (H) **Use of Facilities Benefiting 318 Retail Property.** To 318 Retail, a non exclusive easement (1) for the intended use of all Facilities which are (i) located in the 318 Residential Property, including 318 Retail Owned Facilities; and (ii) connected to Facilities located in the 318 Retail Property which provide or are necessary to provide the 318 Retail Property with any utilities or other services necessary to the operation of the 318 Retail Property and (2) permitting the exercise of the rights of self-help granted to 318 Retail pursuant to this Agreement or otherwise during any period in which said rights may be exercised.
- (I) **Common Walls, Floors and Ceilings.** To each other Owner, a non exclusive easement for support, enclosure, use and Maintenance with respect to Common Walls, Floors and Ceilings existing or constructed in and along the common boundaries of the 318 Residential Property and such Owner's Parcel.
- (J) **Emergency Stairways.** To 318 Retail, a non exclusive easement for pedestrian egress in an Emergency from the 318 Retail Property on, over, across and through the fire escape corridors and stairways located within 318 Residential Property.
- (K) **Retail Utilities.** To 318 Retail (and if requested by the applicable Utility Company, to such Utility Company) non exclusive easements for utility purposes required by the 318 Retail Property, in those areas of the 318 Residential Property where such utilities are currently located or to be located as part of the 318 Residential Improvements. If, at any time, it shall become necessary to relocate or add to utility easements (including installation of Facilities) other than where currently located or to be located as part of the 318 Residential Improvements in the 318 Building in order to provide required utility service to the 318 Retail Property, 318 Residential agrees to grant such additional or relocated utility easements (at such location mutually agreed to by 318 Retail and 318 Residential), provided (1) such easements do not unreasonably interfere with the reasonable use and enjoyment of the 318 Residential Property for the purposes for which the 318 Residential Property is used, or if such use and enjoyment would be disturbed, no reasonable alternative is available, (2) 318 Residential shall not be required to grant an easement which would convert otherwise available space for residential occupancy or storage unless such relocation or additional easements are required by Law and no other space is reasonably available, and the affected Owner is equitably compensated for the value of such converted space and (3) 318 Retail shall pay 318 Residential's reasonable costs or expenses in connection with granting such easement.

UNOFFICIAL COPY

- (L) **Mechanical Rooms**. To 318 Retail, a non exclusive easement for the use and Maintenance of any existing (or, if constructed as part of the 318 Residential Improvements, future) generator, mechanical, machine, electrical, stair, switchgear, panel meter, equipment or pump rooms which are now located in the 318 Residential Property and serve the 318 Retail Property or as may hereafter be located in the 318 Residential Property in accordance with the provisions of this Agreement or other agreement of the Owners.
- (M) **318 Retail Property Encroachments**. To 318 Retail, an easement permitting the existence of encroachments if such encroachments presently exist or are replaced in the same location or result from the construction of the 318 Residential Improvements or the permitted renovation of the 318 Residential Property or if, by reason of settlement or shifting of the Building, any part of the 318 Retail Property or 318 Retail Owned Facilities not currently located within the 318 Residential Property encroaches or shall hereafter encroach upon any part of the 318 Residential Property. This Easement shall exist only so long as the encroaching portion of the 318 Retail Property or such Facilities continues to exist, or replacements are made in the same location which do not materially enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.
- (N) **Roof Use and Access for 318 Retail or its Designee**. To 318 Retail or its designee, a non exclusive easement in, over, on and across the 318 Roof for ingress and egress of persons, materials and equipment to the extent reasonably necessary to permit the existence, attachment, installation and Maintenance of any cell phone towers, antennas, microwave dishes, satellite dishes, broadband facilities or other rooftop communications facilities (both revenue-generating and non-revenue generating) (collectively, the "**318 Rooftop Communications Facilities**"), along with a right to install and access wires serving such 318 Rooftop Communications Facilities in the areas of the 318 Building housing the 318 Building's wiring. 318 Retail or its designee shall install, operate and maintain all 318 Rooftop Communications Facilities in accordance with all applicable laws, ordinances and regulations and shall use commercially reasonable efforts to prevent the 318 Rooftop Communications Facilities from interfering with any communications facilities installed by or on behalf of 318 Residential or with the views from any units in the 318 Condominium. All costs of operating the 318 Rooftop Communications Facilities and all revenues generated from the 318 Rooftop Communications Facilities shall be the sole property of 318 Retail or its designee.
- (O) **318 Residential Passenger Elevator Number 2**. To 318 Retail, a non exclusive easement permitting the use of 318 Residential Passenger Elevator Number 2 for handicapped access to and from the second (2nd) floor of the 318 Retail Property.
- (P) **Window Washing**. To 310 Residential, a non exclusive easement permitting the use of the 318 Roof for the washing of windows in the 310 Building and for Maintenance of the 310 Façade.

UNOFFICIAL COPY

(Q) **Meters.** To Commonwealth Edison Company (and any successors-in-interest) and its employees, agents and contractors, the right to use and access any and all meters in the 318 Residential Property.

ARTICLE 4

EASEMENTS GRANTED BY 310 RETAIL

4.1 **In General.** For the purposes of this Article 4, the following shall apply:

(A) 310 Retail has granted, reserved, declared and created Easements described in this Article 4. The term "Granted" or "granted" as hereinafter used in Article 4 describing Easements shall be deemed to mean "granted, reserved, declared and created". The Easements in this Article 4 shall bind and be enforceable against 310 Retail and its successors, grantees and assigns.

(B) The Easements granted by this Section shall bind and burden the 310 Retail Property and any Person who becomes 310 Retail. Where only a portion of the 310 Retail Property is bound and burdened by the Easement, only that portion shall be deemed to be the servient tenement.

(C) Each Easement granted by this Article 4 is appurtenant to and shall benefit 310 Residential, 318 Residential or 318 Retail, as the case may be, which shall, for the purpose of this Article 4 with respect to such Easement, be deemed to be the dominant tenement. Where only a portion of the 310 Residential Property, 318 Residential Property or 318 Retail Property, as the case may be, is so benefited, only that portion shall be deemed to be the dominant tenement. No property other than the 310 Residential Property, 318 Residential Property or 318 Retail Property shall constitute part of the dominant tenement.

(D) Unless otherwise expressly provided in this Agreement, all Easements granted under this Article 4 are irrevocable and perpetual in nature.

(E) In exercising an Easement granted under this Article 4, the Owner of the Parcel benefited by the Easement shall minimize the impact of its exercise on the Owner of the Parcel burdened by the Easement, taking into consideration the impact of any disruption on the Owner of the Parcel burdened by the Easement, and shall comply with the provisions of Section 16.1(E) whether or not the work being performed or exercise of the Easement constitutes "Alterations".

(F) 310 Retail may (1) in connection with the Maintenance, repair or restoration of the 310 Retail Property, or (2) in an Emergency Situation, or (3) to prevent a dedication of or accruing of rights by the public in and to the use of the 310 Retail Property: temporarily prevent, close off or restrict the flow of pedestrian or vehicular ingress, egress or use in, over, across and through any of the Easements, but only to the

UNOFFICIAL COPY

minimal extent and for the shortest time period reasonably necessary under the circumstances in order to minimize the effect on the user of such Easement.

(G) Any disputes concerning the existence, location, nature, use and scope of any of the Easements granted under this Article 4 shall constitute Arbitrable Disputes.

(H) Any exclusive Easement granted under this Agreement shall in all events be subject to the concurrent use by the Owner of the servient estate as and to the extent reasonably necessary for Maintenance of the property of the Owner of the servient estate, for exercise of rights of self-help granted under Section 7.5 and its rights under Article 11 or Article 15, or elsewhere in this Agreement and for other uses which do not unreasonably interfere with the exercise of the Easement granted.

(I) Some of the stairways, doors or elevators referenced in this Article by numbers or letters (or a combination thereof) are shown on the Project Diagram.

(J) All descriptions of facilities and improvements in this Article 4 are for illustrative purposes only and do not impose upon the Developer, any party hereto or any of their respective affiliates a duty to construct such facilities or improvements.

4.2 **Grant of Easements.** The following Easements in, to, under, over, upon, through and about portions of the 310 Retail Property are hereby granted.

(A) **Ingress and Egress in Favor of 310 Residential.** To 310 Residential, a non exclusive easement for ingress and egress only for Persons, materials and equipment in, over, on, across and through such portions of the 310 Retail Property as are reasonably necessary to permit the use and operation or the Maintenance (but only if and when such Maintenance is required or permitted under this Agreement) of (1) the 310 Residential Property, (2) any Facilities located in the 310 Retail Property or in the 310 Retail Property which provide or are necessary to provide the 310 Residential Property with any utilities or other services necessary to the operation of the 310 Residential Property, including, without limitation, 310 Residential Owned Facilities, and (3) any other areas in the 310 Retail Property to which an Easement for use or Maintenance has been granted to 310 Residential.

(B) **310 Residential Property Structural Support.** To 310 Residential, a non exclusive easement in all 310 Structural Supports located in or constituting a part of the 310 Retail Property for the support of (1) the 310 Residential Property, and (2) any Facilities or areas located in the 310 Retail Property with respect to which 310 Residential is granted an Easement and (3) any 310 Residential Owned Facilities.

(C) **Use of Facilities Benefiting 310 Residential Property.** To 310 Residential, a non exclusive easement (1) for the intended use of all Facilities which are (a) located in the 310 Retail Property, including 310 Residential Owned Facilities; and (b) connected to Facilities located in the 310 Residential Property which provide or are necessary to provide the 310 Residential Property with any utilities or other services

UNOFFICIAL COPY

necessary to the operation of the 310 Residential Property and (2) permitting the exercise of the rights of self-help granted to 310 Residential pursuant to Section 7.5 hereof during any period in which said rights may be exercised.

(D) **Encroachments.** To 310 Residential, an easement permitting the existence of encroachments, including, without limitation, encroachments by balconies attached to the 310 Building, if such encroachments presently exist or are replaced in the same location or result from the construction of the 310 Residential Improvements or the permitted renovation of the 310 Residential Property or if, by reason of any settlement or shifting of the 310 Building, any part of the 310 Residential Property not currently located within the 310 Retail Property encroaches or shall hereafter encroach upon any of the 310 Retail Property. Such Easement permitting encroachments shall exist only so long as the encroachment portion of the 310 Residential Property or such Facilities continues to exist, or replacements are made in the same location which do not enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.

(E) **Common Walls, Floors and Ceilings.** To each other Owner, a non exclusive easement for support, enclosure, use and Maintenance with respect to Common Walls, Floors and Ceilings existing or constructed in and along the common boundaries of the 310 Retail Property and such Owner's Parcel.

(F) **310 Residential Utilities.** To 310 Residential (and if requested by the applicable Utility Company, to such Utility Company) non exclusive easements for utility purposes required by the 310 Residential Property in those areas of the 310 Retail Property where such utilities are currently located or to be located as part of the 310 Residential Improvements. If at any time it shall become necessary to relocate or add to utility easements (including installation of Facilities) other than where currently located or to be located as part of the 310 Residential Improvements in the 310 Building in order to provide required utility service to the 310 Residential Property, 310 Retail agrees to grant such additional or relocated utility easements (at such location mutually agreed to by 310 Retail and 310 Residential) provided (1) such easements do not unreasonably interfere with the business operations and reasonable use and enjoyment of the 310 Retail Property for the purposes for which the 310 Retail Property is used (2) 310 Retail shall not be required to grant an easement which would convert otherwise available rentable space or space in the 310 Retail Property used for 310 Retail's business to such Easement, unless such relocation or additional easements are required by Law and no other space is reasonably available and 310 Retail is equitably compensated for the value of such converted space, and (3) 310 Residential shall pay 310 Retail's reasonable costs or expenses in connection with granting such easement.

(G) **310 Residential Property Canopy and Signage.** To 310 Residential, subject to compliance with applicable law, the right to install and maintain an entrance canopy from the east entrance of the lobby of the 310 Residential Property out onto the sidewalk and the following signage on the exterior of the Building: (i) a building identification sign on any awning or canopy at the main entrance to the 310

UNOFFICIAL COPY

Condominium; provided, however, that only the Developer has the right to install such a sign; and (ii) identification and directional signage relating to the Garage, of a size and design approved by 310 Retail, such approval not to be unreasonably withheld. 310 Residential at its expense, shall maintain the signage and/or canopy allowed by this Section in good condition and repair, shall pay for all utilities consumed in connection therewith and shall comply with all Laws applicable thereto, including obtaining and maintaining all permits and licenses. 310 Retail may temporarily remove the sign and/or canopy during any period it is cleaning, repairing, maintaining and/or replacing the 310 Façade or 310 Building or any time during the period that 310 Residential fails to perform its obligations hereunder and after notice of such default and expiration of any cure period provided in this Agreement.

(H) **310 Residential Mechanical Rooms.** To 310 Residential, a non exclusive easement for the use of equipment and mechanical rooms now or to be located in the basement of the 310 Retail Property (or, if located in the 310 Vault, a license, subject to the terms and conditions of the 310 Vault Permit and this Agreement), which rooms contain Facilities serving the 310 Residential Property for Commonwealth Edison Company (or any replacement electric service provider), Peoples Gas, the telephone company, the cable television company, the fire pump room, if any, the domestic water pump room, the sanitary and kitchen waste ejector pump room, the kitchen waste grease trap collector room, other utility rooms and any fan rooms.

(I) **310 Residential Owned Facilities.** To 310 Residential, an easement permitting the existence, attachment and Maintenance of 310 Residential Owned Facilities in the 310 Retail Property in locations now existing or in locations resulting from the construction of the 310 Residential Improvements or other locations in the 310 Retail Property mutually acceptable to 310 Residential and 310 Retail.

(J) **Exterior Building Lighting.** To 310 Residential, the right to install, attach, operate and perform Maintenance on exterior light fixtures and Facilities illuminating the exterior of the 310 Building, including the 310 Façade, including any exterior lighting as may be requested by the City, subject to compliance with the Preservation Easement.

(K) **Exterior Maintenance.** To 310 Residential, to the extent needed, a non exclusive easement for the use, existence and attachment of tie inserts, tie in sleeves and detent pins on the exterior of the 310 Building and davits and davit sockets on the 310 Roof and in the 310 Building and otherwise to the extent reasonably necessary to permit window washing and exterior Maintenance, repair and restoration of the exterior wall of the Building (including the 310 Façade) and of the 310 Residential Property.

(L) **Garage.** To 310 Residential and all parties authorized to use the Garage pursuant to this Agreement, a non exclusive easement to cross over the southern portion of the 310 Retail Property to the extent that it is surrounded by the Garage.

UNOFFICIAL COPY

(M) **310 Vault.** To the City of Chicago, an easement through those portions of the 310 Retail Property necessary to access the 310 Vault, pursuant to the terms and conditions of the 310 Vault Permit.

ARTICLE 5

EASEMENTS GRANTED BY 318 RETAIL

5.1 **In General.** For the purposes of this Article 5, the following shall apply:

(A) 318 Retail has granted, reserved, declared and created Easements described in this Article 5. The term "Granted" or "granted" as hereinafter used in Article 5 describing Easements shall be deemed to mean "granted, reserved, declared and created". The grants of Easements in this Article 5 shall bind and be enforceable against 318 Retail and its successors, grantees and assigns.

(B) The Easements granted by this Section shall bind and burden the 318 Retail Property and any Person who becomes 318 Retail. Where only a portion of the 318 Retail Property is bound and burdened by the Easement, only that portion shall be deemed to be the servient tenement.

(C) Each Easement granted by this Article 5 is appurtenant to and shall benefit 310 Residential, 310 Retail or 318 Residential, as the case may be, which shall, for the purpose of this Article 5 with respect to such Easement, be deemed to be the dominant tenement. Where only a portion of the 310 Residential Property, 310 Retail Property or 318 Residential Property, as the case may be, is so benefited, only that portion shall be deemed to be the dominant tenement. No property other than the 310 Residential Property, 310 Retail Property or 318 Residential Property shall constitute part of the dominant tenement.

(D) Unless otherwise expressly provided in this Agreement, all Easements granted under this Article 5 are irrevocable and perpetual in nature.

(E) In exercising an Easement granted under this Article 5, the Owner of the Parcel benefited by the Easement shall minimize the impact of its exercise on the Owner of the Parcel burdened by the Easement, taking into consideration the impact of any disruption on the Owner of the Parcel burdened by the Easement, and shall comply with the provisions of Section 16.1(E) whether or not the work being performed or exercise of the Easement constitutes "Alterations".

(F) The Owner of the 318 Retail Property may (1) in connection with the Maintenance, repair or restoration of the 318 Retail Property, or (2) in an Emergency Situation, or (3) to prevent a dedication of or accruing of rights by the public in and to the use of the 318 Retail Property: temporarily prevent, close off or restrict the flow of pedestrian or vehicular ingress, egress or use in, over, across and through any of the Easements, but only to the minimal extent and for the shortest time period reasonably

UNOFFICIAL COPY

necessary under the circumstances in order to minimize the effect on the user of such Easement.

(G) Any disputes concerning the existence, location, nature, use and scope of any of the Easements granted under this Article 5 shall constitute Arbitrable Disputes.

(H) Any exclusive Easement granted under this Agreement shall in all events be subject to the concurrent use by the Owner of the servient estate as and to the extent reasonably necessary for Maintenance of the property of the Owner of the servient estate, for exercise of rights of self-help granted under Section 7.5 and its rights under Article 11 or Article 15, or elsewhere in this Agreement and for other uses which do not unreasonably interfere with the exercise of the Easement granted.

(I) Some of the stairways, doors or elevators referenced in this Article by numbers or letters (or a combination thereof) are shown on the Project Diagram.

(J) All descriptions of facilities and improvements in this Article 5 are for illustrative purposes only and do not impose upon the Developer, any party hereto or any of their respective affiliates a duty to construct such facilities or improvements.

5.2 **Grant of Easements.** The following Easements in, to, under, over, upon, through and about portions of the 318 Retail Property are hereby granted.

(A) **Ingress and Egress in Favor of 318 Residential.** To 318 Residential, a non exclusive easement for ingress and egress only for Persons, materials and equipment in, over, on, across and through such portions of the 318 Retail Property as are reasonably necessary to permit the use and operation or the Maintenance (but only if and when such Maintenance is required or permitted under this Agreement) of (1) the 318 Residential Property, (2) any Facilities located in the 318 Retail Property or in the 318 Retail Property which provide or are necessary to provide the 318 Residential Property with any utilities or other services necessary to the operation of the 318 Residential Property, including, without limitation, 318 Residential Owned Facilities, and (3) any other areas in the 318 Retail Property to which an Easement for use or Maintenance has been granted to 318 Residential.

(B) **318 Residential Property Structural Support.** To 318 Residential, a non exclusive easement in all 318 Structural Supports located in or constituting a part of the 318 Retail Property for the support of (1) the 318 Residential Property, and (2) any Facilities or areas located in the 318 Retail Property with respect to which 310 Residential is granted an Easement and (3) any 318 Residential Owned Facilities.

(C) **Use of Facilities Benefiting 318 Residential Property.** To 318 Residential, a non exclusive easement (1) for the intended use of all Facilities which are (a) located in the 318 Retail Property, including 318 Residential Owned Facilities; and (b) connected to Facilities located in the 318 Residential Property which provide or are necessary to provide the 318 Residential Property with any utilities or other services

UNOFFICIAL COPY

necessary to the operation of the 318 Residential Property and (2) permitting the exercise of the rights of self-help granted to 318 Residential pursuant to Section 7.5 hereof during any period in which said rights may be exercised.

(D) **318 Residential Encroachments.** To 318 Residential, an easement permitting the existence of encroachments if such encroachments presently exist or are replaced in the same location or result from the construction of the 318 Residential Improvements or the permitted renovation of the 318 Residential Property or if, by reason of any settlement or shifting of the 318 Building, any part of the 318 Residential Property not currently located within the 318 Retail Property encroaches or shall hereafter encroach upon any of the 318 Retail Property. Such Easement permitting encroachments shall exist only so long as the encroachment portion of the 318 Residential Property or such Facilities continues to exist, or replacements are made in the same location which do not enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.

(E) **310 Residential Encroachments.** To 310 Residential, an easement permitting the existence of encroachments, including, without limitation, encroachments by balconies attached to the 310 Building, if such encroachments presently exist or are replaced in the same location or result from the construction of the 310 Residential Improvements or the permitted renovation of the 310 Residential Property. Such Easement permitting encroachments shall exist only so long as the encroachment portion of the 310 Residential Property or such Facilities continues to exist, or replacements are made in the same location which do not enlarge the encroachment. No such encroachment shall be placed where such encroachment is not permitted or did not previously exist or is deliberately, materially enlarged.

(F) **Common Walls, Floors and Ceilings.** To each other Owner, a non exclusive easement for support, enclosure, use and Maintenance with respect to Common Walls, Floors and Ceilings existing or constructed in and along the common boundaries of the 318 Retail Property and such Owner's Parcel.

(G) **318 Residential Utilities.** To 318 Residential (and if requested by the applicable Utility Company, to such Utility Company) non exclusive easements for utility purposes required by the 318 Residential Property in those areas of the 318 Retail Property where such utilities are currently located or to be located as part of the 318 Residential Improvements. If at any time it shall become necessary to relocate or add to utility easements (including installation of Facilities) other than where currently located or to be located as part of the 318 Residential Improvements in the 318 Building in order to provide required utility service to the 318 Residential Property, 318 Retail agrees to grant such additional or relocated utility easements (at such location mutually agreed to by 318 Retail and 318 Residential) provided (1) such easements do not unreasonably interfere with the business operations and reasonable use and enjoyment of the 318 Retail Property for the purposes for which the 318 Retail Property is used, (2) 318 Retail shall not be required to grant an easement which would convert otherwise available rentable

UNOFFICIAL COPY

space or space in the 318 Retail Property used for 318 Retail's business to such Easement, unless such relocation or additional easements are required by Law and no other space is reasonably available and 318 Retail is equitably compensated for the value of such converted space, and (3) 318 Residential shall pay 318 Retail's reasonable costs or expenses in connection with granting such easement.

(H) **318 Residential Mechanical Rooms.** To 318 Residential, a non exclusive easement for the use of equipment and mechanical rooms now or to be located in the basement of the 318 Retail Property, which rooms contain Facilities serving the 318 Residential Property for Commonwealth Edison Company (or any replacement electric service provider), Peoples Gas, the telephone company, the cable television company, the fire pump room, if any, the domestic water pump room, the sanitary and kitchen waste ejector pump room, the kitchen waste grease trap collector room, other utility rooms and any jan rooms.

(I) **318 Residential Owned Facilities.** To 318 Residential, an easement permitting the existence, attachment and Maintenance of 318 Residential Owned Facilities in the 318 Retail Property in locations now existing or in locations resulting from the construction of the 318 Residential Improvements or other locations in the 318 Retail Property mutually acceptable to 318 Residential and 318 Retail.

ARTICLE 6

STRUCTURAL SUPPORT

6.1 **Structural Safety and Integrity.** No Owner shall do or permit any act which would adversely affect the structural safety or integrity of any portion of either Building.

6.2 **Construction of Support.**

(A) The Owner responsible for any adverse effect on the structural safety or integrity of any portion of either Building shall commence the construction of all necessary remedial structural support within a reasonable time under the circumstances and shall diligently complete or cause completion of such construction in accordance with plans and specifications detailing necessary remedial structural support prepared by or approved by Architect and the impacted Owner or Owners (whose approval will not be unreasonably withheld or delayed). The responsible Owner shall pay all costs and expenses, including all architectural and engineering fees in connection with construction of the remedial structural support, including any ongoing Maintenance costs. The provisions of Sections 11.2 and 11.3, and not this Article 6, shall apply if the adverse effect of the structural safety or integrity of either Building results from a fire or other casualty.

(B) The construction of such necessary remedial structural support shall be performed by a contractor or contractors jointly selected by the impacted Owners (with the advice of the Architect) (which selection shall be subject to the approval of the

UNOFFICIAL COPY

Mortgagees). If the impacted Owners, and their Mortgagees, fail to agree upon the selection of a contractor or contractors, the selection of a contractor or contractors shall constitute an Arbitrable Dispute. For purposes of this Article 6, provision or construction of necessary remedial structural support shall also include any Maintenance required to remedy or prevent any adverse effect on the structural integrity or safety of the impacted Building.

6.3 **Effect of Delay.** If delay in constructing necessary remedial structural support would endanger the structural safety or integrity of any portion of the impacted Building, or responsibility for providing structural support cannot readily be determined or is disputed, and it is not likely that such work will be commenced in time to avoid a reduction in structural integrity or safety, then the Owner of the portion of the impacted Building in which the reduction occurred or is occurring shall, upon not less than ten (10) business days' advance written notice to the other Owner or Owners (except that such advance written notice shall not be required in an Emergency Situation), provide necessary remedial structural support as and wherever required, or the Owners shall jointly undertake to provide substitute or additional structural support; provided, however, the responsible Owner shall be liable for and pay all costs and expenses incurred as a result of the other Owner's provision of any necessary remedial structural support.

ARTICLE 7

SERVICES

7.1 **Services Provided by 310 Residential to 310 Retail, 318 Residential and 318 Retail.** 310 Residential shall furnish or cause to be furnished the following services to 310 Retail, 318 Residential and 318 Retail when, as and if required:

(A) **Domestic (City) Water.** For 310 Retail and 318 Residential, maintenance of Facilities providing for delivery of domestic (City) water upon the terms and conditions set forth in Exhibit 7.1(A).

(B) **Fire Pumps and Combination Standpipe System.** Maintenance of Facilities providing for the fire pumps and combination standpipe system upon the terms and conditions set forth in Exhibit 7.1(B).

(C) **Storm Water Drainage.** For 310 Retail, storm water drainage of the 310 Building upon the terms and conditions set forth in Exhibit 7.1(C).

(D) **Primary Fire and Life-Safety Systems and Fire Control Panel.** Maintenance of the Facilities located on the first floor of the 310 Residential Property providing each Building's fire and life-safety systems and fire control panel upon the terms and conditions set forth in Exhibit 7.1(D).

(E) **Electric Metering.** Maintenance of electric metering upon the terms and conditions set forth in Exhibit 7.1(E).

UNOFFICIAL COPY

- (F) **Loading Dock Area and 310 Service Elevator.** Maintenance of the Loading Dock Area and 310 Service Elevator upon the terms and conditions set forth in Exhibit 7.1(F).
- (G) **Street Level Exterior Maintenance and Snow Removal.** Street level exterior maintenance and snow removal upon the terms and conditions set forth in Exhibit 7.1(G).
- (H) **310 Façade.** Maintenance of the 310 Façade and maintenance of other portions of the façade of the 310 Building upon the terms and conditions set forth in Exhibit 7.1(H).
- (I) **Expansion Joints.** Maintenance of the expansion joints located at various levels and elevations separating the 310 Building and the 318 Building upon the terms and conditions set forth in Exhibit 7.1(I).
- (J) **Window Washing.** Washing exterior 310 Building windows upon the terms and conditions set forth in Exhibit 7.1(J).
- (K) **Exterior Lighting and Flag.** Installation, attachment, operation and Maintenance of light fixtures and Facilities illuminating the exterior of the 310 Building and maintenance of the flagpoles located thereon upon the terms and conditions set forth in Exhibit 7.1(K).
- (L) **Security System.** Use and Maintenance of the security system surveillance equipment, cameras, video taping equipment and key card access equipment upon the terms and conditions contained in Exhibit 7.1(L).
- (M) **Gas.** Maintenance of Facilities provided for the delivery of gas upon the terms and conditions set forth in Exhibit 7.1(M).
- (N) **Waterproofing.** At its sole cost and expense, waterproofing and drainage of the Garage, including the Garage membranes.

The services which 310 Residential provides under this Section may not be refused by the other Owners. However, 310 Retail and 318 Retail, in the case of the services described in Sections 7.1(G) and 7.1(J), may supplement the services then being provided by 310 Residential, at their sole cost and expense, provided such services are coordinated with the services provided by 310 Residential and in the case of window washing, the 310 Retail Property (and 310 Retail Building) and the 318 Retail Property (and 318 Retail Building) are left in a clean, sightly and safe condition.

7.2 **Other Services.**

- (A) **Other Services by 310 Residential.** If necessary, 310 Residential shall furnish or cause to be furnished the services to 310 Retail reasonably required by 310 Retail for normal business operations of the 310 Retail Property, on terms and conditions

UNOFFICIAL COPY

mutually acceptable to 310 Retail and 310 Residential. Once determined, 310 Retail and 310 Residential may amend this Agreement to incorporate the terms and conditions agreed to by the Owners regarding these services.

(B) **310 Roof.** 310 Residential shall furnish or cause to be furnished Maintenance of the 310 Roof upon the terms and conditions set forth in Exhibit 7.2(B).

(C) **318 Roof.** 318 Residential shall furnish or cause to be furnished Maintenance of the 318 Roof upon the terms and conditions set forth in Exhibit 7.2(B).

(D) **Storm Water Drainage.** 318 Residential shall provide Maintenance of the storm water drainage systems serving the 318 Building upon the terms and conditions set forth in Exhibit 7.1(C).

(E) **Fire Control Panel.** 318 Residential shall provide Maintenance of the Facilities located on the first floor of the 318 Residential Property that provide the 318 Building's satellite fire and life-safety system monitoring panel, which supplements the main fire and life-safety system fire control panel, upon the terms and conditions set forth in Exhibit 7.1(D).

(F) **Street Level Exterior Maintenance and Snow Removal.** 318 Residential shall provide street level exterior maintenance and snow removal upon the terms and conditions set forth in Exhibit 7.1(G).

(G) **318 Façade.** 318 Retail shall provide Maintenance of the 318 Façade upon the terms and conditions set forth in Exhibit 7.1(H).

(H) **Exterior Lighting and Flag.** 318 Residential shall provide installation, attachment, operation and Maintenance of light fixtures and Facilities illuminating the exterior of the 318 Building upon the terms and conditions set forth in Exhibit 7.1(K).

7.3 **Obligation to Furnish Services.** Each Owner obligated to perform services hereunder shall make a good faith effort to operate its Facilities and furnish all services required under this Article 7 in a manner consistent with its intended respective use as mixed-use commercial and residential property and the level of operation and management of comparable properties in downtown Chicago, Illinois. Each Owner shall use reasonable diligence in performing the services required of such Owner as set forth in this Article 7 but shall not be liable under this Article 7 for interruption or inadequacy of service or loss or damage to property or business arising out of such interruption or inadequacy, except as may be provided in Sections 7.4 and 7.5. Each such Owner obligated to furnish services hereunder reserves the right to curtail or halt the performance of any service hereunder at any time in reasonable respects upon reasonable advance notice under the circumstances (except in an Emergency Situation) and for a reasonable period of time to perform Maintenance or in an Emergency Situation. Each Owner who is obligated to maintain, repair and replace any Facilities under Sections 7.1 and 7.2 which are connected to other Facilities in either Building, the responsibility for whose Maintenance is another Owner's under this Article 7, shall perform its obligations under

UNOFFICIAL COPY

Section 7.1 or 7.2 in such a manner and standard so as to permit and facilitate the other Owner's performance of its obligations under Article 7. Where an exception exists to an Owner's obligation to perform Maintenance of Facilities described in an Exhibit to Article 7, such exception has been set forth in the Exhibit.

7.4 **Payment for Services.** Payment for services rendered pursuant to this Article 7 and other charges and fees related to such services, including overhead and supervision fees, shall be made in accordance with the terms and provisions of Exhibit 7.4 attached hereto and made a part hereof.

7.5 **Owner's Failure to Perform Services.**

(A) If an Owner shall fail to perform as required by the terms and conditions of this Article 7 (except when such failure is caused by another Owner or by Unavoidable Delay or except when an Owner obligated to perform the service is entitled to discontinue such service pursuant to Section 7.3 or Section 7.7 hereof) and such failure shall continue for a period of ten (10) days after receipt of written notice thereof to the Defaulting Owner from the Creditor Owner, the Creditor Owner shall have the right to perform the same (without limiting any other rights or remedies of such Owner) until such time as the Defaulting Owner cures its failure to perform. Such notice shall not be required in an Emergency Situation affecting either Building or any of their Occupants.

(B) During any period in which the Creditor Owner is performing pursuant to Section 7.5(A) hereof, the Defaulting Owner shall make payments to the Creditor Owner as provided in Exhibit 7.4.

(C) If a dispute exists as to whether the Owner has failed to perform, then such dispute will constitute an Arbitrable Dispute which may be submitted to arbitration under Article 13 if not resolved within ten (10) days after the dispute arises. Failure to submit the matter to arbitration shall not vitiate an Owner's rights under Section 7.5(A) and (B).

7.6 **Data Unavailable from Metering.** Where the allocation of the cost of a service under Article 7 is based on usage recorded by meters, and if at any time the actual allocation of cost of service based on an Owner's usage recorded by meters cannot be determined because the meters or system for recording metered information are not installed or operative, then for such period when the usage data from meters is unavailable, the Owner performing such service shall in good faith make such reasonable determination of costs based on historical data and usage, using such experts or systems as such Owner may consider helpful to achieve an estimate of usage. Such Owner shall notify the other Owner or Owners in detail of its determination of estimated usage and the method for such determination at the time such Owner sends a Projection Notice or Statement (as such terms are defined in Exhibit 7.6) or statement of Net Capitalized Cost of Replacement under Exhibit 7.6 relating to such service. If, within thirty (30) days after receipt of such notice, the Owner receiving such notice does not, in good faith, dispute that estimated usage has been determined reasonably, such determination of usage shall be final and conclusive upon the parties for such period; provided further, however, if the Owner receiving such notice, in good faith, disputes that the estimated usage has been determined

UNOFFICIAL COPY

reasonably, such Owner shall so notify the other Owner. If the Owners fail to agree concerning the method of estimating usage within thirty (30) days after receipt of the disputing Owner's notice, then any Owner may submit the question to the Architect or other expert agreed to by the parties for its advice. The Architect or other expert agreed to by the parties shall advise the Owners concerning a resolution of the question within a reasonable period of time after the dispute has been submitted to the Architect or other expert. Subsequent failure to agree shall constitute an Arbitrable Dispute, if the amount involved exceeds \$15,000 (in 2007 equivalent dollars).

7.7 Discontinuance of Services. If, at any time, a Defaulting Owner fails to perform its obligations under Article 6 or Article 7 or to pay a Creditor Owner any sum of money payable to the Creditor Owner pursuant to the provisions of Article 6 or Article 7 within ten (10) days after receipt of written notice from the Creditor Owner demanding payment of said sum of money, then, in addition to any other rights or remedies the Creditor Owner may have, the Creditor Owner may discontinue furnishing services to be furnished by the Creditor Owner under Article 7 until said sum of money is paid; provided, however, that if the Defaulting Owner in good faith disputes the Defaulting Owner's obligation to pay said sum of money and diligently contests any action or proceeding brought to collect said sum of money or to enforce any lien therefor, or brings an action or initiates an arbitration proceeding (where permitted or provided for under Article 13) to determine the respective rights of the parties to such dispute and diligently prosecutes the same, then the Creditor Owner may not discontinue furnishing any such services unless and until it shall finally be determined by arbitration in accordance with Article 13 hereof or a final non appealable order of a court of competent jurisdiction that the Defaulting Owner is obligated to pay said sum of money and thereafter said sum of money remains unpaid in excess of five (5) days after any such determination; and further provided, however, that the Creditor Owner may not discontinue any such services if such discontinuance would cause an Emergency Situation (other than one involving solely economic loss) or hinder steps to remedy an existing Emergency Situation (other than one involving solely economic loss). Notwithstanding that there may be dispute as to the amount owed, an Owner shall nevertheless continue making payments as required under this Article 7 and Exhibit 7.4 until the dispute is resolved, at which time the Owners shall refund any overpayment or pay any deficiency, as applicable, including any interest thereon required under Exhibit 7.4.

7.8 Replacement of Facilities. An Owner may, in replacing Facilities, replace such Facilities with Facilities substantially equivalent or better providing substantially the same quality of service or better. Any Owner may correct the description of the room number or Facilities described in the Article 7 Exhibits by notice to the other Owner if such correction is due to error in the description or due to the replacement of such Facilities.

ARTICLE 8

INDEMNIFICATIONS; LIENS; COMPLIANCE WITH LAWS; ZONING; USE; SIGNAGE; ENVIRONMENTAL AND ENGINEERING REVIEW

8.1 Indemnity by Owners. Each Owner (hereinafter in this Section 8.1, the "Indemnifying Owner") covenants and agrees, at its sole cost and expense, to indemnify,

UNOFFICIAL COPY

defend and hold harmless the other Owners (hereinafter in this Section 8.1, the “**Indemnitee**”) from and against any and all claims, including any actions or proceedings, against Indemnitee, for losses, liabilities, damages, judgments, costs and expenses by or on behalf of any Person other than the Indemnitee, arising from the Indemnifying Owner’s negligent use, possession or management of the Indemnifying Owner’s portion of the Buildings or Property or Owned Facilities or activities therein or arising out of the Indemnifying Owner’s negligent use, exercise or enjoyment of an Easement or Facility, and from and against all costs, reasonable attorneys’ fees (including appeals of any judgment or order), expenses and liabilities incurred with respect to any such claim, action or proceeding arising therefrom, but only to the extent the Indemnitee is not insured against such losses, liabilities, damages, judgments, costs, or expenses under valid and collectible insurance policies. In case any action or proceeding is brought against the Indemnitee by reason of any such claim, Indemnifying Owner, upon notice from Indemnitee, covenants to resist or defend such action or proceeding with attorneys reasonably satisfactory to Indemnitee. Any counsel for the insurance company providing insurance against such claim, action or proceeding shall be presumed reasonably satisfactory to Indemnitee.

8.2 **Liens.** Every Owner (the “**Liening Owner**”) shall remove, within thirty (30) days after the filing thereof, any mechanics’, materialmen’s, manager’s or broker’s or any other similar lien arising by reason of the acts of the Liening Owner, its agents and contractors or any work or materials or services for which the Liening Owner or its agents or contractors has contracted (A) against any other Owners’ portion of the Buildings or Owned Facilities, or (B) against its own portion of the Building or Owned Facilities, if the existence or foreclosure of such lien against its own portion of the Building or Owned Facilities would adversely affect any other Owner (such other Owner in (A) or (B) being the “**Impacted Owner**”). The Liening Owner shall not be required to remove such lien within thirty (30) days after its filing if: within said thirty (30) day period, (A) such lien cannot be foreclosed, and (B) the Liening Owner (i) shall in good faith diligently proceed to contest the same by appropriate actions or proceedings and shall give written notice to the Impacted Owner of its intention to contest the validity or amount of such lien and (ii) shall deliver to the Impacted Owner either, at the Impacted Owner’s option: (a) cash or a surety bond from a responsible surety company acceptable to the Impacted Owner in an amount equal to one hundred fifty percent (150%) of the lien claim and all interest and penalties then accrued thereon or such greater amount as may reasonably be required to assure payment in full of the amount claimed plus all penalties, interest and costs which may thereafter accrue by reason of such lien claim or (b) other security or indemnity reasonably acceptable to the Impacted Owner’s title insurance company and the Impacted Owner. An endorsement by the Impacted Owner’s title insurance company over such lien claim to the Impacted Owner’s title insurance policy shall be deemed an indemnity reasonably acceptable to the Impacted Owner and satisfy the requirements of (ii). In any case, a Liening Owner must remove or release such lien prior to entry of a final judgment of foreclosure. If the Liening Owner fails to comply with the foregoing provisions of this Section 8.2, thereby becoming a Defaulting Owner, the Impacted Owner, thereby becoming a Creditor Owner, may take such action as the Creditor Owner may deem necessary to defend against or remove such lien. The Creditor Owner shall be entitled to payment from the Defaulting Owner for all costs and expenses (including reasonable attorneys’ fees and litigation expenses, including appeals of any judgment or order) paid or incurred by the Creditor Owner in defending against, removing or attempting to remove or defend against such lien and may use any security delivered to the

UNOFFICIAL COPY

Creditor Owner for such purposes and for any other damages from Defaulting Owner's breach under Section 8.2.

8.3 Compliance With Laws. Every Owner:

(A) shall each comply with all Laws, if noncompliance by such Owner with respect to its portion of the Project or any part thereof or Owned Facilities or areas for which such Owner has been granted an exclusive easement would subject either of the other Owners to civil or criminal liability, or would jeopardize the full force or effect of any certificate of occupancy issued to either of the other Owners or for the Building itself or would jeopardize the any Owner's right to occupy or utilize beneficially its respective portion of the Project or any part thereof or Owned Facilities or any Easement (considering the time and circumstances), or would result in the imposition of a lien against any of the property of either of the other Owners;

(B) shall each comply with all rules, regulations and requirements of any insurance rating bureau having jurisdiction of the Project or any portion thereof or the requirements of any insurance coverage on either of the other Owner's portion of the Project or Owned Facilities if noncompliance by it with respect to its respective portion of the Project or any portion thereof or Owned Facilities would (i) increase the premiums of any policy of insurance maintained by any of the other Owners or the premiums of any policy of insurance maintained by all Owners (unless the non complying Owner pays all such increases), or (ii) render any other Owner's portion of the Project or Owned Facilities uninsurable, or (iii) create a valid defense to any of the other Owners' right to collect insurance proceeds under policies insuring such other Owner's portion of the Project or Owned Facilities; and

(C) shall each deliver to every other Owner, within ten (10) business days after receipt, a copy of any written report, citation or notice having an effect on or relating to compliance of the Project with Laws.

8.4 Zoning.

(A) None of the Owners shall (i) make any Alterations, (ii) allow any use of their respective portions of the Project, or (iii) take or fail to take any action which would violate the provisions of the Chicago Zoning Ordinance or the Existing Zoning, as said ordinances may be amended from time to time.

(B) The 310 South Michigan Property and 318 South Michigan Property are each treated as one zoning lot for purposes of complying with the Existing Zoning. If the applicable zoning ordinances require that there be a single designated controlling entity for either zoning lot, then for purposes of dealing with the City of Chicago, 310 Residential shall be such designated entity for the 310 South Michigan Property and 318 Residential shall be such designated entity for the 318 South Michigan Property.

UNOFFICIAL COPY

(C) All excess Gross Floor Area (as such term is hereinafter defined) on the Project available as of the Effective Date of this Agreement, after first taking into account the legal impact of the 310 Residential Improvements on such calculation, is hereby allocated (i) with respect to the property upon which the 310 Building is located, to 310 Retail and (ii) with respect to the property upon which the 318 Building is located, to 318 Retail. The term "Gross Floor Area" shall have the same definition as that contained in the Chicago Zoning Ordinance as of the date this Agreement is recorded or, if such term is changed or amended, then the comparable definition contained in the Chicago Zoning Ordinance relating to usable area.

(D) Applications for variations, changes, modifications or amendments to the provisions of the Chicago Zoning Ordinance and the Existing Zoning applicable to the Project which conform to the restrictions contained in Section 8.4(C) above and do not change the permitted use under such ordinances or this Agreement, may be filed and processed solely by the Owner or Owners of the portion of the Building directly affected by such application and shall not require the joinders of the other Owner or Owners.

(E) Each Owner shall execute such applications or other instruments as may be necessary to obtain any zoning variation, change, modification or amendment conforming with the provisions of this Section 8.4, including without limitation, the combination of zoning lots and allocation of excess development rights, density or number of allowable units referred to in (B) above and use and allocation of Gross Floor Area referred to in (C) above; provided, however, the Owner requesting such zoning variation, change, modification or amendment shall indemnify and hold harmless the other Owners from and against any and all loss, liability, claims, judgments, costs and expenses arising out of the other Owners' execution of such applications or other instruments. If any Owner fails to execute said applications or instruments when required hereunder to do so, the Owner requesting such zoning variation, change, modification or amendment is hereby irrevocably appointed attorney in fact of such Owner (such power of attorney being coupled with an interest) to execute said application or instruments on behalf of such Owner.

8.5 Use.

(A) No use shall be permitted in the Project which does not comply with Law, or would increase significantly the cost of insurance maintained by an Owner. No use in the 310 Condominium shall be permitted which does not comply with the 310 Condominium Declaration. Nothing contained in the Section shall authorize or permit any use by 310 Residential not allowed in the 310 Condominium Declaration. However, if there is a conflict or ambiguity between the provisions of this Section and the provisions contained in the 310 Condominium Declaration with respect to use by 310 Residential, those contained in this Agreement shall govern, control and prevail. No use in the 318 Condominium shall be permitted which does not comply with the 318 Condominium Declaration. Nothing contained in the Section shall authorize or permit any use by 318 Residential not allowed in the 318 Condominium Declaration. However, if there is a conflict or ambiguity between the provisions of this Section and the

UNOFFICIAL COPY

provisions contained in the 318 Condominium Declaration with respect to use, those contained in this Agreement shall govern, control and prevail.

(B) The following uses shall not be permitted in the Project without the consent of all of the Approving Parties, which may be withheld in an Approving Parties' sole and exclusive discretion:

- (i) Any fire sale, bankruptcy or going out of business sale (unless pursuant to a court order with proper permits issued by the City of Chicago);
- (ii) Any mortuary or funeral home;
- (iii) Any establishment selling or exhibiting pornographic materials or drug-related paraphernalia;
- (iv) Any adult theater or live performance theater exhibiting nude or lewd performers or performances or lascivious behavior;
- (v) Any bar, tavern, restaurant or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds forty-five percent (45%) of the gross revenues of such business;
- (vi) Any flea market, amusement or video arcade, pool or billiard hall or dance hall;
- (vii) Any package liquor store;
- (viii) Any clinic or office performing abortions;
- (ix) Any off-track betting store or parlor;
- (x) Any pawn shop or currency exchange;
- (xi) Any deep discount electronic merchandise or apparel store;
- (xii) Any fast food operation selling prepared or cooked fast food primarily for consumption off the premises comparable to McDonald's, Kentucky Fried Chicken, Popeyes, Taco Bell, Pizza Hut, Wendy's and Burger King; provided, however that this restriction shall not prohibit a user selling coffee and coffee-related drinks and food for consumption off premises comparable to Starbuck's, Caribou Coffee, Peet's Coffee and Seattle's Best Coffee; and
- (xiii) the use, presence or release of Hazardous Materials, except in the ordinary course of the permitted and usual business operations conducted thereon, provided that any such use shall at all times be in compliance with all applicable environmental laws.

UNOFFICIAL COPY

8.6 Exterior Building Signage/Visible Window Treatments.

(A) 310 Retail shall have the exclusive right to use the exterior of the 310 Building below the floor of the lowest unit in the 310 Condominium for signage. 310 Retail shall not be permitted to install or use any signage in the interior of the lobby of the 310 Building. Except as permitted by Section 4.2(G) hereinabove, none of 310 Residential, the 310 Association, or any Unit Owner or Occupant of the 310 Residential Property or the 310 Condominium may place or install any signage on the exterior of the 310 Building or in the interior of the 310 Condominium which is visible from the exterior of the 310 Building.

(B) 318 Retail shall have the exclusive right to use the exterior of the 318 Building for signage below the floor of the lowest Unit in the 318 Condominium. Except as permitted by Section 5.2(G) hereinabove, none of 318 Residential, the 318 Association, or any Unit Owner or Occupant of the 318 Residential Property or the 318 Condominium may place or install any signage on the exterior of the 318 Building or in the interior of the 318 Condominium which is visible from the exterior of the 318 Building.

(C) All exterior Building signage permitted by this Section, or by any other Section of this Agreement, must also comply with the following requirements:

- (i) all exterior building signs must comply with applicable Law;
- (ii) all signs must be installed and operated in a first-class manner; and
- (iii) all signs must be professionally designed and fabricated.

8.7 Environmental and Engineering Review. Each Owner (“Inspecting Owner”) shall have the right in certain instances listed below to obtain from an environmental engineer or an inspecting architect or engineer of the Inspecting Owner’s choice and at the Inspecting Owner’s own cost and expense, an audit, review, assessment or report (each referred to as a “Review”) relating to the Project, which Review may include tests or inspections of the other Owner’s portion of the Project as part of such Review. The Inspecting Owner shall use reasonable efforts to minimize the disruption of the other Owner’s operation of business or use in its portion of the Project and shall repair any damage to property of the other Owner caused by a Review. The instances when an Owner may obtain a Review necessitating tests or inspections of the other Owner’s portion of the Project are:

- (A) if the Inspecting Owner has entered into or will enter into a contract to sell or refinance its property in which a requirement of said contract is a Review; or
 - (B) if the Inspecting Owner’s then current Mortgagee has requested a Review;
- or
- (C) if a Review is required by Laws; or

UNOFFICIAL COPY

(D) if the Inspecting Owner, in good faith believes that the other Owner may have breached the provisions of Sections 8.3, 8.4 and 8.5 as it relates to the matters which could be disclosed by a Review or that the Inspecting Owner may be adversely affected or subject to liability as a result of matters which could be disclosed by a Review.

ARTICLE 9

INTENTIONALLY OMITTED

ARTICLE 10

INSURANCE

10.1 **Insurance Required.** The Owners shall procure and maintain the following insurance:

(A) **Real and Personal Property.**

(i) 310 Residential shall keep the 310 Residential Property, 310 Residential Owned Facilities and 310 Façade insured for no less than "all risk" coverage on real property and personal property owned by 310 Residential used in the operation of the 310 Residential Property for an amount not less than one hundred percent (100%) of the insurable replacement cost thereof, except that if the 310 Residential Property is submitted to the Act such percentage shall be increased (but not decreased) to the amount of coverage required by the Act, at all such times the 310 Residential Property remains subject to the Act.

(ii) 318 Residential shall keep the 318 Residential Property, 318 Residential Owned Facilities and 318 Façade insured for no less than "all risk" coverage on real property and personal property owned by 318 Residential used in the operation of the 318 Residential Property for an amount not less than one hundred percent (100%) of the insurable replacement cost thereof, except that if the 318 Residential Property is submitted to the Act such percentage shall be increased (but not decreased) to the amount of coverage required by the Act, at all such times the 318 Residential Property remains subject to the Act.

(iii) 310 Retail shall keep the 310 Retail Property (other than the 310 Façade) and the 310 Retail Owned Facilities insured for no less than "all risk" coverage on real property and improvements and betterments owned by 310 Retail used in the operation of the 310 Retail Property for an amount not less than one hundred percent (100%) of the insurable replacement cost thereof. 310 Retail may, in its discretion, include or exclude from such insurance improvements or betterments and personal property owned by tenants or others from such coverage.

UNOFFICIAL COPY

(iv) 318 Retail shall keep the 318 Retail Property (other than the 318 Façade) and the 318 Retail Owned Facilities insured for no less than “all risk” coverage on real property and improvements and betterments owned by 318 Retail used in the operation of the 318 Retail Property for an amount not less than one hundred percent (100%) of the insurable replacement cost thereof. 318 Retail may, in its discretion, include or exclude from such insurance improvements or betterments and personal property owned by tenants or others from such coverage.

(v) Each Owner shall separately insure on an “all risk” basis its loss of rental income or use caused by business interruption or extra expense incurred to reduce such loss of income, in such amounts and with such deductibles as may be carried by prudent owners of first class commercial or residential buildings in the City of Chicago, Illinois, and shall pay all premiums for such coverage. Replacement cost shall be determined annually by an independent appraiser or by a method acceptable to the insurance company providing such coverages. Such policies shall be endorsed with a replacement coverage endorsement and an agreed amount clause (waiving any applicable co insurance clause) in accordance with such determination or appraisal.

(B) **Public Liability.** Each Owner shall (1) insure against public liability claims and losses on a comprehensive or commercial general liability form of insurance with broad form coverage endorsements covering claims for personal and bodily injury or property damage occurring in, on, under, within, upon or about the Project, or as a result of operations thereon (including contractual liability covering obligations created by this Agreement including, but not limited to, those indemnity obligations contained herein), and (2) maintain automobile liability insurance for owned, non owned and hired vehicles, each coverage in such amounts as may be required by Law and as may from time to time be carried by prudent owners of first class commercial or residential buildings (as the case may be) in the City of Chicago, Illinois, but in all events for limits, as to each Owner and its portion of the Project, of not less than \$1,000,000 combined single limit for personal and bodily injury or property damage with an amount not less than \$9,000,000 umbrella coverage. Each such policy shall be endorsed to provide cross liability or severability of interests for the named insureds.

(C) **Boiler and Machinery.** The Owners shall jointly insure their boiler and machinery risks, on a comprehensive, blanket basis covering all equipment, machinery and apparatus in the Buildings consisting of, but not limited to, boilers, heating apparatus, fired and unfired pressure vessels, air conditioning equipment, miscellaneous electrical apparatus and their appurtenant equipment on a repair or replacement basis for not less than \$5,000,000 limit each accident, and also providing coverage, as to each Owner in accordance with its own needs for loss of rental income or use caused by business interruption or extra expense incurred to reduce such loss of income, in such amounts as may be carried from time to time by prudent owners of first class commercial or residential buildings in the City of Chicago, Illinois. Alternatively, each Owner may

UNOFFICIAL COPY

separately insure its loss of rental income caused by business interruption or extra expense incurred to reduce such loss of income in required amounts.

(D) **Flood and Earthquake.** The Owners may, in addition to “all risk” property insurance required under Section 10.1(A), determine to jointly insure their respective portions of the Project against earthquake and flood risks in an amount equal to the replacement cost thereof or such lesser amount as then may be reasonably available in the insurance market; both subject, however, to deductibles available and reasonable for such types of insurance.

(E) **Builder’s Risk.** Each Owner shall carry “all risk” builder’s risk insurance (including loss of income and “soft costs”) for not less than the completed value of the work then being performed by such Owner or Owners under Article 6, Section 11.2, Section 11.3 or Section 16.4 or for any Alterations which require another Owner’s consent under Section 16.1 and for the 310 Residential Improvements by 310 Residential and the 318 Residential Improvements by 318 Residential. Such insurance shall include coverage for items stored off site and items in transit for an amount sufficient to cover fully any loss. Loss of rental income or use and “soft costs” occurring during the period covered by builder’s risk insurance shall be insured in such amounts as may be carried by prudent owners of first class commercial or residential buildings in the City of Chicago. Coverage under this Section 12.1(E) shall only be required to the extent such coverage is not already provided within the property coverage under Section 12.1(A).

(F) **Worker’s Compensation.** Each Owner shall carry worker’s compensation insurance in amounts as required by Law and employer’s liability insurance in not less than the following amounts: bodily injury by accident, \$1,000,000 each accident; bodily injury by disease, \$1,000,000 each employee.

10.2 **Insurance Companies.** Unless all Owners otherwise agree in writing, but in any event subject to the approval of the Mortgagees, with respect to each of the insurance policies required in Sections 10.1(A), 10.1(C), and 10.1(D) and 10.1(E) (for work being performed under Section 6.2(B) or 11.3) hereof, the interest of all Owners shall be insured by the same insurance companies. Such policies may be issued in combination covering one or several items and covering jointly the interests of each Owner. Unless otherwise unanimously agreed in writing, there shall be a single joint policy for insurance required under Sections 10.1(C), 10.1(D) and 10.1(E) (for work being performed under Sections 6.2(B) or 11.3 of this Agreement). In the case of any insurance policy covering the Owners jointly, the Owners shall apportion the premium based on the manner in which the insurance company has underwritten the risks. Policies not required to be a single joint policy may be joint or may be issued separately by the same insurance company with respect to each Owner’s interest in the Project. If separate policies are issued, they shall be coordinated so that there are no gaps in coverage, and the insurance company shall agree that the entire Property will be covered among the Owners’ separate policies. The Owners will consult with one another at least annually (and may retain a consultant to advise them, the cost of employing such consultant to be shared in the same manner as provided in Section 10.4) concerning the advantage and disadvantages to each Owner and the Project as a whole of separate insurance policies as opposed to joint policies, where separate

UNOFFICIAL COPY

policies are permitted, and will give careful consideration to these matters before choosing to have separate policies. If the Owners do not each agree to have separate policies, where permitted, joint policies shall be obtained. If a joint policy is issued for the insurance required under Section 10.1(A), then coverage under Section 10.1(D) may be included in the same policy. In the event the Owners cannot agree upon the insurance companies to provide the insurance required under Section 10.1(A), 10.1(C), 10.1(D) and 10.1(E) (where required to be a joint policy), the decision of 310 Residential shall be binding upon the other Owners. In the event that any Owner disagrees with the apportionment of the insurance premium, the question of selection of an insurance company or apportionment of premium shall constitute an Arbitrable Dispute. Insurance policies required by Section 10.1 hereof shall be purchased from reputable and financially responsible insurance companies, taking into consideration the nature and amount of insurance required, who shall hold a current Policyholder's Alphabetic and Financial Size Category Rating of not less than A/XIV (or such lesser rating as the Owners and Mortgagees may agree) according to Best's Insurance Reports or a substantially equivalent rating from a nationally recognized insurance rating service. If separate insurance companies provide the coverages required hereunder, then all such companies shall coordinate their coverages with the other, to insure that there are no gaps in coverage, and any disputes regarding coverages will not delay adjustments of loss and payments to the insureds.

10.3 Insurance Provisions. Each policy described in Section 10.1 (other than Section 10.1(F)) hereof: (i) shall provide that the knowledge or acts or omissions of any insured party shall not invalidate the policy as against any other insured party or otherwise adversely affect the rights of any other insured party under any such policy; (ii) shall insure as "named" insureds all of the Owners (except that the Owners other than the primary insured shall be "additional" insureds under policies described in 10.1(B)); (iii) shall provide (except for liability insurance described in Section 10.1(B), for which it is inapplicable) by endorsement or otherwise, that the insurance shall not be invalidated should any of the insureds under the policy waive in writing prior to a loss any or all rights of recovery against any party for loss occurring to the property insured under the policy, if such provisions or endorsements are available and provided that such waiver by the insureds does not invalidate the policy or diminish or impair the insured's ability to collect under the policy, or unreasonably increase the premiums for such policy unless the party to be benefited by such endorsement or provision pays such increase; (iv) shall provide, except for liability insurance required by Section 10.1(B), that all losses payable thereunder shall be paid to the Depositary in accordance with the terms of Article 18 hereof, unless the Owners otherwise agree, subject to the consent of the Mortgagees; (v) shall provide for a minimum of thirty (30) days' advance written notice of the cancellation, nonrenewal or material modification thereof to Mortgagees and all insureds thereunder; (vi) shall include a standard mortgagee endorsement and loss payable clause in favor of the Mortgagees reasonably satisfactory to them; and (vii) shall not include a co insurance clause. Unless otherwise specified herein, the "all risk" form of property related insurance required to be procured and maintained by the Owners shall provide no less coverage (with the exception of deductible amounts) than the standard form of insurance currently promulgated by the Insurance Services Office, its successor, or other substantially similar insurance organization having responsibility for the design and publication of standardized insurance coverage forms for use by the insurance industry.

UNOFFICIAL COPY

10.4 **Limits of Liability.** Insurance specified in this Article 10 or carried by the Owners shall be jointly reviewed by the Owners periodically at the request of any Owner, but no review will be required more often than annually (unless there is a substantial change in either Building or operations conducted in such Building), to determine if such limits, deductible amounts and types of insurance are reasonable and prudent in view of the type, place and amount of risk to be transferred and the financial responsibility of the insureds, and to determine whether such limits, deductible amounts and types of insurance comply with the requirements of all applicable statutes, laws, ordinances, codes, rules, regulations, or orders and whether on a risk management basis, additional types of insurance or endorsements against special risks should be carried or whether required coverages or endorsements should be deleted. Initially, deductible amounts for insurance required under Sections 10.1(A) (other than loss of rental income insurance), 10.1(C) and 10.1(E) shall not exceed \$25,000; provided, however, such maximum shall not apply to an Owner at any time who qualifies under Section 8.7 to self insure risks. Deductible amounts for insurance required under Section 10.1(B) shall not be more than is reasonable considering the financial responsibility of the insured and shall also be subject, in any case, to the consideration to be given deductible amounts described above in this Section 8.4. Where separate policies are issued under Section 10.1(A) or 10.1(D), then deductibles shall be the same, if reasonably possible. Limits of liability may not be less than limits required by Mortgagees, notwithstanding amounts set forth above in this Article 10. Such limits shall be increased or decreased, deductible amounts increased or decreased or types of insurance shall be modified, if justified, based upon said review, and upon any such increase, decrease or modification, the Owners shall, at any Owner's election, execute an instrument in recordable form confirming such increase, decrease or modification, which any Owner may record with the Recorder as a supplement to this Agreement; provided, that no agreement regarding a decrease in limits of liability, increase in deductible amounts or elimination of any types of coverages shall be effective without the written consent of the Mortgagees. With the consent of all Owners, the Owners may employ an insurance consultant to perform such review on their behalf or to administer insurance related matters, and the cost of employing any such consultant shall be shared by the Owners in the ratio their annual insurance premiums for joint policies of insurance required or provided for hereunder bear to each other.

10.5 **Renewal Policies.** Copies of all renewal insurance policies or binders with summaries of coverages afforded and evidencing renewal shall be delivered by each Owner to the other Owners and to the Mortgagees at least thirty (30) days prior to the expiration date of any such expiring insurance policy. Binders shall be replaced with certified full copies of the actual renewal policies as soon as reasonably possible. Should an Owner fail to provide and maintain any policy of insurance required under this Article 10 or pay its share of the premiums or other costs for any joint policies, then the other Owners may purchase such policy and the costs thereof (or the Defaulting Owner's share of such costs) shall be due from the Defaulting Owner within ten (10) days after the Creditor Owner's written demand therefor.

10.6 **Waiver.** Provided that such a waiver does not invalidate the respective policy or policies or diminish or impair the insured's ability to collect under such policy or policies or unreasonably increase the premiums for such policy or policies unless the party to be benefited by such waiver pays such increase, and without limiting any release or waiver of liability or recovery contained elsewhere in this Agreement, each Owner hereby waives all claims for

UNOFFICIAL COPY

recovery from the other Owners for any loss or damage to any of its property insured (or required hereunder to be insured) under valid and collectible insurance policies to the extent of any recovery collectible (or which would have been collectible had such insurance required hereunder been obtained) under such insurance policies plus any deductible amounts.

10.7 **Self-Insurance.** Notwithstanding anything to the contrary contained in this Article 10, an Owner (or the beneficiary thereof in the event an Owner is a land trust) having a net worth in excess of (A) \$25,000,000 (in 2007 equivalent dollars) (as defined in Section 13.2) plus (B) the amount for which such Owner is responsible for insuring under this Article 10, shall not be required, at any time that such net worth standard is met, to obtain and pay for insurance coverage from a third party as required under Section 10.1(B) and may self insure the risks under Section 10.1(B) upon notice to the other Owners; provided that the coverage self insured (i.e., amounts which would otherwise be required to be insured by a third party insurer under Section 10.1(B)) shall not exceed ten percent (10%) of the said net worth of such Owner (or the beneficiary thereof) and such self insurance shall comply with any applicable law. At any time such net worth standard is not met or no longer met, such insurance requirements under Section 10.1(B) shall apply. Self insured amounts shall be deposited with the Depository and disbursed in the same manner as insurance proceeds. The consent of all of the Mortgagees of the Project shall be required in order for any Owner to self insure its risks under Section 10.1(B), which consent may be granted or withheld by the Mortgagees in their absolute discretion. Once the 310 Residential Property is submitted to the Act, the Owner of the 310 Condominium Property may not self insure any risks under this Section, and once the 318 Residential Property is submitted to the Act, the Owner of the 318 Condominium Property may not self insure any risks under this Section.

ARTICLE 11

MAINTENANCE AND REPAIR; DAMAGE TO EITHER BUILDING

11.1 **Maintenance of Property.** Except as expressly provided in Sections 7.1 and 7.2 hereof (and related Exhibits) relating to Maintenance of certain Facilities and areas of either Building or hereinafter in this Article 11 or in the event of fire or other casualty, and except as provided in and without limiting or diminishing such Owner's obligations under Article 6, each Owner shall, at its sole cost and expense, maintain and keep its Parcel and Owned Facilities in good and safe order and condition, and shall make all repairs or replacements of, in, on, under, within, upon or about such property, whether said repairs or replacements are to the interior or exterior thereof, or structural or non structural components thereof, or involve ordinary or extraordinary repairs or replacements, necessary to keep the same in safe first class order and condition, howsoever the necessity or desirability thereof may arise, and whether or not necessitated by wear, tear, obsolescence, defects or otherwise. The Owners agree not to suffer or commit, and shall use all reasonable precaution to prevent, waste to their property. With respect to the Maintenance of the Project or Facilities located in the 310 Condominium or the 318 Condominium, Maintenance expressly includes the right of entry with or without notice (in an emergency) by the Party seeking to perform Maintenance, and its contractors, agents and employees into any Unit and the right to perform Maintenance as and when needed, using reasonable efforts to minimize damage caused by such Maintenance; provided, however that

UNOFFICIAL COPY

there shall be no responsibility to repair or replace any wall coverings, decorations, fixtures, finish coat of paint, finishes, improvements and betterments made to a Unit or any other improvement, finish or betterment to a Unit which is the obligation of a Unit Owner under the Condominium Declaration to repair or replace, which is damaged or destroyed as a result of performing Maintenance under this Agreement.

11.2 **Damage Affecting Only 310 Residential Property, 310 Retail Property, 318 Residential Property or 318 Retail Property.** If any portion of the Project is damaged by fire or other casualty and such damages occurs within a Party's Owned Facilities only, then any such damage shall be repaired and restored by the Owner of the portion of the Project in which any such damage occurs in as timely a manner as practicable under the circumstances, and such Owner shall, in accordance with the provisions of Article 19 hereof, be entitled to withdraw any insurance proceeds (including deductible amounts and self insurance amounts) held by the Depository by reason of any such damage, for application to the cost and expense of the repair and restoration of any such damage. If at any time any Owner so obligated to repair and restore such damage shall not proceed diligently with any repair or restoration adversely and materially affecting an Easement in favor of the other Owner or Owners or services to be furnished the other Owner or Owners under Article 7 hereof, then (i) the Creditor Owner may give written notice to the Defaulting Owner specifying the respect or respects in which such repair or restoration is not proceeding diligently and, if, upon expiration of ten (10) days after the receipt of such notice, any such work of repair or restoration is still not proceeding diligently, then the Creditor Owner may perform such repair and restoration and may take all appropriate steps to carry out the same; or (ii) in an Emergency Situation, the Creditor Owner may immediately perform such repair or restoration and may take all appropriate steps to carry out the same. The Creditor Owner in so performing such repair and restoration shall, in accordance with Article 19 hereof, be entitled to withdraw any insurance proceeds and any other monies held by the Depository as a result of any such damage, for application to the cost and expense of any such repair or restoration and shall also be entitled to reimbursement upon demand from Defaulting Owner for all costs and expenses incurred by Creditor Owner in excess of said insurance proceeds. Repair and restoration under this Section 11.2 shall constitute Alterations, except that the Owner performing the repair and restoration shall not be required to obtain the other Owners' consent if such consent would not otherwise be required under Article 18, and Section 16.1(E)(iii) shall not apply.

11.3 **Joint Damage.** If either Building is damaged by fire or other casualty and if the provisions of Section 11.2 hereof are not applicable because the damage only affects one Owner's Parcel, then to the extent such damage does not fall within any of such categories, the repair and restoration of only that portion of such damage which does not fall within those categories shall be the joint responsibility of the Owner or Owners in whose portion of such Building the damage occurs or whose Facilities are damaged (the "**Affected Owners**"). Said repair and restoration shall be commenced and pursued to completion in as timely a manner as practicable and shall be performed on behalf of the Affected Owners by a contractor or contractors jointly selected by the Affected Owners, from contractors who are licensed to do business in the State of Illinois and who have substantial experience in the construction and renovation of properties of similar age and type of construction, in the downtown Chicago area. The contractor selection shall be subject to the approval of the Mortgagees if the approximate

UNOFFICIAL COPY

cost of the repair and restoration is greater than \$1,000,000.00 (in 2007 equivalent dollars). Participation by an Affected Owner in selecting an Architect or contractor shall be limited to the selection of the Architect preparing plans and specifications for, and the contractor performing repair or restoration of, its actual areas or Facilities damaged. In the event the Affected Owners, and their Mortgagees, if required, fail to agree upon the selection of a contractor or contractors, the Affected Owners shall request the advice of the Architect. If after receiving the Architect's advice, the Affected Owners and their Mortgagees cannot agree on a contractor or contractors, then the selection of a contractor or contractors shall be an Arbitrable Dispute. The plans and specifications for such repair and restoration shall be prepared by the Architect, unless the Affected Owners otherwise agree upon another person or entity to prepare them in accordance with instructions given by all Affected Owners, which plans and specifications shall be subject to the reasonable approval of the Mortgagees. Such plans and specifications shall provide for the damaged portion of the Building to be rebuilt as nearly identical as commercially practicable to the damaged portion of Building as constructed prior to the damage unless prohibited by law or unless the Affected Owners otherwise agree, subject to the approval of their Mortgagees and subject to the consent of other Owners under Section 16.1(B) where required. The Architect (or other architect or engineer preparing the plans and specifications) shall furnish to each of the Affected Owners, and the Mortgagees, a set of the plans and specifications which it has prepared or caused to be prepared. Unless the Affected Owners otherwise agree (subject to the approval of their Mortgagees, provided however, such approval of the Mortgagees shall be required only if the approximate cost of the repair and restoration is greater than \$1,000,000.00 in 2007 equivalent dollars), any contractor or contractors shall work under the supervision of the Architect (or other architect or engineer preparing the plans and specifications), and the Architect (or other architect or engineer preparing the plans and specifications) is hereby authorized and directed to instruct the Depository, from time to time, but only with the prior approval of the Affected Owners and their Mortgagees, as such repair and restoration progresses, to disburse in accordance with Article 19 hereof, the insurance proceeds (including deductible and self insured amounts) held by the Depository and any other monies deposited with the Depository pursuant to Section 11.4 hereof for application against the cost and expense of any such repair and restoration.

11.4 **Cost of Repairs.** If the cost and expense of performing any repair and restoration provided for in Section 11.3 hereof shall exceed the amount of available insurance proceeds, paid by reason of the damage, including deductible and self insured amounts (self insured amounts being those amounts not required to be insured by a third party insurer pursuant to Section 10.7), then such excess cost and expense (or the entire amount of such cost and expense, if there be no insurance proceeds) shall be borne by the Owners: first, in such proportion as may be required by the provisions of Article 7 providing for allocation of replacement costs of Facilities, until such costs are recouped, and second, in proportion to the cost and expense of repairing and restoring to their former condition their respective portions of the Building and Owned Facilities. Notwithstanding the foregoing, if an Owner (not entitled to self insure) has not carried the insurance required under Article 10 and, therefore, is a Defaulting Owner, then such Defaulting Owner shall pay the costs and expenses not covered by insurance which another Owner is obligated to pay which would not have been payable by such Owner if proper insurance had been carried by the Defaulting Owner to the extent of the amount which would have been available as insurance proceeds had such Defaulting Owner carried the required insurance.

UNOFFICIAL COPY

11.5 **Deposit of Costs.** In any instance of repair or restoration pursuant to Sections 11.3 or 11.4 hereof, any affected Owner, may require that an estimate of the cost or expense of performing such repair or restoration be made by a reputable independent professional construction cost estimating firm, unless a construction contract providing for the performance of such repair and restoration at a stipulated sum has theretofore been executed. If said estimate or stipulated sum, or if the actual amount incurred in performing repair or restoration, exceeds the amount of insurance proceeds, if any, paid or payable by reason of the damage, then any Owner may at any time give notice to the other Owners demanding that each Owner deposit with the Depository the amount of such excess cost and expense attributable to each Owner pursuant to Section 11.4. An Owner self insuring any risk as permitted under Section 10.7 shall deposit with the Depository the entire cost and expense attributable to such Owner, and not just excess costs. Any Owner maintaining deductible amounts shall deposit the deductible amount based upon said estimate or stipulated sum, or actual cost and expense of performing such repair or restoration, an Owner may deliver to the Depository security for payment of its share reasonably acceptable to the other Owners, the Depository and the Mortgagees. Such security may be in the form of, but shall not be limited to, an irrevocable and unconditional letter of credit in favor of the Depository in the face amount of the share owed or an irrevocable loan commitment, satisfactory to the other Owners and the Mortgagees, issued by a responsible lending institution to disburse an amount equal to such Owner's share of such excess, self insured or deductible amount to the Depository to pay the cost and expense of any such repair or restoration as the work progresses, in proportion to such Owner's share of the cost and expense of any such repair or restoration. If the amount of the security required is based on an estimate of the cost and expense of repair and restoration, then the amount of security required to be deposited or available shall be readjusted upward or downward as the work progresses based on actual cost and expenses of the work. If an Owner shall fail to pay, or, as the case may be, deposit, such Owner's share of the cost and expense (or estimated cost and expense) of performing any repair or restoration in accordance with this Section 11.5, or fails to deliver the security provided for above within ten (10) days after receipt of the other Owners' written demand therefor, then the Creditor Owner may pay the Defaulting Owner's share and the Defaulting Owner shall, upon written demand, reimburse the Creditor Owner for such payment and the Creditor Owner' reasonable costs and expenses incurred in connection with such payment.

11.6 **Excess Insurance Proceeds.** Upon completion of the repair and restoration of any damage to either Building, any remaining insurance proceeds paid by reason of such damage shall be refunded to each Owner in proportion to the ratio that the insurance proceeds contributed by such Owner or by such Owner's insurance company bears to the total insurance proceeds made available by the insurer for the repair and restoration or, if the insurance is provided by a single policy covering such Building, then the ratio of insurance proceeds attributed to such Owner's portion of such Building and Owned Facilities by the insurer or the Owners to the total insurance proceeds made available by the insurer or the Owners for the repair and restoration. For purposes of this Section 11.6, insurance proceeds include deductible amounts and amounts contributed by a self insured Owner.

UNOFFICIAL COPY**11.7 Agreement Not to Repair.**

(A) If the 310 Building is destroyed or substantially damaged, and 310 Residential and 310 Retail (in compliance with the requirements of the Act, if the 310 Residential Property has been submitted to the Act) agree not to rebuild, repair or restore the 310 Building, subject to the written approval of the Mortgagees (which approval may be granted or withheld be each such Mortgagee in their sole and absolute discretion), it is the intent of the Owners that (i) the insurance proceeds shall be shared (but only to the extent specified herein below in this Section 11.7(a)), (ii) any improvements or other property (other than the land) owned by an Owner sold, and (iii) 310 Residential shall convey all of its right, title and interest in the Project to 310 Retail by special warranty deed subject only to the title exceptions and title matters reasonably acceptable to 310 Retail. This agreement to convey by 310 Residential is in consideration of 310 Retail's release of 310 Residential from its obligations and liabilities accruing thereafter under this Agreement. 310 Residential shall not be obligated to pay any closing costs in connection with such conveyance. After such conveyance, the Project shall be owned solely by 310 Retail and may be sold by 310 Retail and all proceeds from such sale may be retained by 310 Retail free and clear of the claims of any other Owner, subject to the rights of 310 Retail's Mortgagee. Upon agreement not to rebuild, the 310 Building shall be demolished to the extent necessary to comply with all applicable Laws. In such event, the available insurance proceeds, other than insurance proceeds used to cause said demolition to be performed, shall be refunded to each Owner in the same ratio of insurance proceeds contributed by such Owner or by such Owner's insurance company to the total insurance proceeds paid by reason of such damage or, if the insurance is provided by a single policy covering the 310 Building, then in the ratio of insurance proceeds attributed by the insurer to such Owner's portion of the Building and Owned Facilities to the total insurance proceeds paid by reason of such damage. If the Owners agree not to rebuild, repair or restore the 310 Building, the rights of the Owners to receive available insurance proceeds, if any, shall be subject to the rights of the Mortgagees with respect to the applicable Owner's share of any such available insurance proceeds. Such demolition shall be deemed to be a "repair or restoration" to which the provisions of Sections 11.3, 11.4, 11.5 and 11.10 are applicable except that demolition, and not construction, shall be performed. Any sale proceeds due 310 Residential if the 310 Residential Property has been submitted to the Act shall be divided among all Unit Owners based on their Unit Ownership or as otherwise provided in the Condominium Declaration or in the Act. For purposes of this Section 11.7, insurance proceeds include amounts contributed by a self insured Owner.

(B) If the 318 Building is destroyed or substantially damaged, and 318 Residential, 318 Retail and 310 Residential (in compliance with the requirements of the Act, if the 310 Residential Property and/or 318 Residential Property have been submitted to the Act) agree not to rebuild, repair or restore the 318 Building, subject to the written approval of the Mortgagees (which approval may be granted or withheld be each such Mortgagee in their sole and absolute discretion), it is the intent of the Owners that (i) the insurance proceeds shall be shared (but only to the extent specified herein below in this Section 11.7(a)), (ii) any improvements or other property (other than the land) owned by

UNOFFICIAL COPY

an Owner sold, and (iii) 318 Residential shall convey all of its right, title and interest in the Project to 318 Retail by special warranty deed subject only to the title exceptions and title matters reasonably acceptable to 318 Retail. This agreement to convey by 318 Residential is in consideration of 318 Retail's release of 318 Residential from its obligations and liabilities accruing thereafter under this Agreement. 318 Residential shall not be obligated to pay any closing costs in connection with such conveyance. After such conveyance, the Project shall be owned solely by 318 Retail and may be sold by 318 Retail and all proceeds from such sale may be retained by 318 Retail free and clear of the claims of any other Owner, subject to the rights of 318 Retail's Mortgagee. Upon agreement not to rebuild, the 318 Building shall be demolished to the extent necessary to comply with all applicable Laws. In such event, the available insurance proceeds, other than insurance proceeds used to cause said demolition to be performed, shall be refunded to each Owner in the same ratio of insurance proceeds contributed by such Owner or by such Owner's insurance company to the total insurance proceeds paid by reason of such damage or, if the insurance is provided by a single policy covering the 318 Building, then in the ratio of insurance proceeds attributed by the insurer to such Owner's portion of the Building and Owned Facilities to the total insurance proceeds paid by reason of such damage. If the Owners agree not to rebuild, repair or restore the 318 Building, the rights of the Owners to receive available insurance proceeds, if any, shall be subject to the rights of the Mortgagees with respect to the applicable Owner's share of any such available insurance proceeds. Such demolition shall be deemed to be a "repair or restoration" to which the provisions of Sections 11.3, 11.4, 11.5 and 11.10 are applicable except that demolition, and not construction, shall be performed. Any sale proceeds due 318 Residential if the 318 Residential Property has been submitted to the Act shall be divided among all Unit Owners based on their Unit Ownership or as otherwise provided in the Condominium Declaration or in the Act. For purposes of this Section 11.7, insurance proceeds include amounts contributed by a self insured Owner.

11.8 **Costs Defined.** For purposes of this Article 9, architects' and engineers' fees, attorneys' fees, consultants' fees, title insurance premiums and other similar costs and expenses relating to repair or restoration shall be included in the costs and expenses of any such repair or restoration.

11.9 **Restoration of Condominium Property.**

(A) To the fullest extent permitted by law, the provisions of Article 11 of this Agreement shall be controlling over the provisions of the Act or 310 Condominium Declaration insofar as the provisions of the Act or 310 Condominium Declaration limit (i) the obligation of the 310 Unit Owners to repair or restore the 310 Condominium Property or (ii) the use of insurance proceeds for repair and restoration of the 310 Condominium Property, (iii) any limitation or prohibition on the obligation of the 310 Unit Owners to convey their respective interest in the Project to 310 Retail as required by Section 11.7. In the event of fire or other "disaster" (such term being used in the Act) causing damage to the 310 Condominium Property which would entitle 310 Residential, under the Act or 310 Condominium Declaration, not to repair and restore the 310 Condominium Property as required by this Agreement or not to use insurance proceeds

UNOFFICIAL COPY

for repair and restore of the 310 Condominium Property, notwithstanding the foregoing sentence, then prior to disbursement of any insurance or other proceeds to the 310 Unit Owners and no later than ninety (90) days after occurrence of the fire or other disaster in any event, if affirmative action and provision has not been taken by such date by 310 Residential to repair and restore the 310 Condominium Property, 310 Residential shall pay 310 Retail an amount necessary so that 310 Retail shall have sufficient proceeds to demolish or repair and restore the 310 Building to a condition so as adequately to assure:

- (i) the structural integrity and safety and weathertight enclosure of the 310 Building;
- (ii) the continuous and efficient operation of 310 Retail Owned Facilities and all 310 Building electrical, utility, mechanical, plumbing and other systems and Facilities serving the 310 Retail Property;
- (iii) compliance with all zoning, building and other laws, rules, orders, ordinances, regulations and requirements of any governmental body or municipality or agency thereof having jurisdiction of the Project; and
- (iv) the architectural unity and aesthetic appearance of the restored 310 Building as first class property.

Upon compliance with (i)-(iv) the 310 Unit Owners shall convey their interest in the Project to 310 Retail upon the said terms and conditions as required of 310 Residential under Section 11.7.

(B) To the fullest extent permitted by law, the provisions of Article 11 of this Agreement shall be controlling over the provisions of the Act or 318 Condominium Declaration insofar as the provisions of the Act or 318 Condominium Declaration limit (i) the obligation of the 318 Unit Owners to repair or restore the 318 Condominium Property or (ii) the use of insurance proceeds for repair and restoration of the 318 Condominium Property, (iii) any limitation or prohibition on the obligation of the 318 Unit Owners to convey their respective interest in the Project to 318 Retail as required by Section 11.7. In the event of fire or other "disaster" (such term being used in the Act) causing damage to the 318 Condominium Property which would entitle 318 Residential, under the Act or 318 Condominium Declaration, not to repair and restore the 318 Condominium Property as required by this Agreement or not to use insurance proceeds for repair and restore of the 318 Condominium Property, notwithstanding the foregoing sentence, then prior to disbursement of any insurance or other proceeds to the 318 Unit Owners and no later than ninety (90) days after occurrence of the fire or other disaster in any event, if affirmative action and provision has not been taken by such date by 318 Residential to repair and restore the 318 Condominium Property, 318 Residential shall pay 318 Retail an amount necessary so that 318 Retail shall have sufficient proceeds to demolish or repair and restore the 318 Building to a condition so as adequately to assure:

UNOFFICIAL COPY

- (i) the structural integrity and safety and weathertight enclosure of the 318 Building;
- (ii) the continuous and efficient operation of 318 Retail Owned Facilities and all 318 Building electrical, utility, mechanical, plumbing and other systems and Facilities serving the 318 Retail Property;
- (iii) compliance with all zoning, building and other laws, rules, orders, ordinances, regulations and requirements of any governmental body or municipality or agency thereof having jurisdiction of the Project; and
- (iv) the architectural unity and aesthetic appearance of the restored 318 Building as first class property.

Upon compliance with (i)-(iv), the 318 Unit Owners shall convey their interest in the Project to 318 Retail upon the said terms and conditions as required of 318 Residential under Section 11.7.

11.10 Common Walls and Doors. The vertical boundaries between the Parcels have generally been established based on measurement to the inside or outside surface of walls separating the Parcels, to the extent existing, or, if not in existence as of the date of this Agreement, then based upon the plans and specifications for the Project. Notwithstanding the foregoing, the obligations of the Owners under Section 11.1 shall be deemed to include an obligation to the center of common walls (including doors) regardless of the exact location of the boundary; provided, however, the Owners shall coordinate work with respect to common walls and doors and share equally their cost, except that improvements or repairs and maintenance benefiting only one Owner shall be performed by and shall be at such Owner's sole cost.

ARTICLE 12

LIENS, DEBTS, INTEREST AND REMEDIES

12.1 Failure to Perform. If, at any time, any Owner fails within ten (10) business days after notice or demand to pay any sum of money due to a Creditor Owner under or pursuant to the provisions of this Agreement or any other time period expressly provided for such payment to be made (thereby becoming a Defaulting Owner) then, in addition to any other rights or remedies the Creditor Owner may have, the Creditor Owner shall have (A) a lien against the portion of the Project owned by the Defaulting Owner and (B) for a default under Article 11, a lien also against any insurance proceeds payable to the Defaulting Owner for loss or damage to such portion of the Project or otherwise under insurance policies carried pursuant to Article 10 hereof, to secure the repayment of such sum of money and all interest on such sum accruing pursuant to the provisions of this Article 12. Such liens shall arise immediately upon the recording of a notice by the Creditor Owner with the Recorder and may be enforced by a proceeding in equity to foreclose such lien through a judicial foreclosure in like manner as a mortgage of real property in the State of Illinois. Such liens shall continue in full force and effect until such sum of money and any accrued interest thereon ("**Default Amount**") shall have

UNOFFICIAL COPY

been paid in full. A Creditor Owner shall release its lien upon payment in full. Notwithstanding the foregoing, a Creditor Owner's lien shall be superior to and shall take precedence over any Mortgage, trust deed or other encumbrance constituting a lien on the portion of the Building or Property owned by the Defaulting Owner, except a Prior Lien. A "Prior Lien" means a mortgage which has been recorded against the Building or Property prior to the time of recording of the Creditor Owner's notice of lien, including a mortgage or trust deed against a Unit.

12.2 No Diminution of Lien.

(A) No conveyance or other divestiture of title (except foreclosure of a Prior Lien which is superior to a lien arising under Article 12) shall in any way affect or diminish any lien arising pursuant to this Article 12, and any lien which would have arisen against any property pursuant to this Article 12 had there been no conveyance or divestiture of title (except foreclosure of a Prior Lien which is superior to a lien arising under Article 12) shall not be defeated or otherwise diminished or affected by reason of such conveyance or divestiture of title.

(B) If at any time either Owner as a Creditor Owner has recorded a notice of lien under Section 12.1 of this Agreement against the other Owner's portion of the Project, which lien has not been foreclosed, released, or satisfied in full, and if such portion of the Project or any part or interest is thereafter sold, the Creditor Owner shall be entitled to receive from the proceeds of sale of such portion of the Project or part or interest the lesser of (a) an amount sufficient to satisfy that portion of the unpaid Default Amount and (b) the entire proceeds from the sale, minus any amount paid to satisfy the Prior Lien. Following any such sale the Creditor Owner, shall continue to have (x) a lien on the Defaulting Owner's portion of the Project and (y) the rights with respect to the proceeds of any subsequent sales of such Defaulting Owner's portion of the Project, as provided in this Article 12, to secure repayment of any remaining portion of the Default Amount secured by the lien that applies to such Defaulting Owner's portion of the Project. If the amount secured by such lien is being contested in a judicial action or is the subject of arbitration under Article 13, then the proceeds which a Creditor Owner could apply to satisfy its lien shall be deposited by the Defaulting Owner with the Depositary or other escrowee acceptable to the Creditor Owner and held for disbursement at the joint order of the Owners or as directed by court order or by the arbitrator in such arbitration. Further, (i) if at any time after the 310 Residential Property or any portion of the 310 Future Development Parcel has been submitted to the Act, and if a Creditor Owner has recorded a notice of lien under Section 12.1 of this Agreement against a unit of the 310 Condominium, which lien has not been foreclosed, released, or satisfied in full, and if such unit of 310 Condominium Property is thereafter sold, then the Creditor Owner, shall be entitled to receive from the proceeds of sale of such unit the lesser of (a) an amount sufficient to satisfy that portion of the unpaid Default Amount for which such unit owner is liable, as provided in Section 20.6, and (b) the entire proceeds from the sale of such unit, minus any amount paid to satisfy the Prior Lien on such unit; and (ii) if at any time after the 318 Residential Property or any portion of the 318 Future Development Parcel has been submitted to the Act, and if a Creditor Owner has recorded a notice of lien under Section 12.1 of this Agreement against a unit of the 318 Condominium, which lien has

UNOFFICIAL COPY

not been foreclosed, released, or satisfied in full, and if such unit of 318 Condominium Property is thereafter sold, then the Creditor Owner, shall be entitled to receive from the proceeds of sale of such unit the lesser of (a) an amount sufficient to satisfy that portion of the unpaid Default Amount for which such unit owner is liable, as provided in Section 20.6, and (b) the entire proceeds from the sale of such unit, minus any amount paid to satisfy the Prior Lien on such unit. The Creditor Owner shall notify the 318 Association of the recordation, foreclosure, release or satisfaction of liens against units of the 318 Condominium Property. The Association shall notify the Creditor Owner in advance of any sale of a unit of Condominium Property known to the Association against which such lien exists, and the Creditor Owner shall issue an Estoppel Certificate under Section 17.1 of this Agreement. Following any such sale, the Creditor Owner shall continue to have (x) a lien on such unit and (y) the rights with respect to the proceeds of any subsequent sales of such unit, as provided in this Article 12, to secure repayment of any remaining portion of the Default Amount secured by the lien that applies to such unit.

12.3 **Mortgagee's Subrogation.** The holder of a mortgage or trust deed on all or any portion of the Project shall have the right to be subrogated to the position of the holder of any lien arising pursuant to this Article 12 affecting the property secured by its mortgage upon payment of the amount secured by such lien.

12.4 **Interest Rate.** Interest shall accrue on sums owed by a Defaulting Owner to a Creditor Owner and shall be payable from the date any such sum first became due hereunder until paid in full, at a rate of interest equal to the floating rate which is equal to three percent (3%) per annum in excess of the annual rate of interest from time to time announced by J.P. Morgan Chase Bank, N.A. at Chicago, Illinois or any successor thereto as its base or prime or reference rate of interest, or if a base or reference rate is not announced or available, then interest shall accrue at the annual rate of eighteen percent (18%).

12.5 **Cumulative Remedies.** The rights and remedies of an Owner provided for in this Article 12 or elsewhere in this Agreement are cumulative and not intended to be exclusive of any other remedies to which such Owner may be entitled at law or in equity or by statute. An Owner may enforce, by a proceeding in equity for mandatory injunction, another Owner's obligation to execute or record any document which such other Owner is required to execute under or pursuant to this Agreement. The exercise by such Owner of any right or remedy to which it is entitled hereunder shall not preclude or restrict the exercise of any other right or remedy provided hereunder or at law and equity; provided, however, no Owner shall be entitled to "economic loss" (including lost profits, if or however characterized as damages) or special or consequential damages from the other Owner as a result of any breach by the other Owner of its obligations under this Agreement.

12.6 **No Set Off.** Each claim of any Owner arising under this Agreement shall be separate and distinct, and no defense, set off, offset or counterclaim arising against the enforcement of any lien or other claim of any Owner shall thereby be or become a defense, set off, offset or counterclaim against the enforcement of any other lien or claim.

UNOFFICIAL COPY

12.7 **Period of Limitation.** Actions to enforce any right, claim or lien under this Agreement shall be commenced within three (3) years immediately following the date the cause of action accrued, or such other shorter period as may be provided by law or statute.

12.8 **Attorneys' Fees.** A Defaulting Owner shall pay the reasonable attorneys' fees and court costs (including appeals of any judgment or order) paid or incurred by a Creditor Owner in successfully enforcing its rights against the Defaulting Owner under this Agreement. In the case of an appeal, attorneys' fees shall be payable after the decision in such appeal.

12.9 **Self-Help.** Without limiting any other rights or remedies of an Owner, including any other self-help provision of this Agreement which grants an Owner the right to perform an obligation which the other Owner has failed to perform, a Creditor Owner shall have the right, in an Emergency Situation, upon reasonable advance notice, if possible under the circumstances and which may be oral, to perform the obligation which the Defaulting Owner has failed to perform until the Defaulting Owner cures such default. The Creditor Owner shall be entitled to payment from the Defaulting Owner for all costs and expenses (including reasonable attorney's fees, including appeals from judgments or orders) paid or incurred by the Owner in performing such obligation which the Defaulting Owner has failed to perform. Where a specific self-help right is granted elsewhere under this Agreement for non-performance of an obligation, such provision shall control the provisions of this Section 12.9.

ARTICLE 13

ARBITRATION

13.1 **Disputes Subject to Arbitration; Arbitration Procedure.** All questions, differences, disputes, claims or controversies arising among or between Owners under this Agreement:

- (A) constituting a monetary claim involving an amount as to any one claim not exceeding \$100,000.00 (in 2007 Equivalent dollars); or
- (B) expressly made an Arbitrable Dispute or subject to arbitration under this Article 13 by the terms of this Agreement; or
- (C) involving any of the following matters:
 - (i) selection of an insurance company or apportionment of insurance premiums under Section 10.2 hereof;
 - (ii) appointment of a contractor or contractors pursuant to Section 11.3 or 15.4 hereof;
 - (iii) replacement of the Architect pursuant to Section 18.1 hereof;

UNOFFICIAL COPY

(iv) other failure to agree on a matter described in Section 7.7, 9.2, 13.2, 18.1, 20.1 or 20.4 which this Agreement expressly requires the Owners to jointly decide or agree upon;

(v) disputes arising generally under Articles 7, 9, 10, 11, 15 or 16; or

(vi) matters otherwise not constituting Arbitrable Disputes but which are incidental to and not easily divisible from an Arbitrable Dispute being submitted to Arbitration,

which (with respect to any of such matters) shall not be resolved within sixty (60) days after it shall arise (or such other shorter or longer time period expressly provided herein), shall be submitted for arbitration to one (1) arbitrator at the Chicago, Illinois office of the American Arbitration Association in accordance with its then existing Commercial Arbitration Rules for expedited arbitration. Each Owner who is a party to the arbitration shall cause the arbitrator to be selected within ten (10) business days, and proceedings shall commence within five (5) business days after selection of the arbitrator, notwithstanding that a longer period may be allowed under the Commercial Arbitration Rules. In the case of disputes under clauses (C)(i), (ii) or (iii) above, or where the subject for arbitration is otherwise the joint selection or appointment of an individual company or other entity to perform professional or other services, the decision of the arbitrator shall be limited to the individuals, companies and other entities proposed by the Owners in their attempt to agree or from those included in an approved list submitted by the Owners. In the case of any other matter which the parties fail to agree upon which this Agreement expressly requires the Owners to jointly decide or agree upon, the decision of the arbitrator shall be limited to the terms (or a compromise of such terms) or within the scope of the terms proposed by each of the Owners in the negotiations of the issue and the provisions of this Agreement, if any, which require the arbitrator to make a particular finding. Any award issued by the arbitrator shall take into account and be consistent with any standards, terms or conditions contained in this Agreement expressly governing the subject of the dispute, except in those instances where the arbitrator is required to select an individual, company or entity from those selected by the Owners and none meets such standards, terms or conditions. Such arbitration may be initiated by any Owner. The Owner initiating arbitration shall notify the Mortgagees of the filing of a claim and demand in arbitration within five (5) days thereafter. Owners may not seek injunctive relief in the arbitration. The fees and costs of such arbitration (filing fees, arbitrators' fees and expenses, court reporter's fees and transcript fees, but exclusive of witness fees and attorneys' fees) shall be borne equally by the Owners involved in the arbitration; provided that the arbitrator may include in its award any of the fees and costs of arbitration. Any award of the arbitrator shall be final and binding upon the Owners and judgment thereon shall be entered by any court of competent jurisdiction. Any award including payment of delinquent amounts shall include interest on such delinquent amounts at the rate set forth in Section 10.4. Where a dispute involves both matters which are Arbitrable Disputes and matters which are not Arbitrable Disputes which are not incidental to the Arbitrable Dispute and not easily divisible from it, the dispute shall not be submitted to arbitration.

13.2 **Monetary Adjustment (Equivalent Dollars)**. For purposes of this Agreement, "2007 equivalent dollars" means the equivalent purchasing power at any time of the value of the

UNOFFICIAL COPY

same number of U.S. Dollars in calendar year 2007. The 2007 equivalent dollars of any amount shall be determined by multiplying said amount by one (1) plus a fraction (but not less than zero) (expressed as a percentage), the numerator of which is the difference obtained by subtracting (x) the Consumer Price Index for January, 2007 from (y) the monthly Consumer Price Index (as hereinafter defined) last published prior to the date of such determination, and the denominator of which is the Consumer Price Index for January, 2007. As used herein, the term "Consumer Price Index" shall mean the Consumer Price Index for Urban Wage Earners and Clerical Workers, Chicago, Gary, Lake County, IL-IN-WI All Items (Base Year 1982 4 = 100) for the applicable month published by the Bureau of Labor Statistics of the United States Department of Labor or similar index agreed to by the Owners if such index is no longer available.

ARTICLE 14

UNAVOIDABLE DELAYS

No Owner shall be deemed to be in default in the performance of any obligation created under or pursuant to this Agreement, other than an obligation requiring the payment of a sum of money, if and as long as non performance of such obligation shall be directly caused by fire or other casualty, national emergency, governmental or municipal laws or restrictions, enemy action, flood, civil commotion, strikes, lockouts, unavailability of labor or materials to projects generally in the Chicago metropolitan area, war or national defense preemptions, acts of God, energy shortages or similar causes beyond the reasonable control of such Owner applicable to projects generally in the Chicago metropolitan area (other than inability to make payment of money) ("**Unavoidable Delay**") and the time limit for such performance shall be extended for a period equal to the period of any such Unavoidable Delay. The Owner unable to perform (hereinafter in this Article the "**Non Performing Owner**") shall notify the other Owner in writing of the existence and nature of any Unavoidable Delay within a reasonable time after the onset of any such Unavoidable Delay. The Non Performing Owner shall, from time to time upon written request of the other Owner, keep such other Owner fully informed, in writing, of all further developments concerning any such Unavoidable Delay. If non performance is due to an Unavoidable Delay affecting the Non Performing Owner which does not affect the other Owner's self help remedy provided for elsewhere in this Agreement and which is otherwise exercisable for such non performance, then notwithstanding such Unavoidable Delay, the other Owner shall still be entitled to the self help remedy exercisable only under reasonable circumstances with respect to those obligations to have been performed by the Non Performing Owner which are the subject of Unavoidable Delay.

ARTICLE 15

CONDEMNATION

15.1 **In General.** In the event of a taking by the exercise of the power of eminent domain or deed in lieu of condemnation of all or any part of the Project by any competent authority for any public or quasi public use, the award, damages or just compensation (hereinafter in this Article 15, the "**Award**") resulting from any such taking shall be allocated and disbursed, and any repair and restoration of either Building shall be performed, in

UNOFFICIAL COPY

accordance with the requirements of this Article 15. The Owners shall cooperate with one another to maximize the amount of the Award.

15.2 **Payment of Award to Depositary; Temporary Taking Awards.** All Awards resulting from the taking of all or any part of the Project, other than damages resulting from a taking for the temporary use of space as hereinafter described, shall be paid to the Depositary by the Owners, regardless of the Owner who received the Award, except as otherwise provided in Section 15.3 and the Depositary shall disburse the Award as hereinafter provided. The obligations of 310 Retail and 318 Retail under this Article 15 relating to payment or deposit of any Award for taking of the 310 Retail Property or 318 Retail Property or any interest therein shall be subject to the rights of any tenant of the 310 Retail Property or 318 Retail Property under a lease existing as of the date this Agreement is recorded. In the event of a taking of temporary use of any space not affecting services described in Section 7.1 or 7.2 hereof, each Owner shall be entitled to receive directly from the taking authority any Award resulting from such temporary taking within its respective portion of the Project.

15.3 **Taking of Only One Parcel.** In the event of a taking of a part or all of the Parcel or Owned Facilities of one Owner and none of the other Owners' Parcels or Owned facilities, subject to the provisions of Section 15.6 hereof, the Owner of the portion of the Building or Owned Facilities in which the taking occurred shall repair and restore the remainder of its portion of the 310 Building or 318 Building, as the case may be, or Owned Facilities to form an architectural and functional whole, if the failure to do so would adversely and materially affect an Easement in favor of another Owner essential to the other Owner's operations or the services to be furnished the other Owner under Article 7. Such repair and restoration shall be commenced and pursued to completion in as timely a manner as practicable under the circumstances and shall be at the sole cost and expense of the Owner of the portion of the 310 Building or 318 Building, as the case may be, or Owned Facilities in which the taking occurred. Such Owner shall be entitled to withdraw any Award paid to the Depositary by reason of such taking for application to the cost of said repair and restoration in accordance with the provisions of Article 15 hereof and to retain any excess not required for such repair and restoration; provided, however, that the right of any particular Owner to receive a portion of such excess, if any, shall be subject to the provisions of Section 22.12 and to Mortgages encumbering such Parcel. If the cost of repair or restoration is estimated to be less than \$100,000, then the Award need not be paid to the Depositary. If at any time either Owner so obligated to repair and restore such damage shall not proceed diligently with any repair or restoration which adversely and materially affects an Easement essential to the other Owner's operations in favor of the other Owner or the services to be furnished the other Owners under Article 7 hereof, then (i) a Creditor Owner may give written notice to the Defaulting Owner specifying the respect or respects in which such repair or restoration is not proceeding diligently and, if, upon expiration of ten (10) business days after the receipt of such notice, any such work of repair or restoration is still not proceeding diligently, then a Creditor Owner may perform such repair and restoration and may take all appropriate steps to carry out the same; or (ii) in an Emergency Situation (other than an Emergency Situation involving solely an economic loss) a Creditor Owner may immediately perform such repair or restoration and may take all appropriate steps to carry out the same. The Creditor Owner in so performing such repair and restoration shall, in accordance with Article 19 hereof, be entitled to withdraw any Award and any other monies held by the Depositary as a

UNOFFICIAL COPY

result of any such taking, for application to the cost and expense of any such repair or restoration and shall also be entitled to reimbursement upon demand from Defaulting Owner for all costs and expenses incurred by Creditor Owner in excess of the Award and other monies. Repair and restoration under this Section 15.3 constitute Alterations, except that the Owner performing repair and restoration shall not be required to obtain the other Owner's consent if it would not otherwise be required under Article 16.

15.4 Repair and Restoration by All Owners. In the event of a taking other than (A) a temporary taking described in Section 15.2 hereof, (B) a taking described in Section 15.3 hereof, or (C) a taking of all or substantially all of either Building, then, subject to the provisions of Section 15.6 hereof, the Owners shall cooperate to repair and restore the remainder of such Building in accordance with plans and specifications (hereinafter described) approved by all Owners and their Mortgagees. Such repair and restoration shall be commenced and pursued to completion in as timely a manner as practicable under the circumstances and shall be performed on behalf of the Owners by a contractor or contractors jointly selected by the Owners (subject to the approval of their Mortgagees, except as hereinafter provided). In the event the Owners (with approval of their Mortgagees, when required above) fail to agree upon the selection of a contractor or contractors, the Owners shall request the advice of the Architect. If after receiving the Architect's advice, the Owners (with approval of their Mortgagees, when required above) cannot agree on a contractor or contractors, then the selection of a contractor or contractors shall constitute an Arbitrable Dispute. If such repair and restoration is to be performed solely in on Parcel, then the approval of the Owners of the other Parcels (and approval by their respective Mortgagees) shall not be required with respect to the plans and specifications therefor which do not constitute Alterations requiring consent of the other Owners under Article 16, nor shall the consent of the other Owners (and approval by their respective Mortgagees) be required with respect to the selection of a contractor. In such event, however, the Owner performing the repairs shall consult with the other Owners (and their respective Mortgagees) regarding those matters. The plans and specifications for such repair and restoration shall be prepared by the Architect, unless the Owners shall otherwise agree, all subject to the approval of their Mortgagees. Such plans and specification shall provide for repair and restoration of the remainder of the 310 Building or 318 Building, as the case may be, to form an architectural and functional whole, with such changes in such Building as shall be required by reason of such taking. If, as a result of such taking, any Easements or covenants under this Agreement are extinguished or materially impaired, then changes shall be made to provide for Easements and for furnishing of services comparable, to the extent commercially practicable, to Easements created under Articles 2, 3, 4 and 5 hereof and for the furnishing of services under Article 7 hereof. The Architect will furnish to each of the Owners (but only if and to the extent such Owner's approval is required) and the Mortgagees a set of such plans and specifications for their approval. Unless the Owners otherwise agree (subject to the approval of their Mortgagees), the contractor or contractors shall work under the supervision of the Architect, and the Architect is hereby authorized and directed to instruct the Depository, from time to time, but only with the prior approval of the Owner or Owners in whose portion of the Parcel such repair and restoration is being performed and the Mortgagees of such Parcel, as such repair and restoration progresses, to disburse, in accordance with Article 19 hereof, any Award paid to the Depository for application to the cost and expense of such repair and restoration.

UNOFFICIAL COPY

15.5 **Excess Award.** The Award for any taking described in Section 15.4 shall first be used to pay for the repair and restoration (including any demolition, repair or restoration under Section 13.6 hereof). Any excess of the Award over the cost of repair and restoration shall then be allocated to an Owner in the same ratio that the apportionment of the Award to such Owner (including other parties with an interest in such Owner's portion of the Project) bears to the apportionment of the Award to the other Owner (including parties with an interest in the other Owners' portion of the Project); provided, however, that the right of an Owner to receive its share of any such excess shall be subject to the provisions of Section 22.12. If there is no apportionment in any judicial or administrative proceeding, the Owners shall petition for such apportionment, if possible. Otherwise, the Owners shall negotiate with one another in good faith to arrive at an allocation to each of such excess based upon the same general criteria that would have been used in such proceedings to apportion the Award. A failure to reach agreement shall constitute an Arbitrable Dispute.

15.6 **Demolition.** If, as a result of a taking (other than a temporary taking or a taking described in Section 15.7 hereof), any Owner reasonably determines that its portion of the 310 Building or 318 Building can no longer be repaired or restored or operated on an economically feasible basis, then such Owner shall notify the other Owners of its determination within sixty (60) days after such taking and shall not be obligated to repair or restore its portion of the 310 Building or 318 Building as may be required by Sections 15.3 and 15.4 hereof. However, such Owner not repairing or restoring shall demolish, repair or restore its portion of the 310 Building or 318 Building to the extent, if any, as may be necessary to provide essential services set forth in this Agreement, easements essential to the operations of the other Owner or structural support for the other portion of such Building. Such demolition, repair or restoration shall be deemed to be a repair or restoration to which the provisions of Section 15.4 hereof are applicable.

15.7 **Allocation of Award.** In the event of a taking of all or substantially all of either Building, the Award for such taking shall be allocated to the Owners in accordance with the apportionment made in any final judicial or administrative proceedings in connection with the taking and paid to the Owners, subject to the rights of their respective Mortgagees, in accordance with said apportionment; provided, however, that the right of an Owner to receive its share of any award and payment shall be subject to the provisions of Section 22.12.

15.8 **Condominium.** If at any time any portion of the 310 Residential Property or the 310 Future Development Parcel is submitted to the Act, then to the fullest extent permitted by law, the provisions of Article 15 hereof shall be controlling over the provisions of the Act and 310 Condominium Declaration insofar as the provisions of the Act or 310 Condominium Declaration limit (i) the obligation of the condominium unit owners to repair or restore the 310 Condominium Property in the event of a taking or (ii) the use of the Award as provided in Article 15. If at any time any portion of the 318 Residential Property or the 318 Future Development Parcel is submitted to the Act, then to the fullest extent permitted by law, the provisions of Article 15 hereof shall be controlling over the provisions of the Act and 318 Condominium Declaration insofar as the provisions of the Act or 318 Condominium Declaration limit (i) the obligation of the condominium unit owners to repair or restore the 318

UNOFFICIAL COPY

Condominium Property in the event of a taking or (ii) the use of the Award as provided in Article 15.

ARTICLE 16

ALTERATIONS

16.1 Permitted Alterations.

(A) An Owner (hereinafter in this Article 16, “**Altering Owner**”) may, at any time, at such Altering Owner’s sole cost and expense, make additions, improvements or alterations (hereinafter in this Article 16, “**Alterations**”) to the part of the 310 Building or 318 Building within such Altering Owner’s portion of the Project, provided that such Alterations comply with all of the provisions of this Article 16. Alterations include the right of 310 Residential to add, at its sole cost and expense, within the Garage, additional parking spaces and drive aisles, in compliance with Section 16.1(B) below, for use by 310 Residential, the Developer or their respective Permittees. Alterations shall also include relocation of Facilities, which shall be permitted, subject to compliance with the conditions set forth in this Article 16. Replacement of Facilities may be made by an Altering Owner without consent of other Owners, subject to the provisions of Section 7.9. The provisions of this Article 16 governing Alterations do not negate or diminish other provisions of this Agreement having to do with additions, improvements or alterations expressly required or permitted in Articles 6 (Structural Support), 7 (Services), 8 (Compliance With Laws), 11 (Maintenance and Repair) and 15 (Condemnation) hereof, which are governed by such provisions only and not this Article 16 unless also designated in such Articles as “Alterations” to be governed by this Article 16.

(B) Alterations shall not be made without the prior written consent of the other Owner unless otherwise expressly permitted by this Agreement if such Alterations will:

(1) during their performance or upon their completion, unreasonably diminish the benefits afforded to such other Owner by an Easement or unreasonably interrupt such other Owner’s use or enjoyment of any Easement;

(2) during their performance or upon their completion, degrade or diminish services to the other Owner under Article 7;

(3) materially increase the costs or expenses for which such other Owner is or would be responsible pursuant to Article 7 hereof, unless, in the case where 310 Residential adds parking spaces and drive aisles to the Garage, 310 Residential assumes the fair and equitable increase in costs allocated to such additional spaces and drive aisles;

(4) consist of drilling, coring, chopping, cutting or otherwise making any opening or hole into any Structural Supports in violation of Article 6; or

UNOFFICIAL COPY

(5) consist of or result in discharge, release, emission, deposit, treatment, transport, production, incorporation, disposal, leakage, transfer or escape of Hazardous Material, in a manner which fails to comply with any applicable law if the other Owner could be adversely affected by such Alterations.

(C) If, at any time, the Altering Owner proposes to make any Alterations which require or could possibly require (in the Altering Owner's reasonable opinion or the reasonable opinion of any other Owner) the consent of the other Owner, then before commencing or proceeding with such Alterations, the Altering Owner, at its own cost, shall deliver to such other Owner a copy of the plans and specifications showing the proposed Alterations and a reference to this Section 16.1. An Altering Owner may also at any time request confirmation from the other Owner that its consent is not required with respect to proposed Alterations, if such Alterations do not require its consent and such confirmation shall be given within ten (10) business days after the request is made. No response during such ten (10) business day period shall be deemed confirmation that no consent is required. If such other Owner consents to such Alterations or does not respond (with approval, disapproval, request for additional information or time or statement of conditions for approval or disapproval) within thirty (30) days (as hereinafter extended) after receipt of plans and specifications, the Altering Owner may proceed to make its Alterations substantially in accordance with said plans and specifications. Within the thirty (30) day response period the other Owner may request (i) additional information with respect to the proposed Alterations, in which case the other Owner will be granted an additional thirty (30) days to respond from the date the other Owner receives such additional information or (ii) an extension of the time to respond, which extension of time shall not exceed thirty (30) days from the date of the request. The Owner whose consent is requested will not unreasonably delay its response, having in mind the scope and complexity of the proposed Alterations. If, in the good faith opinion of the other Owner, the Altering Owner has violated or will violate the provisions of Section 16.1(A) or (B), then such Owner (the "**Objecting Party**") believing a violation exists shall notify the Altering Owner of its opinion that the Alterations or proposed Alterations violate or will violate the provisions of Section 16.1(A) or (B) hereof, and shall specify the respect or respects in which its provisions are or will be violated. If an Objecting Party in good faith asserts a violation of Section 16.1(A) or (B), then the Altering Owner shall not commence with the Alterations or proceed with the Alterations, if already commenced, until the matter has been resolved (except in an Emergency Situation). In addition to the rights or remedies to which the Objecting Party may be entitled by reason of an Altering Owner's violation or likely violation of the provisions of this Section 16.1, the Objecting Party shall be entitled to seek and obtain injunctive relief to enjoin any such violation.

(D) **Roof Alterations.**

(i) Any Alteration which might in any way affect the 310 Roof (by way of illustration and not limitation, any penetration of the 310 Roof or any increase in the load on the 310 Roof beyond the designed load capacity affects the 310 Roof) shall require the prior written consent described in this Section. Before

UNOFFICIAL COPY

commencing or proceeding with Alterations on the 310 Roof, the Altering Owner, at its own cost, shall deliver to each other Owner a copy of the plans and specifications showing the proposed Alterations and a reference to this Section 16.1. Any Unit Owner seeking to perform Alterations to the 310 Roof must first obtain in writing the consent of the Association pursuant to the 310 Condominium Declaration and then the consent and approval of 310 Retail. If the other Owner consents to such Alterations or does not respond (with approval, disapproval, request for additional information or time or statement of conditions for approval or disapproval) within thirty (30) days (as hereinafter extended) after receipt of plans and specifications, the Altering Owner may proceed to make its Alterations substantially in accordance with said plans and specifications. Within the thirty (30) day response period the other Owner may request (i) additional information with respect to the proposed Alterations, in which case the other Owner will be granted an additional thirty (30) days to respond from the date the other Owner receives such additional information or (ii) an extension of the time to respond, which extension of time shall not exceed thirty (30) days from the date of the request. The Owner whose consent is requested will not unreasonably delay its response, having in mind the scope and complexity of the proposed Alterations. If, in the good faith opinion of the other Owner, the Altering Owner has violated or will violate the provisions of Section 16.1(A) or (B), then such Owner (the "**Objecting Party**") believing a violation exists shall notify the Altering Owner of its opinion that the Alterations or proposed Alterations violate or will violate the provisions of Section 16.1(A) or (B) hereof, and shall specify the respect or respects in which its provisions are or will be violated. If an Objecting Party in good faith asserts a violation of Section 16.1(A) or (B), then the Altering Owner shall not commence with the Alterations, until the matter has been resolved (except in an Emergency Situation). In addition to the rights or remedies to which the Objecting Party may be entitled by reason of an Altering Owner's violation or likely violation of the provisions of this Section 16.1, the Objecting Party shall be entitled to seek and obtain injunctive relief to enjoin any such violation.

(ii) Any Alteration which might in any way affect the 318 Roof (by way of illustration and not limitation, any penetration of the 318 Roof or any increase in the load on the 318 Roof beyond the designed load capacity affects the 318 Roof) shall require the prior written consent described in this Section. Before commencing or proceeding with Alterations on the 318 Roof, the Altering Owner, at its own cost, shall deliver to each other Owner a copy of the plans and specifications showing the proposed Alterations and a reference to this Section 16.1. Any Unit Owner seeking to perform Alterations to the 318 Roof must first obtain in writing the consent of the Association pursuant to the 310 Condominium Declaration and then the consent and approval of 310 Retail. If the other Owner consents to such Alterations or does not respond (with approval, disapproval, request for additional information or time or statement of conditions for approval or disapproval) within thirty (30) days (as hereinafter extended) after receipt of plans and specifications, the Altering Owner may proceed to make its

UNOFFICIAL COPY

Alterations substantially in accordance with said plans and specifications. Within the thirty (30) day response period the other Owner may request (i) additional information with respect to the proposed Alterations, in which case the other Owner will be granted an additional thirty (30) days to respond from the date the other Owner receives such additional information or (ii) an extension of the time to respond, which extension of time shall not exceed thirty (30) days from the date of the request. The Owner whose consent is requested will not unreasonably delay its response, having in mind the scope and complexity of the proposed Alterations. If, in the good faith opinion of the other Owner, the Altering Owner has violated or will violate the provisions of Section 16.1(A) or (B), then such Owner (the “**Objecting Party**”) believing a violation exists shall notify the Altering Owner of its opinion that the Alterations or proposed Alterations violate or will violate the provisions of Section 16.1(A) or (B) hereof, and shall specify the respect or respects in which its provisions are or will be violated. If an Objecting Party in good faith asserts a violation of Section 16.1(A) or (B), then the Altering Owner shall not commence with the Alterations, until the matter has been resolved (except in an Emergency Situation). In addition to the rights or remedies to which the Objecting Party may be entitled by reason of an Altering Owner’s violation or likely violation of the provisions of this Section 16.1, the Objecting Party shall be entitled to seek and obtain injunctive relief to enjoin any such violation.

(E) Each Owner in making Alterations, shall (i) perform all work in a good and workmanlike manner and in accordance with good construction practices, (ii) comply with all Laws, including, without limitation, the City of Chicago Building Code, (iii) comply with all of the applicable provisions of this Agreement. Each Owner shall, to the extent reasonably practicable, make Alterations within its portion of the Building in such a manner and at times so as to minimize any noise, vibrations, particulates and dust infiltration or other disturbance which would disturb an occupant or occupants of the other portion of the Building, but such Owner shall not be liable in any event for damages as a result of any such disturbance (as opposed to physical damage to property) normally incidental to construction. The foregoing restriction on damages shall not restrict an Owner’s right to seek and obtain injunctive relief from unreasonable disturbances. An Altering Owner may perform work during any hours permitted by applicable Law. However, if requested by an Owner who would otherwise suffer unreasonable disturbance, the Altering Owner shall not unreasonably refuse to perform work outside normal business hours and shall pay all costs associated with work at times other than normal business hours, including overtime and delay costs.

16.2 **Building Permits.** Applications for building permits to make Alterations shall be filed and processed by the Altering Owner without the joinder of the other Owner in such application, unless the City of Chicago or other government agency having jurisdiction thereof requires joinder of the other Owner. An Altering Owner shall send copies of any building permits to another Owner at such other Owner’s request. If joinder by the other Owner not making Alterations is so required, said Owner shall cooperate in executing such application or other instruments as may be necessary to obtain the building permit; provided, however, the

UNOFFICIAL COPY

Altering Owner shall indemnify and hold harmless the other Owner from and against any and all loss, liability, claims, judgments, costs and expenses (including reasonable attorney's fees, including appeals of any judgment or order) arising out of the other Owner's execution of the application, permit or other instrument. If an Owner fails to execute said application or instruments when required hereunder to do so, and there is no dispute between the Owners concerning the affected Alterations, the other Owner is hereby irrevocably appointed attorney in fact of the other Owner (such power of attorney being coupled with an interest and hence, irrevocable) to execute said application or instruments on behalf of such other Owner.

16.3 **No Liens.** An Owner performing any work required or provided for under this Agreement shall use reasonable efforts to include in any construction contract a provision pursuant to which the contractor (i) recognizes the separate ownership of the Parcel and agrees that any lien rights which the contractor or subcontractors have under the Mechanics' Liens Act set forth in 770 ILCS 60/0.01 et seq. (said Act and any successors thereto, the "**Mechanics' Lien Act**") shall only be enforceable against the portion of the Project owned by the Altering Owner, or (ii) agrees that, to the extent permitted by Law, no lien or claim may be filed or maintained by such contractor or any subcontractors and agrees to comply with the provisions of Section 21 of the Mechanics' Lien Act in connection with giving notice of such "no lien" provision.

ARTICLE 17

ESTOPPEL CERTIFICATES

17.1 **Estoppel Certificates.** Each Owner shall, from time to time, within ten (10) business days after written request from the other Owner, any prospective transferee of such Owner or any Mortgagee or prospective Mortgagee which has complied with the notice provisions of Section 22.12(B) hereof, execute, acknowledge and deliver to the requesting party, a certificate ("**Estoppel Certificate**") stating:

(A) That the terms and provisions of this Agreement are unmodified and are in full force and effect or, if modified, identifying such modifications;

(B) Whether, to the knowledge of the Owner executing the Estoppel Certificate, there is any existing default under this Agreement (on grounds therefor after giving the requisite notice hereunder) by the requesting Owner and, if so, specifying the nature and extent thereof;

(C) Whether there are any sums (other than payments for Operating Expenses owed under Exhibit 7.4 which in the aggregate are less than \$100,000 and are not overdue) which the Owner executing such Estoppel Certificate is entitled to receive or demand from the requesting Owner, and if there is any such sum, specifying the nature and amounts thereof;

(D) Whether the Owner executing the Estoppel Certificate has performed or is performing work other than services pursuant to Article 7 hereof, the cost of which such Owner is or will be entitled to charge in whole or in part to the requesting Owner under

UNOFFICIAL COPY

the provisions hereof, but has not yet charged to such requesting Owner, and if there be any such work, specifying the nature and extent thereof and the projected amount to be paid by the requesting Owner;

(E) The nature and extent of any setoffs, claims, counterclaims or defenses then being asserted or capable of being asserted (after giving the requisite notice, if any, required hereunder), or otherwise known by the Owner, against the enforcement of the requesting Owner's rights hereunder;

(F) The total amount of all liens being asserted or capable of being asserted (after giving the requisite notice, if any, required hereunder) by the Owner executing the Estoppel Certificate under the provisions of this Agreement describing the applicable provision or provisions and the details of any such lien claim;

(G) Whether the Owner executing the Estoppel Certificate has requested that a matter be submitted to arbitration, which matter has not been discharged, released or otherwise resolved, and if so, a copy of any such notice or notices shall be delivered with the Estoppel Certificate;

(H) The nature of any arbitration proceeding or finding under Article 13 made within the ninety (90) days preceding the date of such Estoppel Certificate;

(I) The current address or addresses to which notices given to the Owner executing such Estoppel Certificate are required to be mailed under Article 21 hereof; and

(J) Such other facts or conclusions as may be reasonably requested.

At any time the 310 Residential Property or any portion of the 310 Future Development Parcel has been submitted to and remains subject to the Act, Estoppel Certificates may only be requested by the 310 Association and not a 310 Unit Owner (except that in connection with a sale or financing of a Unit or other transaction involving a Unit, the 310 Association may request an Estoppel Certificate on behalf of a 310 Unit Owner and such Estoppel Certificate need only include the items under (B) and (F) [in the case of (F), as to the Unit only]); and Estoppel Certificates requested of 310 Residential as to the 310 Condominium shall be given by the Association and shall bind all 310 Unit Owners. If the requesting party is a Mortgagee or prospective Mortgagee, the Owner on whose property it holds or intends to hold a Mortgage will be deemed the "requesting Owner." If the requesting party is a prospective transferee of an Owner, such Owner will be deemed the "requesting Owner."

At any time the 318 Residential Property or any portion of the 318 Future Development Parcel has been submitted to and remains subject to the Act, Estoppel Certificates may only be requested by the 318 Association and not a 318 Unit Owner (except that in connection with a sale or financing of a Unit or other transaction involving a Unit, the 318 Association may request an Estoppel Certificate on behalf of a 318 Unit Owner and such Estoppel Certificate need only include the items under (B) and (F) [in the case of (F), as to the Unit only]); and Estoppel

UNOFFICIAL COPY

Certificates requested of 318 Residential as to 318 Condominium shall be given by the Association and shall bind all 318 Unit Owners. If the requesting party is a Mortgagee or prospective Mortgagee, the Owner on whose property it holds or intends to hold a Mortgage will be deemed the "requesting Owner." If the requesting party is a prospective transferee of an Owner, such Owner will be deemed the "requesting Owner."

ARTICLE 18

DEPOSITARY

18.1 **Appointment of Depositary.** A depositary (the "Depositary") shall be appointed, at or before such time as the duties of Depositary are to be performed, in the manner hereinafter provided to receive insurance proceeds and condemnation Awards, to disburse such monies and to act otherwise in accordance with the terms and provisions of this Agreement. The Depositary shall be appointed by the Owners jointly, and shall be one of the then five (5) largest banks or trust companies (measured in terms of capital funds) with principal offices in Chicago, Illinois or other bank or trust company agreed to by the Owners. Any Owner may at any time propose a Depositary, and if the Owners fail to agree on a Depositary within ten (10) business days after receipt of the proposal by the other Owner, the disagreement shall become an Arbitrable Dispute. The Depositary shall be entitled to receive from each of the Owners said Owner's equitable share of the Depositary's reasonable fees and expenses for acting as Depositary, as such share is agreed to by the Owners, and may retain said fees and expenses, free of trust, from monies held by it. Any Owner may propose to the other Owner how such fee shall be shared and if the Owners fail to agree on a cost sharing arrangement within ten (10) business days after receipt of an Owner's proposal, such disagreement shall become an Arbitrable Dispute. Any Depositary appointed to act hereunder shall execute an agreement with the Owners accepting said appointment in substantially the form attached hereto as Exhibit 18.1 and made part hereof.

18.2 **Liability of Depositary.** The Depositary shall not be liable or accountable for any action taken or disbursement made in good faith by the Depositary, except that arising from its own negligence. The Depositary's reliance upon advice of independent competent counsel shall be conclusive evidence of good faith, but shall not be the only manner in which good faith may be shown. The Depositary shall have no affirmative obligation to prosecute a determination of the amount of, or to effect the collection of, any insurance proceeds or condemnation Award or Awards unless the Depositary shall have been given an express written authorization from the Owners; provided that if only one Owner is entitled to said insurance proceeds or condemnation Award or Awards, then said Owner may authorize the Depositary to so proceed. In addition, the Depositary may rely conclusively on any certificate furnished by the Architect to the Depositary in accordance with the provisions of Section 19.1 hereof and shall not be liable or accountable for any disbursement of funds made by it in reliance upon such certificate or authorization.

18.3 **Interest on Deposited Funds.** The Depositary shall have no obligation to pay interest on any monies held by it, unless the Depositary shall have given an express written undertaking to do so; or, unless all of the Owners for whose benefit monies are being held have requested, and the Mortgagees of said Owner have concurred, in connection with a specified

UNOFFICIAL COPY

deposit of funds with the Depository, that the Depository undertake to do so. However, if the monies on deposit are not held in an interest bearing account pursuant to an agreement among the Depository and said Owner, then the Depository, within thirty (30) days after request from any Owner given to the Depository and to the other Owner, shall purchase with such monies, to the extent feasible, negotiable United States Government securities payable to bearer and maturing within ninety (90) days from the date of purchase thereof, except insofar as it would, in the good faith judgment of the Depository, be impracticable to invest in such securities by reason of any disbursement of such monies which the Depository expects to make shortly thereafter, and the Depository shall hold such securities in trust in accordance with the terms and provisions of this Agreement. Any interest paid or received by the Depository on monies or securities held in trust, and any gain on the redemption or sale of any securities, shall be added to the monies or securities so held in trust by the Depository. Unless the Depository shall have undertaken to pay interest thereon, monies received by the Depository pursuant to any of the provisions of this Agreement shall not be mingled with the Depository's own funds and shall be held by the Depository in trust for the uses and purposes herein provided.

18.4 **Indemnification of Depository.** In consideration of the services rendered by Depository, the Owners jointly and severally hereby agree to indemnify and hold harmless the Depository from any and all damage, liability or expense of any kind whatsoever (including, but not limited to, reasonable attorneys' fees and expenses) incurred in the course of Depository's duties hereunder or in the defense of any claim or claims made against Depository by reason of its appointment hereunder, except where due to the negligence of the Depository or actions not taken in good faith by the Depository. Where the Depository is only disbursing funds for one Owner, and the other Owner is not involved in the deposit or overseeing of disbursement of funds, such other Owner shall not be obligated to indemnify and hold harmless the Depository in connection with such duties of the Depository.

18.5 **Resignation of Depository.** The Depository may resign by serving not less than sixty (60) days' prior written notice on all of the Owners and Mortgagees. Within thirty (30) days after receipt of such notice, the Owners jointly shall, in the manner set forth in Section 18.1 appoint a substitute who qualifies under Section 18.1 hereof (if there are duties to be performed at such time by a Depository or funds are held by the resigning Depository), and the Depository shall prepare a final accounting of all funds received, held and disbursed by it and transfer all funds, together with copies of all records, held by it as Depository to such substitute, at which time its duties as Depository shall cease. If the Owners shall fail to appoint a substitute within said thirty (30) days, and there are funds held by the resigning Depository, the Depository may deposit such funds with either a court of competent jurisdiction or with a bank or trust company in Chicago, Illinois, which qualifies under Section 18.1 hereof.

UNOFFICIAL COPY

ARTICLE 19

DISBURSEMENTS OF FUNDS BY DEPOSITARY

19.1 Disbursement Requests.

(A) Each request by the Architect acting pursuant to the provisions of this Agreement for disbursement of insurance proceeds, any Award or other funds for application to the cost of repair, restoration or demolition (the “work”) shall be accompanied by a certificate of the Architect or another Person having knowledge of the facts reasonably acceptable to the Owners and their Mortgagees, dated not more than ten (10) days prior to the date of the request for any such disbursement, stating the following in its professional judgment based on periodic observations of the work:

(1) That the sum requested has either (a) been or will be paid by or on behalf of an Owner (in which event the certificate shall name such Owner) or by or on behalf of both Owners (in which event the certificate shall specify the amount paid by each respective Owner), or (b) is justly due to contractors, subcontractors, materialmen, engineers, architects or other persons (whose names and addresses shall be stated) who have rendered or furnished services or materials for the work; such certificate shall also give a brief description of such services and materials and the principal subdivisions or categories thereof, the respective amounts so paid or due to each of said persons in respect thereof and the amount of any retentions, and shall state the progress of the work up to the date of said certificate and any other information required by the Mechanics’ Liens Act and any title insurer affording coverage against mechanics’ liens;

(2) That the sum requested, plus all sums previously disbursed, less retentions, does not exceed the cost of the work actually in place up to the date of such certificate plus the cost of materials supplied and actually stored on site;

(3) That no part of the cost of the services and materials described in the certificate has been the basis of the withdrawal of any funds pursuant to any previous request or is the basis of any other pending request for funds; and

(4) Other information which may from time to time be required by the Mortgagees which is customarily required by mortgagees of comparable mixed use office/retail/residential buildings, or as may be agreed to by the Owners.

(B) Upon:

(1) compliance with the provisions of Section 19.1(A), and

(2) receipt of contractors’ and subcontractors’ sworn statements required under the Mechanics’ Liens Act accompanied by partial or final waivers of lien, as appropriate, and any other information required by the title insurer

UNOFFICIAL COPY

affording coverage against mechanics' liens from the persons named in the sworn statement, and

(3) approval by the title insurer, the Owners and the Mortgagees of the lien waivers and other documentation, and the willingness of such title insurer to issue an endorsement (satisfactory to the Owners and the Mortgagees) insuring over possible mechanics' lien claims relating to work in place and the continued priority of the liens in favor of the Mortgagees, the Depository shall, out of the monies so held by the Depository, pay or cause to be paid to the Owners, contractors, subcontractors, materialmen, engineers, architects and other persons named in the Architect's certificate and contractors' and subcontractors' sworn statements the respective amounts stated in said certificate and statements due them. Notwithstanding the foregoing, any Owner or Mortgagee or the Depository may require that disbursements be made through the customary form of construction escrow then in use in Chicago, Illinois, with such changes as may be required to conform to the requirements or provisions of this Agreement. The Depository may rely conclusively, with respect to the information contained therein, on any certificate furnished by the Architect to the Depository in accordance with the provisions of this Section 19.1 and shall not be liable or accountable for any disbursement of funds made by it in reliance upon such certificate or authorization.

19.2 **No Lien or Consent by Contractor.** No contractor, subcontractor, materialman, engineer, architect or any other person whatsoever, other than the Owners and the Mortgagees, shall have any interest in or right to or lien upon any funds held by the Depository. The Owners, with the consent of the Mortgagees, may jointly at any time provide in writing for a different disposition of funds than that provided for in this Agreement, without the necessity of obtaining the consent of any contractor, subcontractor, materialman, engineer, architect or any other person whatsoever. If at any time the Owners, with the consent of the Mortgagees, shall jointly instruct the Depository in writing with regard to the disbursement of any funds held by the Depository, then the Depository shall disburse such funds in accordance with said instructions, and the Depository shall have no liability to anyone by reason of having so disbursed said funds in accordance with said instructions.

ARTICLE 20

ARCHITECT

20.1 **Appointment of Architect.** When and if required by the provisions of this Agreement, the Owners shall jointly appoint a firm consisting of both architects and engineers (or a firm of architects and a firm of engineers agreeing to act jointly hereunder) experienced in the design and operation of structures similar to the Building to serve under and pursuant to the terms and provisions of this Agreement (the "Architect"). The Architect shall, upon its appointment, execute an agreement with the Owners in the form required by the Owners, which agreement shall also incorporate those services necessary to implement the provisions of this Agreement and shall provide that the Owners may cause the then serving Architect to be

UNOFFICIAL COPY

replaced without cause upon thirty (30) days' prior written notice. The Owners jointly may replace the Architect for any reason. Any Owner also may cause any Architect to be replaced, and the other Owner shall be deemed to have consented to such replacement, if it demonstrates to the other Owner that such then serving Architect has failed to perform its duties hereunder fairly, diligently or competently. A Mortgagee shall have the right to approve the appointment of the Architect in the first instance or any replacement of the Architect, if required by the terms of its Mortgage. If all Owners do not jointly desire to replace the Architect, then the Owner desiring replacement of the Architect shall serve notice upon the other Owner and the Mortgagees requesting the removal of the then serving Architect, which notice shall set forth with specificity the respect or respects in which such Architect shall have failed to perform fairly, diligently or competently. If, in the opinion of the Owner or Mortgagees receiving such notice, the Owner desiring to replace the Architect is not entitled to require the appointment of a new Architect pursuant to this Section 20.1, an Owner or Mortgagee receiving such notice and objecting to the appointment of a new Architect shall notify the other Owner and Mortgagees of its objection in writing within ten (10) business days after receipt of such notice from the requesting Owner. If, within ten (10) business days after receipt by the Owner desiring to replace the Architect of such objection, the Owners do not resolve their differences (subject to the approval of their Mortgagees), or if the Owners fail to agree on the form of agreement, then the dispute shall constitute an Arbitrable Dispute. The Architect sought to be replaced may give evidence or otherwise participate in the arbitration proceeding, but said proceeding shall not serve any purpose other than the purpose of determining whether an Owner is entitled to have the Architect replaced. Any Architect acting hereunder shall have the right to resign at any time upon not less than ninety (90) days' prior written notice to the Owner and the Mortgagees.

20.2 Notice of Submission of Dispute to Architect. In any instance when the Architect serving pursuant to Section 20.1 hereof is authorized by this Agreement to advise the Owners concerning any dispute or matter, any Owner involved in such dispute or matter may submit the same to the Architect. The Owner submitting such dispute or matter shall simultaneously give written notice of the submission of such dispute or matter to the other Owner involved in such dispute and the Mortgagees. The Architect shall, except in an Emergency Situation, afford each Owner involved in any dispute or matter, and any attorney or other representative designated by such Owner or the Mortgagees, an opportunity to furnish information or data or to present such party's views. The Architect shall not be liable for any advice given by it hereunder, or for any other action taken by it hereunder, in good faith and in the absence of negligence. No advice given by the Architect under this Agreement shall be binding on the Owners, and an Owner may accept or reject such advice.

20.3 Replacement of Architect. If any new Architect is appointed hereunder, and if the Architect being replaced is then engaged in the resolution of any dispute or matter theretofore submitted hereunder, or if the Architect being replaced is then engaged in the preparation of any plans and specifications or in the supervision of any work required hereunder or pursuant hereto, then, if the Owners so choose, subject to the consent of the Mortgagees, the Architect being replaced shall continue to act as Architect with respect, and only with respect, to such pending dispute or matter or the completion of such preparation of plans and specifications or supervision of any such work.

UNOFFICIAL COPY

20.4 Architect's Fees. The Architect shall be paid a reasonable fee for any services rendered hereunder and shall be reimbursed for reasonable and necessary expenses incurred in connection therewith, and each Owner involved in the work shall pay its equitable share of such fees. In this regard, in any instance when the Architect shall, in accordance with any of the provisions of this Agreement, render services in connection with the preparation of plans and specifications or the supervision of repair, restoration or demolition of the 310 Building, the 318 Building or any part thereof, the fees and expenses of the Architect shall be considered as costs and expenses of such repair, restoration or demolition, as the case may be, and shall be paid in the same manner as other costs and expenses of repair, restoration and demolition under the provisions of this Agreement pursuant to which the Architect is performing such services. If not otherwise provided in this Agreement, the Owners shall agree on the equitable share owed by each Owner. If any Owner shall fail to pay its allocable share of any fees or expenses of the Architect within ten (10) business days after receipt of any invoice therefor from the Architect, then any other Owner may pay the same and the Owner failing to pay shall, within ten (10) business days after written demand for reimbursement, reimburse the other Owner for any such payment.

ARTICLE 21**NOTICES AND APPROVALS**

21.1 Notice to Parties. Each notice, demand, request, consent, approval, disapproval, designation or other communication (all of the foregoing are herein referred to as a "**notice**") that an Owner is required, permitted or desires to give or make or communicate to the other Owner shall be in writing and shall be given or made or communicated by personal delivery (including messenger service), written telecommunication (such as telex or facsimile telecopy) or by United States mail, addressed as follows:

If to 310 Residential: c/o Metropolitan Properties of Chicago LLC
30 West Monroe Street
Chicago, IL 60603
Attention: Mr. Louis D. D'Angelo
Facsimile: 312/922-0869

With a copy to: DLA Piper US LLP
203 N. LaSalle
Chicago, IL 60601
Attn: James L. Beard, Esq.
Facsimile: 312/630-7379

If to 310 Retail: c/o Metropolitan Properties of Chicago LLC
30 West Monroe Street
Chicago, IL 60603
Attention: Mr. Louis D. D'Angelo
Facsimile: 312/922-0869

UNOFFICIAL COPY

With a copy to:

DLA Piper US LLP
 203 N. LaSalle
 Chicago, IL 60601
 Attn: James L. Beard, Esq.
 Facsimile: 312/630-7379

If to 318 Residential:

c/o Metropolitan Properties of Chicago LLC
 30 West Monroe Street
 Chicago, IL 60603
 Attention: Mr. Louis D. D'Angelo
 Facsimile: 312/922-0869

With a copy to:

DLA Piper US LLP
 203 N. LaSalle
 Chicago, IL 60601
 Attn: James L. Beard, Esq.
 Facsimile: 312/630-7379

If to 318 Retail:

c/o Metropolitan Properties of Chicago LLC
 30 West Monroe Street
 Chicago, IL 60603
 Attention: Mr. Louis D. D'Angelo
 Facsimile: 312/922-0869

With a copy to:

DLA Piper US LLP
 203 N. LaSalle
 Chicago, IL 60601
 Attn: James L. Beard, Esq.
 Facsimile: 312/630-7379

and to any Mortgagee which has complied with the notice provisions of Section 22.12 hereof.

Any Owner may designate a different address from time to time, provided however it has given at least ten (10) business days' advance notice of such change of address. Failure to give notices to an Owner's or Mortgagee's counsel identified above shall not render notice to an Owner or Mortgagee invalid or ineffective. If any of the aforesaid Owners shall cease to be the "Owner" of its respective portion of the Project, and the succeeding Owner of that portion of the Project shall fail to give a notice of change of address, then notices may be sent to any one of the following: (i) to the last Owner of record disclosed to the Owner giving notice, (ii) to "Owner of Record" at the street address for that Owner's portion of the Project as designated by the U.S. Postal Service (or by the successor of the U.S. Postal Service) or City of Chicago department or agency having jurisdiction over City of Chicago addresses, or (iii) to the grantee at the address shown in that last recorded conveyance of the portion of the Project in question. Unless specifically stated to the contrary elsewhere in this Agreement, any notice shall be deemed to have been given, made or communicated, as the case may be, (i) upon delivery in the case of

UNOFFICIAL COPY

personal delivery or immediate written telecommunication (such as facsimile or telex), or (ii) on the date three (3) days after the same was deposited in the United States mail, properly addressed, with postage thereon fully prepaid.

21.2 **Multiple Owners.** If at any time the interest or estate of an Owner shall be owned by more than one Person (hereinafter collectively referred to as “multiple owners”), the multiple owners shall give to the other Owners a written notice, executed and acknowledged by all of the multiple owners, in form proper for recording, which shall (a) designate one Person, having an address in the State of Illinois to whom shall be given, as agent for all of the multiple owners, all notices thereafter given to the multiple owners, and (b) designate such Person as agent for the service of process in any action or proceeding, whether before a court or by arbitration, involving the determination or enforcement of any rights or obligations hereunder. The 310 Condominium Association is hereby designated as agent for all of the 310 Unit Owners for purposes of (a) and (b) above. The 318 Condominium Association is hereby designated as agent for all of the 318 Unit Owners for purposes of (a) and (b) above. Thereafter, until such designation is revoked by written notice given by all of the multiple owners of their successors in interest, any notice, and any summons, complaint or other legal process or notice given in connection with an arbitration proceeding (which such summonses, complaints, legal processes and notices given in connection with arbitration proceedings are hereafter in this Article 21 collectively referred to as “legal process”), given to, or served upon, such agent shall be deemed to have been given to, or served upon, each and every one of the multiple owners at the same time that such notice or legal process is given to, or served upon, such agent. If the multiple owners shall fail so to designate in writing one such agent to whom all notices are to be given and upon whom all legal process is to be served, or if such designation shall be revoked as aforesaid and a new agent is not designated, then any notice or legal process may be given to, or served upon, any one of the multiple owners as agent for all of the multiple owners and such notice or legal process shall be deemed to have been given to, or served upon, each and every one of the multiple owners at the same time that such notice or legal process is given to, or served upon, any one of them, and each of the multiple owners shall be deemed to have appointed each of the other multiple owners as agent for the receipt of notices and the service of legal process as stated above. The term “multiple owners” as used in this Section 21.2 shall not include Unit Owners; provided, however that notice to or from Unit Owners shall be governed by Section 22.6 of this Agreement.

ARTICLE 22

GENERAL

22.1 **Cooperation of Owners.** In fulfilling obligations and exercising rights under this Agreement, each Owner shall cooperate with the other Owners to promote the efficient operation of each respective portion of the Buildings and the harmonious relationship among the Owners and to protect the value of each Owner’s respective portion, estate or interest in the Buildings. To that end, each Owner shall share information which it possesses relating to matters which are the subject of this Agreement, except such information as an Owner may reasonably deem confidential or privileged or which may be the subject of litigation or which such Owner is prohibited from revealing pursuant to court order. From time to time after the date hereof, each

UNOFFICIAL COPY

Owner shall furnish, execute and acknowledge, without charge (except where elsewhere provided herein) such other instruments, documents, materials and information as another Owner may reasonably request in order to confirm to such requesting Owner the benefits contemplated hereby, but only so long as any such request does not restrict or abridge the benefits granted the other Owner hereunder.

22.2 **Severability**. The illegality, invalidity or unenforceability under law of any covenant, restriction or condition or any other provision of this Agreement shall not impair or affect in any manner the validity, enforceability or effect of the remaining provisions of this Agreement.

22.3 **Headings**. The headings of Articles and Sections in this Agreement are for convenience of reference only and shall not in any way limit or define the content, substance or effect of the Articles or Sections.

22.4 **Amendments to Agreement**. Except as otherwise provided in this Agreement, this Agreement may be amended or terminated only by an instrument signed by the Approving Parties established for the Owners and consented to by the Mortgagees. So long as any portion of the Project is submitted to the Act, the 310 Condominium Association or 318 Condominium Association administering such portion of the Project may, by its authorized officers, execute all amendments to or any termination of this Agreement on behalf of all Unit Owners in such portion of the Project, which amendments or termination shall be binding on all Unit Owners. Any amendment to or termination of this Agreement shall be recorded with the Recorder.

22.5 **Perpetuities and Other Invalidity**. The covenants, conditions and restrictions contained in this Agreement shall be enforceable by the Owners and their respective successors and assigns for the term of this Agreement, which shall be perpetual to coincide with the perpetual Easements provided for under this Agreement (or if the law, including any rule against perpetuities or other statutory or common law rule, prescribes a shorter period, then upon expiration of such period). If the law prescribes such shorter period, then upon expiration of such shorter period, said covenants, conditions and restrictions shall be automatically extended without further act or deed of the Owners, except as may be required by law, for successive periods of twenty (20) years), subject to amendment or termination as set forth in Section 22.4.

22.6 **Condominium Associations Acting for Unit Owners**.

(A) Upon submission of the 310 Residential Property to the Act, all rights, approvals, Easements and benefits under this Agreement appurtenant to or enjoyed by the 310 Condominium shall be exercised by the Association on behalf of the 310 Unit Owners of the 310 Condominium except for Easements which by their nature are exercisable only by Unit Owners individually. Any action to enforce rights, approvals, obligations, Easements, burdens and benefits under this Agreement on behalf of the 310 Unit Owners or the 310 Association shall be taken on behalf of all 310 Unit Owners and the 310 Association solely by the 310 Association by its duly authorized officers acting pursuant to authority granted by law, the 310 Condominium Declaration or resolution of the board of managers of the 310 Condominium. All obligations of 310 Residential

UNOFFICIAL COPY

under this Agreement shall be the obligations jointly and severally of both the Association and the 310 Unit Owners collectively so long as the 310 Condominium is subject to the Act; provided, however, that no individual unit owner (or the holder of any mortgage on such owner's unit) shall be liable for any obligation of 310 Residential in excess of a percentage of such liability equal to the percentage interest in the common elements in the 310 Condominium attributable to such Unit as shown in the 310 Condominium Declaration. In any case, such liability of a unit owner shall be subject to the provisions of Section 23.1. Upon payment of such amount for which a 310 Unit Owner may be liable, (i) any lien arising against such 310 Unit Owner's unit on account of such claim shall be deemed released against such 310 Unit Owner's Unit without further act or deed by any such 310 Unit Owner, and (ii) upon the written request of such 310 Unit Owner and at the expense of such 310 Unit Owner, the Creditor Owner who has recorded notice of such lien shall deliver to such 310 Unit Owner an instrument evidencing the release of such lien, but only with respect to said 310 Unit Owner's Unit. When a Unit is owned by more than one "person" (as defined in the Act) the liability of each such person for any claim against the Unit shall be joint and several. Notices under Section 21.1 to a 310 Unit Owner or 310 Unit Owners shall be effective if given either to the 310 Association or to 310 Unit Owners, and notices from a 310 Unit Owner or 310 Unit Owners shall be given by the Association.

(B) Upon submission of the 318 Residential Property to the Act, all rights, approvals, Easements and benefits under this Agreement appurtenant to or enjoyed by the 318 Condominium shall be exercised by the Association on behalf of the 318 Unit Owners of the 318 Condominium except for Easements which by their nature are exercisable only by Unit Owners individually. Any action to enforce rights, approvals, obligations, Easements, burdens and benefits under this Agreement on behalf of the 318 Unit Owners or the 318 Association shall be taken on behalf of all 318 Unit Owners and the 318 Association solely by the 318 Association by its duly authorized officers acting pursuant to authority granted by law, the 318 Condominium Declaration or resolution of the board of managers of the 318 Condominium. All obligations of 318 Residential under this Agreement shall be the obligations jointly and severally of both the Association and the 318 Unit Owners collectively so long as the 318 Condominium is subject to the Act; provided, however, that no individual unit owner (or the holder of any mortgage on such owner's unit) shall be liable for any obligation of 318 Residential in excess of a percentage of such liability equal to the percentage interest in the common elements in the 318 Condominium attributable to such Unit as shown in the 318 Condominium Declaration. In any case, such liability of a unit owner shall be subject to the provisions of Section 23.1. Upon payment of such amount for which a 318 Unit Owner may be liable, (i) any lien arising against such 318 Unit Owner's unit on account of such claim shall be deemed released against such 318 Unit Owner's Unit without further act or deed by any such 318 Unit Owner, and (ii) upon the written request of such 318 Unit Owner and at the expense of such 318 Unit Owner, the Creditor Owner who has recorded notice of such lien shall deliver to such 318 Unit Owner an instrument evidencing the release of such lien, but only with respect to said 318 Unit Owner's Unit. When a Unit is owned by more than one "person" (as defined in the Act) the liability of each such person for any claim against the Unit shall be joint and several. Notices under

UNOFFICIAL COPY

Section 21.1 to a 318 Unit Owner or 318 Unit Owners shall be effective if given either to the 318 Association or to 318 Unit Owners, and notices from a 318 Unit Owner or 318 Unit Owners shall be given by the Association.

22.7 **Abandonment of Easements.** Easements created hereunder shall not be presumed abandoned by non use or the occurrence of damage or destruction of a portion of the Building subject to an Easement, unless the Owner benefited by such Easement states in writing its intention to abandon the Easement, provided the consent of the Mortgagees shall also be required with respect to any such abandonment.

22.8 **Applicable Laws.** The parties hereto acknowledge that this Agreement and all other instruments in connection herewith have been negotiated, executed and delivered in the City of Chicago, County of Cook and State of Illinois. This Agreement and said other instruments shall, in all respects, be governed, construed, applied and enforced in accordance with the laws of the State of Illinois, including without limitation, matters affecting title to all real property described herein.

22.9 **Licenses.** Metropolitan Properties of Chicago LLC (“**Met Properties**”) owns the right to use the name “Metropolitan Tower”, the logo depicted on Exhibit 22.9(A), the name “Richelieu Flats”, the logo depicted on Exhibit 22.9(B), and, in each of the above cases, any derivatives thereof. Met Properties intends to enter into a non-exclusive, revocable license agreement with (i) 310 Residential for the right to use of the name “Metropolitan Tower” and the logo depicted on Exhibit 22.9(A) and (ii) 318 Residential for the use of the name “Richelieu Flats” for the right to use the name “Richelieu Flats” and the logo depicted on Exhibit 22.9(B).

22.10 **No Third Party Beneficiary.** This Agreement is not intended to give or confer any benefits, rights, privileges, claims, actions or remedies to any person or entity as a third party beneficiary (except the Mortgagees) under any Laws or otherwise.

22.11 **Incorporation.** Each provision of the Recitals to this Agreement and each Exhibit and Appendix attached hereto is hereby incorporated in this Agreement and is an integral part hereof.

22.12 **Notice to Mortgagees; Rights of Mortgagee.**

(A) The term “Mortgage” as used herein shall mean any mortgage (or any trust deed) of an interest in the Project given primarily to secure the repayment of money owed by the mortgagor. The term “Mortgagee” as used herein shall mean the Mortgagee from time to time under any such Mortgage (or the beneficiary under any such trust deed); provided, however, no mortgage or trust deed on an individual condominium unit of the Condominium (other than a mortgage initially placed on the entire 310 Condominium Property or 318 Condominium Property or all 310 Condominium Units or 318 Condominium Units) shall be included within the definition of “Mortgage” nor shall the holder thereof be included within the definition of “Mortgagee” thereby granting such Mortgagee rights to consent to or approve matters arising under this Agreement unless explicitly and specifically stated in this Agreement to the contrary.

UNOFFICIAL COPY

(B) If a Mortgagee shall have served on the Owners, by personal delivery or by registered or certified mail return receipt requested, a written notice specifying the name and address of such Mortgagee, such Mortgagee shall be given a copy of each and every notice required to be given by one party to the others at the same time as and whenever such notice shall thereafter be given by one party to the others, at the address last furnished by such Mortgagee. The address of any existing Mortgagee shall be as set forth in its consent to subordination attached hereto. After receipt of such notice from a Mortgagee, no notice thereafter given by either party shall be deemed to have been given unless and until a copy thereof shall have been so given to the Mortgagee. If a Mortgagee so provides or otherwise requires and notice thereof is given by the Mortgagee as provided above:

(1) the proceeds of any claim under an insurance policy or condemnation Award required to be delivered to an Owner shall, upon notice from a Mortgagee, be delivered to such Owner's Mortgagee to be disbursed by the Mortgagee to the Depository in accordance with the provisions of this Agreement.

(2) If an Owner shall fail to appoint an arbitrator or otherwise take any action as may be required or permitted under this Agreement with respect to arbitration, such appointment or action as otherwise would have been permitted by that Owner may be taken by its Mortgagee and such appointment and action shall be recognized in all respects by the other Owner.

(C) A Mortgagee shall have the absolute right, but no duty or obligation, to cure or correct a breach of this Agreement by the Owner whose property is secured by the Mortgagee's Mortgage within any applicable cure period provided for such breach by such mortgagor Owner plus an additional period of twenty (20) days after notice to the Mortgagee of expiration of the cure period allowed the mortgagor Owner before the other Owner may exercise any right or remedy to which it may be entitled as a Creditor Owner, except exercise of a self help right in an Emergency Situation.

(D) Should any prospective Mortgagee require a modification or modifications of this Agreement, which modification or modifications will not cause an increased cost or expense to the Owner whose property is not subject to the Mortgage of such Mortgagee or in any other way materially and adversely change the rights and obligations of such Owner, then and in such event, such Owner agrees that this Agreement may be so modified and agrees to execute whatever documents are reasonably required therefor and deliver the same to the other Owner within ten (10) business days following written requests therefor by the other Owner or prospective Mortgagee.

(E) Developer hereby acknowledges and agrees that First Mortgagee, as holder of the First Mortgage Loan, and has executed the Consent of Mortgagee instrument attached hereto to make the Mortgages and the terms and provisions of the Mortgages and any loan documents secured by the Mortgages now held by such Mortgagees encumbering the Project subordinate to the Agreement. Except as provided in the

UNOFFICIAL COPY

foregoing sentence, the Owners, with respect to the First Mortgage Loan, further expressly acknowledge and agree that said Mortgagees, by their execution of such Consents, have not otherwise waived, released, or relinquished any other rights or remedies or any covenants, agreements, duties, obligations or liabilities of the Mortgagor under either of its Mortgages or under any of the other relevant loan documents securing their respective loans.

22.13 **Coordination with Tenants.** Unless an Owner otherwise agrees in writing in each case, and except in an Emergency Situation, each Owner shall coordinate all requests and contacts between tenants of its portion of the Buildings and the other Owner relating to the enjoyment of any Easements or the exercise of any rights or benefits granted under this Agreement or with respect to any other matters arising under or pursuant to this Agreement; provided, however, and any such coordination shall not render such Owner liable either to such tenants or the other Owner for acts of such tenants or other Owner.

22.14 **Waiver of Mechanic's Liens by Owners.** The Owners do hereby fully and completely waive and release, for themselves, their successors and assigns, any and all claim of, or right to, liens, which such Owners may have under the Illinois Mechanic's Lien Act against, or with respect to the Project or improvements owned by any other Owner or any part thereof, or with respect to the estate or interest of any person whatsoever in the Project or improvements owned by any other Owner, or any part thereof, or with respect to any material, fixtures, apparatus, or machinery furnished or to be furnished thereto pursuant to this Agreement, by the Owners, their successors, assigns, materialmen, contractors, subcontractors, or subsubcontractors, of any labor, services, material, fixtures, apparatus, machinery, improvements, repairs or alterations in connection with the Project or the improvements thereon, other than with respect to any of the foregoing furnished pursuant to Article 6 or Article 7 of this Agreement. The parties agree that, to the extent permitted by law, the legal effect of this Agreement is that no mechanic's lien or claim may be filed or maintained by any Owner under the Illinois Mechanic's Lien Act with respect to that portion of the Project or improvements owned by any other Owner, except as set forth above with regard to Articles 6 and 7 of this Agreement. The provisions of this Section 22.14 are not intended to waive any lien created under Article 12.

22.15 **Binding Effect.** The Easements, covenants and restrictions created under this Agreement shall be binding upon and inure to the benefit of all parties having or acquiring any right, title or interest in or to any portion of, or interest or estate in, the Project, and each of the foregoing shall run with the land.

22.16 **Special Amendment by Developer.** The Developer reserves the right and power to record a special amendment ("**Special Amendment**") to this Agreement at any time and from time to time which amends this Agreement to correct clerical or typographical errors in this Agreement. A Special Amendment may also contain such complementary and supplemental grants and reservations of Easements as may be necessary in order to effectuate the Maintenance, operation and administration of the Project to incorporate the descriptions by Lots from the Plat of Subdivision. The Developer, with the prior written consent of all Mortgagees, also reserves the right to include, within a Special Amendment, revisions to the legal descriptions of the 310

UNOFFICIAL COPY

Residential Property, 310 Retail Property, 318 Residential Property and 318 Retail Property. In furtherance of the foregoing, a power coupled with an interest is hereby reserved and granted to the Developer to vote in favor of, make, or consent to a Special Amendment on behalf of each Owner as proxy or attorney-in-fact, as the case may be. Except for the prior written consent of all Mortgagees, which shall be required, each deed, mortgage, trust deed, other evidence of obligation, or other instrument affecting any portion of the Project, and the acceptance thereof shall be deemed to be a grant and acknowledgment of, and a consent to the reservation of, the power to the Developer to vote in favor of, make, execute and record Special Amendments. The right of the Developer to act pursuant to rights reserved or granted under this section shall terminate at such time as the Developer no longer holds or controls title to any portion of the Project.

22.17 **Alley.** A portion of the Project is located within, above and below the alley located adjacent to and to the west of the 310 Building. To the extent that portions or all of this property is conveyed to a third party, such portions automatically shall be released from this Agreement without further action by any party.

22.18 **Field Changes.** The legal description of each Owner's Parcel is based on the Owners' best estimate of where the boundaries of the Parcels would exist upon the completion of the construction of the Project. To the extent that field changes during the course of construction cause or have caused non-material variations in such legal descriptions, each Owner shall permit the existence of encroachments that result from such field changes. In addition, if one affected Owner desires to correct a non-material error in the legal description of its Parcel that resulted from a field change, the other affected Owner or Owners shall cooperate in recording a deed or taking such other measures as are necessary or desirable in order to correct such discrepancy.

22.19 **Tax Parcels.** As of the date hereof, the Project is divided into nineteen (19) tax parcels. To the extent that any tax parcel is shared by more than one (1) Owner, such Owners shall reasonably cooperate to (i) have the Cook County assessor revise the boundaries of such tax parcel so that it is solely owned by one Owner or (ii) convey portions of the tax parcel from one (1) Owner to another in order for one (1) Owner to own all of the property within such tax parcel. In addition, if a non-material portion of a tax parcel is owned by one Owner and the remainder of the tax parcel is owned by another Owner, the owner of the majority of the property within the tax parcel shall pay the entire tax bill for such parcel and shall waive the right to reimbursement from the other Owner. Without limiting the foregoing sentence, examples of non-material portions of one Owner's property that are located on another Owner's tax parcel are shown on Exhibit N attached hereto.

ARTICLE 23

LIMITATION OF LIABILITY

23.1 **Limitation of Liability.** The liability under this Agreement of an Owner shall be limited to and enforceable solely against the assets of such Owner constituting an interest in the Project or Owned Facilities (including insurance and condemnation proceeds attributable to the

UNOFFICIAL COPY

Project and Owned Facilities and including, where the Owner is a trustee of a land trust, the subject matter of the trust) and any security, such as a letter of credit or bond provided pursuant to this Agreement, and no other assets of such Owner. Assets of an Owner which is a partnership do not include the assets of the partners of such partnership Owner, and the negative capital account of a partner in a partnership which is an Owner and an obligation of a partner to contribute capital to the partnership which is an Owner shall not be deemed to be assets of the partnership which is an Owner. At any time during which an Owner is trustee of a land trust, all of the covenants and conditions to be performed by it hereunder are undertaken solely as trustee, as aforesaid, and not individually, and no personal liability shall be asserted or be enforceable against it or any of the beneficiaries under said trust Agreement by reason of any of the covenants or conditions contained herein.

23.2 **Transfer of Ownership**. If an Owner shall sell, assign, transfer, convey or otherwise dispose of its portion of the Project (other than as security for a loan to such Owner), then (a) such Owner shall be entirely freed and relieved of any and all covenants and obligations arising under this Agreement which accrue under this Agreement from and after the date such Owner shall so sell, assign, transfer, convey or otherwise dispose of its interest in such portion of the Project, and (b) the Person who succeeds to Owner's interest in such portion of the Project shall be deemed to have assumed any and all of the covenants and obligations arising under this Agreement of such Owner both theretofore accruing or which accrue under this Agreement from and after the date such Owner shall so sell, assign, transfer, convey or otherwise dispose of its interest in such Property.

[Signature page follows]

UNOFFICIAL COPY

IN WITNESS WHEREOF, the parties have caused this Reciprocal Easement Agreement to be executed and recorded the day and year first above written.

310 SOUTH MICHIGAN AVENUE, L.L.C., an Illinois limited liability company

By: 310 Met Tower, L.L.C., an Illinois limited liability company, its Manager

By: 
Louis D. D'Angelo, Manager

318 SOUTH MICHIGAN AVENUE, L.L.C., an Illinois limited liability company

By: 310 Met Tower, L.L.C., an Illinois limited liability company, its Manager

By: 
Louis D. D'Angelo, Manager

310 RETAIL, L.L.C., an Illinois limited liability company

By: Boulevard Shoppes, L.L.C., an Illinois limited liability company, its Manager

By: 
Louis D. D'Angelo, Manager

318 RETAIL, L.L.C., an Illinois limited liability company

By: Boulevard Shoppes, L.L.C., an Illinois limited liability company, its Manager

By: 
Louis D. D'Angelo, Manager

Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF ILLINOIS)
)SS
COUNTY OF Cook)

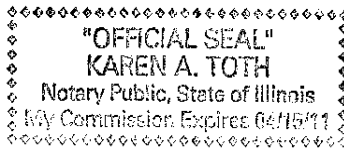
I, Karen Toth, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that Louis D. D'Angelo, as Manager of 310 Met Tower, L.L.C., an Illinois limited liability company, which is the Manager of 310 SOUTH MICHIGAN AVENUE, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 17th day of December, 2007.

Karen A Toth

Notary Public

My commission expires 4-15-11



STATE OF ILLINOIS)
)SS
COUNTY OF Cook)

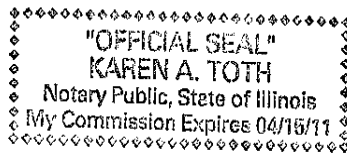
I, Karen Toth, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that Louis D. D'Angelo, as Manager of Boulevard Shoppes, L.L.C., an Illinois limited liability company, which is the Manager of 310 RETAIL, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 17th day of December, 2007.

Karen A Toth

Notary Public

My commission expires 4-15-11



UNOFFICIAL COPY

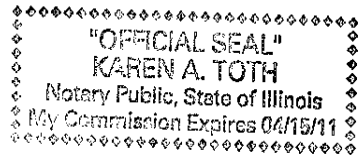
STATE OF ILLINOIS)
)SS
COUNTY OF Cook)

I, Karen Toth, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that Louis D. D'Angelo, as Manager of 310 Met Tower, L.L.C., an Illinois limited liability company, which is the Manager of 318 SOUTH MICHIGAN AVENUE, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 17th day of December, 2007.

Karen A Toth
Notary Public

My commission expires 4-15-11



STATE OF ILLINOIS)
)SS
COUNTY OF Cook)

I, Karen Toth, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that Louis D. D'Angelo, as Manager of Boulevard Shoppes, L.L.C., an Illinois limited liability company, which is the Manager of 318 RETAIL, L.L.C., an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 17th day of December, 2007.

Karen A. Toth
Notary Public

My commission expires 4-15-11



UNOFFICIAL COPY

CONSENT OF MORTGAGEE

THE UNDERSIGNED, iStar FM Loans LLC, a Delaware limited liability company ("First Mortgagee"), as successor-in-interest to Fremont Investment & Loan, a California investment bank, holder of a Mortgage and Fixture Filing on the Property dated May 19, 2006, and recorded on May 31, 2006 as Document No. 0615110116 and a Mortgage and Fixture Filing on a portion of the Property dated May 19, 2006 and recorded on May 31, 2006 as Document No. 0615110117 (collectively, the "Mortgages"), hereby consents to the execution and recording of the attached Reciprocal Easement Agreement (the "Agreement"), for the purposes of, and as required by, the terms of the Mortgages, and by this Consent, First Mortgagee assumes no responsibility or liability for any of the terms or provisions of the Agreement. First Mortgagee agrees that the Mortgages and other documents securing the Mortgages are subject and subordinate hereto. Notwithstanding anything to the contrary contained in the Agreement, the Agreement shall not be amended without the prior written consent of First Mortgagee unless and until the Mortgages have been fully reconveyed. The address of First Mortgagee is:

iStar FM Loans LLC
 c/o iStar Financial Inc.
 1114 Avenue of the Americas
 New York, New York 10036
 Attn: Chief Operating Officer
 Reference: Loan No. 950114996 and 950114997
 Telephone: 212-930-9400
 Facsimile: 212-930-9494

iStar FM Loans LLC
 c/o iStar Financial Inc.
 2425 Olympic Boulevard, 3rd floor West
 Santa Monica, California 90404
 Attn: Alec G. Nedelman, Senior Vice President of Business and Legal Affairs
 Reference: Loan No. 950114996 and 950114997
 Telephone: 310-315-5578
 Facsimile: 310-315-7017

iStar Asset Services Inc.
 180 Glastonbury Blvd., Suite 201
 Glastonbury, Connecticut 06033
 Attn: President
 Reference: Loan No. 950114996 and 950114997
 Telephone: 860-815-5900
 Facsimile: 860-815-5901


Katten Muchin Rosenman LLP
 525 West Monroe Street
 Chicago, Illinois 60661-3693
 Attn: Marcia W. Sullivan, P.C.
 Reference: Loan No. 950114996 and 950114997
 Telephone: 312-902-5535
 Facsimile: 312-577-8645

UNOFFICIAL COPY

This Consent is intended to, and shall be deemed to constitute a notice from First Mortgagee to the Owners for purposes of Section 22.12(B) hereinabove in the Agreement entitling First Mortgagee to receive copies of all notices from each Owner to any Owner.

IN WITNESS WHEREOF, iStar FM Loans, LLC has caused this Consent to be signed by its duly authorized officer this 17th day of December, 2007.

iStar FM Loans LLC, a Delaware limited liability company

By: 
Name: MICHAEL BATTEN
Title: VICE PRESIDENT

Property of Cook County Clerk's Office

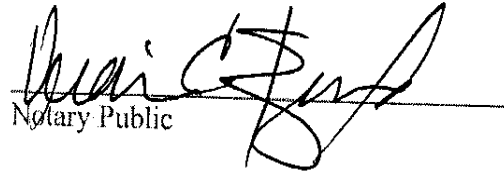
UNOFFICIAL COPY

STATE OF IL)
)SS
COUNTY OF COOK)

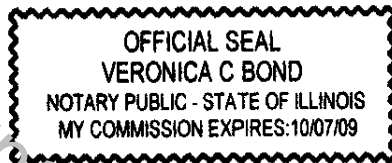
I, VERONICA BOND, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that MICHAEL BATTIN the ~~VICE PRESIDENT~~ of ISTAR FINANCIAL, a ~~VICE PRESIDENT~~ personally known to me to be the same person whose name is subscribed to the foregoing instrument as such OFFICER, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as such officer of said company as his/her own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

AGENT
②

GIVEN under my hand and Notarial Seal this 17 day of DECEMBER, 2007.


Notary Public

My commission expires 10/17/09



UNOFFICIAL COPY

EXHIBIT A

310 PROPERTY LEGAL DESCRIPTION

LOTS 1 AND 4 IN BLOCK 8 IN FRACTIONAL SECTION 15, TOWNSHIP 39 NORTH RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN IN COOK COUNTY, ILLINOIS.

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT B

318 PROPERTY LEGAL DESCRIPTION

THE NORTH 53 FEET OF LOT 5 IN BLOCK 8 IN FRACTIONAL SECTION 15, IN ADDITION TO CHICAGO IN SECTION 16, TOWNSHIP 39 NORTH RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ALL IN COOK COUNTY, ILLINOIS.

Property of Cook County Clerk's Office