

# UNOFFICIAL COPY

## Illinois Anti-Predatory Lending Database Program

### Certificate of Exemption



1234939036

**Doc#:** 1234939036 **Fee:** \$146.00  
Karen A. Yarbrough RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 12/14/2012 01:20 PM Pg: 1 of 55

**Report Mortgage Fraud**  
**800-532-8785**

The property identified as: **PIN:** 17-10-219-019-0000

**Address:**

**Street:** 455 North Park Drive

**Street line 2:**

**City:** Chicago

**State:** IL

**ZIP Code:** 60611

**Lender:** Bank of America

**Borrower:** New Water Park LLC

**Loan / Mortgage Amount:** \$210,000,000.00

This property is located within the program area and is exempt from the requirements of 765 ILCS 7/70 et seq. because it is commercial property.

**Certificate number:** FA29298A-ECE1-4B96-9DCC-4A6D30DF1F44

**Execution date:** 12/05/2012

RC 544 400 10F1

58

# UNOFFICIAL COPY

**This Document Prepared By  
and After Recording Return to:**

**GoodSmith Gregg & Unruh LLP  
150 S. Wacker Drive, Suite 3150  
Chicago, Illinois 60606  
Attention: Linda S. Schurman**

**Address of Property:**

455 North Park Drive  
Chicago, Illinois

**PIN Numbers:**

17-10-219-019-0000 Vol. 501  
17-10-219-020-0000 Vol. 501  
17-10-219-018-0000 Vol. 501  
17-10-219-021-0000 Vol. 501

NCS-544400 12/11/12 RC

**CONSTRUCTION MORTGAGE,  
ASSIGNMENT OF RENTS AND LEASES, SECURITY AGREEMENT AND FIXTURE FILING**

This document serves as a Fixture Filing under the Illinois Uniform Commercial Code, Chapter 810 ILCS 5/9-502(b), et. seq. Mortgagor's Organizational Identification Number is 477082.

**THIS CONSTRUCTION MORTGAGE, ASSIGNMENT OF RENTS AND LEASES, SECURITY AGREEMENT, AND FIXTURE FILING** (this "Mortgage") is made this 13<sup>th</sup> day of December, 2012, by New Water Park LLC, a Delaware limited liability company ("Mortgagor"), in favor of BANK OF AMERICA, N.A., a national banking association as Administrative Agent for the Lenders under the Loan Agreement described below (together with its successors and assigns, "Mortgagee"), for the benefit of the Lenders and any Swap Counterparty (as such terms are hereinafter defined).

# UNOFFICIAL COPY

## ARTICLE 1

### Definitions; Granting Clauses; Secured Indebtedness

#### Section 1.1.

(a) Definitions. In addition to other terms defined herein, each of the following terms shall have the meaning assigned to it, such definitions to be applicable equally to the singular and the plural forms of such terms and to all genders:

“Administrative Agent”: shall have the meaning set forth in the Loan Agreement.

“Declaration”: means that certain Reciprocal Easement and Operating Agreement to be executed by Mortgagor and Hotel Buyer and recorded in the Cook County, Illinois real estate records pursuant to Section 2.17.1(d) of the Loan Agreement.

“Lenders”: shall have the meaning set forth in the Loan Agreement.

“Loan”: shall mean the loan in the principal amount of Two Hundred Ten Million Dollars (\$210,000,000) to be made by Lenders to Mortgagor pursuant to the Loan Agreement and evidenced by the Notes.

“Loan Agreement”: That certain Construction Loan Agreement dated of even date herewith among Mortgagor, Mortgagee and the Lenders party thereto from time to time, as it may be from time to time amended, restated, modified, extended or supplemented.

“Loan Documents”: shall have the meaning set forth in the Loan Agreement.

“Mortgagee”: shall mean Bank of America, N.A., a national banking association, in its capacity as Administrative Agent for the Lenders, and its successors and assigns in such capacity.

“Mortgagor”: New Water Park LLC, a Delaware limited liability company, whose address is c/o DRW Holdings, Inc., 540 West Madison Street, Chicago, Illinois 60661-2555, and its permitted successors and assigns.

“Notes”: shall mean those certain Promissory Notes dated of even date herewith made by Mortgagor and payable to the order of the Lenders in the aggregate principal face amount of \$210,000,000, as they may be amended, restated, modified, replaced, extended or supplemented from time to time, including, without limitation, any promissory notes issued by Mortgagor in replacement thereof as a result of the transfer of any Note or portion thereof by any Lender pursuant to the terms of the Loan Agreement.

“Plat”: means the plat of subdivision to be recorded in the Cook County, Illinois real estate records pursuant to Section 2.17.1(c) of the Loan Agreement.

“Swap Contract”: shall mean any agreement, whether or not in writing, relating to any Swap Transaction, including, unless the context otherwise clearly requires, any form of master agreement published by the International Swaps and Derivatives Association, Inc., or any other master agreement, entered into prior to the date hereof or any time after the date hereof, between Swap Counterparty and

# UNOFFICIAL COPY

Mortgagor (or its Affiliate), together with any related schedule and confirmation, as amended, supplemented, superseded or replaced from time to time.

“Swap Counterparty”: shall mean any Lender or an Affiliate of Lender, in its capacity as counterparty under any Swap Contract.

“Swap Transaction”: shall mean any transaction that is a rate swap, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap or option, bond option, note or bill option, interest rate option, forward foreign exchange transaction, cap transaction, collar transaction, floor transaction, currency swap transaction, cross-currency rate swap transaction, swap option, currency option, credit swap or default transaction, T-lock, or any other similar transaction (including any option to enter into the foregoing) or any combination of the foregoing, entered into prior to the date hereof or anytime after the date hereof between Swap Counterparty and Mortgagor (or its Affiliate) so long as a writing, such as a Swap Contract, evidences the parties’ intent that such obligations shall be secured by this Mortgage in connection with the Loan.

(b) Any term used or defined in the Illinois Uniform Commercial Code, as in effect from time to time, and not defined in this Mortgage has the meaning given to the term in the Illinois Uniform Commercial Code, as in effect from time to time, when used in this Mortgage.

(c) Any capitalized term used herein and not defined shall have the meaning ascribed to such term in the Loan Agreement.

Section 1.2. Granting Clause. In consideration of the provisions of this Mortgage and the sum of TEN DOLLARS (\$10.00) cash in hand paid and other good and valuable consideration the receipt and sufficiency of which are acknowledged by the Mortgagor, Mortgagor hereby MORTGAGES, WARRANTS, CONVEYS, GRANTS, ASSIGNS, RELEASES, TRANSFERS AND SETS OVER unto Mortgagee, for the benefit of the Lenders and any Swap Counterparty, the following, subject to the Permitted Encumbrances (as hereinafter defined): (a) the real property described in Exhibit A which is attached hereto and incorporated herein by reference (the “Land”) together with: (i) any and all buildings, structures, improvements, alterations or appurtenances now or hereafter situated or to be situated on the Land (collectively the “Improvements”); and (ii) all right, title and interest of Mortgagor, now owned or hereafter acquired, in and to (1) all streets, roads, alleys, easements, right-of-ways, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the Land or the Improvements; (2) any strips or gores between the Land and abutting or adjacent properties; (3) all options to purchase the Land or the Improvements or any portion thereof or interest therein, and any greater estate in the Land or the Improvements; (4) all easements and other rights under the Plat and the Declaration (after the same are recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), including, without limitation, all rights of Mortgagor with respect to funds held by Depositary (as such term is defined in the Declaration); and (5) all water and water rights, timber, crops and mineral interests on or pertaining to the Land (the Land, Improvements and other rights, titles and interests referred to in this clause (a) being herein sometimes collectively called the “Premises”); (b) all right, title and interest of Mortgagor, now owned or hereafter acquired, in and to all fixtures, equipment, systems, machinery, furniture, furnishings, appliances, inventory, goods, building and construction materials, supplies, and articles of personal property, of every kind and character, tangible and intangible (including software embedded therein), now owned or hereafter acquired by Mortgagor, which are now or hereafter attached to or situated in, on or about the Land or the Improvements, or used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired (whether delivered to the Land or stored elsewhere) for use or installation in or on the Land or the Improvements, and all renewals and

# UNOFFICIAL COPY

replacements of, substitutions for and additions to the foregoing (the properties referred to in this clause (b) being herein sometimes collectively called the "Accessories," all of which are hereby declared to be permanent accessions to the Land); (c) all (i) Mortgagor's right, title and interest in any plans and specifications for the Improvements; (ii) Mortgagor's rights, but not liability for any breach by Mortgagor, under all commitments (including any commitments for financing to pay any of the Secured Indebtedness, as defined below), insurance policies, (or additional or supplemental coverage related thereto, including from an insurance provider meeting the requirements of the Loan Documents or from or through any state or federal government sponsored program or entity), Swap Contracts, other interest rate protection agreements, contracts and agreements for the design, construction, operation or inspection of the Improvements (including the Architect's Agreement, the General Construction Agreement and the Development Management Agreements), the Hotel Purchase Agreement, the Hotel Purchase Guaranty and other contracts and general intangibles (including but not limited to payment intangibles, trademarks, trade names, goodwill, software and symbols) related to the Premises or the Accessories or the operation thereof; (iii) Mortgagor's right, title and interest in any deposits and deposit accounts arising from or related to any transactions related to the Premises or the Accessories (including but not limited to Mortgagor's rights in tenants' security deposits, deposits with respect to utility services to the Premises, and any deposits, deposit accounts or reserves hereunder or under any other Loan Documents for taxes, insurance or otherwise), rebates or refunds of impact fees or other taxes, assessments or charges, money, accounts, (including deposit accounts) instruments, documents, promissory notes and chattel paper (whether tangible or electronic) arising from or by virtue of any transactions related to the Premises or the Accessories and any account or deposit account from which Mortgagor may from time to time authorize Mortgagee or any Swap Counterparty to debit and/or credit payments due with respect to the Loan or any Swap Contract, all rights to the payment of money from any Swap Counterparty under any Swap Contract, and all accounts, deposit accounts and general intangibles including payment intangibles, described in any Swap Contract; (iv) Mortgagor's right, title and interest (to the extent a security interest can lawfully be granted) in any permits, licenses, approvals, franchises, certificates, development rights, commitments and rights for utilities, and other rights and privileges obtained in connection with the Premises or the Accessories; (v) Mortgagor's right, title and interest in any leases, rents, issues, profits, royalties, bonuses, revenues and other benefits of the Premises and the Accessories (without derogation of Article 3 hereof); (vi) Mortgagor's right, title and interest in any as-extracted collateral produced from or allocated to the Land including, without limitation, oil, gas, and other hydrocarbons and other minerals and all products processed or obtained therefrom, and the proceeds thereof, and (vii) Mortgagor's right, title and interest in any engineering, accounting, title, legal, and other technical or business data concerning the Property which are in the possession of Mortgagor or in which Mortgagor can otherwise grant a security interest; and (d) all (i) Mortgagor's right, title and interest in any accounts and proceeds (cash or non-cash and including payment intangibles) of or arising from the properties, rights, titles and interests referred to above in this Section, including but not limited to proceeds of any sale, lease or other disposition thereof, proceeds of each policy of insurance (or additional or supplemental coverage related thereto, including from an insurance provider meeting the requirements of the Loan Documents or from or through any state or federal government sponsored program or entity) relating thereto (including premium refunds), proceeds of the taking thereof or of any rights appurtenant thereto, including change of grade of streets, curb cuts or other rights of access, by condemnation, eminent domain or transfer in lieu thereof for public or quasi-public use under any law, and proceeds arising out of any damage thereto; (ii) Mortgagor's right, title and interest in any letter-of-credit rights (whether or not the letter of credit is evidenced by a writing) Mortgagor now has or hereafter acquires relating to the properties, rights, titles and interests referred to in this Section; (iii) Mortgagor's right, title and interest in any commercial tort claims Mortgagor now has or hereafter acquires relating to the properties, rights, titles and interests referred to in this Section; and (iv) all right, title and interest of Mortgagor, now owned or hereafter acquired, in and to other interests of every kind and character which Mortgagor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in this

# UNOFFICIAL COPY

Section and all property used or useful in connection therewith, including but not limited to rights of ingress and egress and remainders, reversions and reversionary rights or interests; and if the estate of Mortgagor in any of the property referred to above in this Section is a leasehold estate, this conveyance shall include, and the lien and security interest created hereby shall encumber and extend to, all other or additional title, estates, interests or rights which are now owned or may hereafter be acquired by Mortgagor in or to the property demised under the lease creating the leasehold estate; TO HAVE AND TO HOLD the foregoing rights, interests and properties, and all rights, estates, powers and privileges appurtenant thereto (herein collectively called the “Property”), unto Mortgagee, and to its successors and assigns, for the benefit of the Lenders and any Swap Counterparty, subject to the terms, provisions and conditions herein set forth, to secure the obligations of Mortgagor under the Notes and Loan Documents and all other indebtedness and matters defined as the Secured Indebtedness in Section 1.4 of this Mortgage, including any and all renewals, or extensions of the whole or any part thereof (and any such renewals or extensions shall not impair in any manner the validity or priority of this Mortgage).

Section 1.3. Security Interest. Mortgagor hereby grants to Mortgagee, for the benefit of the Lenders and any Swap Counterparty, a security interest in all of the Property which constitutes personal property or fixtures, all proceeds and products thereof, and all supporting obligations ancillary to or arising in any way in connection therewith (herein sometimes collectively called the “Collateral”) to secure the obligations of Mortgagor under the Notes and Loan Documents and all other indebtedness and matters defined as Secured Indebtedness in Section 1.4 of this Mortgage. In addition to its rights hereunder or otherwise, Mortgagee shall have all of the rights of a secured party under the Illinois Uniform Commercial Code, as in effect from time to time, or under the Uniform Commercial Code in force, from time to time, in any other state to the extent the same is applicable law.

Section 1.4. Secured Indebtedness. This Mortgage is made to secure and enforce the payment and performance of (a) the Loan and all other indebtedness and obligations of Mortgagor under the Loan Documents, including all portions thereof advanced or incurred after the date hereof, and including all interest, fees and late charges owing under the Loan Agreement, all monies expended to complete construction of the improvements contemplated by the Loan Agreement and cure defaults under the Loan Documents and all Protective Advances (as such term is hereinafter defined), and (b) all indebtedness, liabilities, duties, covenants, promises and other obligations whether joint or several, direct or indirect, fixed or contingent, liquidated or unliquidated, and the cost of collection of all such amounts, owed by Mortgagor to any Swap Counterparty with respect to any Swap Contract, including all portions thereof advanced or incurred after the date hereof. The indebtedness referred to in this Section 1.4 is hereinafter referred to as the “Secured Indebtedness” or the “indebtedness secured hereby.”

Section 1.5. Swap Counterparties. Notwithstanding anything to the contrary set forth herein, in no event shall any Swap Counterparty receive any benefit under this Mortgage unless it has complied with the provisions of Section 1 of Exhibit “L” of the Loan Agreement with respect to the applicable Swap Contract.

## ARTICLE 2

### Representations, Warranties and Covenants

Section 2.1. Mortgagor represents, warrants, and covenants as follows:

(a) Payment and Performance. Mortgagor will make due and punctual payment of the Secured Indebtedness as, when, and to the extent the same is due and payable. Mortgagor will

# UNOFFICIAL COPY

timely and properly perform and comply with all of the covenants, agreements, and conditions imposed upon it by this Mortgage and the other Loan Documents subject to all provisions herein and thereof. Time shall be of the essence in this Mortgage.

(b) Title and Permitted Encumbrances. Mortgagor has, in Mortgagor's own right, and Mortgagor covenants to maintain, lawful, good and marketable title to the Property as it actually exists from time to time, is lawfully seized and possessed of such Property and every part thereof, and has the right to convey the same, free and clear of all liens, charges, claims, security interests, and encumbrances except for (i) the matters, if any, set forth under the heading "Permitted Encumbrances" in Exhibit B hereto, (ii) the liens and security interests evidenced by this Mortgage, (iii) statutory liens for real estate taxes and assessments on such Property which are not yet delinquent, (iv) the Hotel Purchase Agreement, and (v) the Plat and the Declaration (after the same are recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement) (the matters described in the foregoing clauses (i), (ii), (iii), (iv) and (v) being herein called the "Permitted Encumbrances"). Mortgagor, and Mortgagor's successors and assigns, will warrant generally and forever defend title to the Property as it actually exists from time to time, subject to the Permitted Encumbrances, to Mortgagee and its successors or substitutes and assigns, against the claims and demands of all persons claiming or to claim the same or any part thereof. Mortgagor will punctually pay, perform, observe and keep all covenants, obligations and conditions in or pursuant to any Permitted Encumbrance and will not amend or consent to any amendment of any document or instrument creating any Permitted Encumbrance without the prior written consent of Mortgagee. Inclusion of any matter as a Permitted Encumbrance does not constitute approval or waiver by Mortgagee or any Lender of any existing or future violation or other breach thereof by Mortgagor, by the Property or otherwise. No part of the Property constitutes all or any part of the principal residence of Mortgagor if Mortgagor is an individual. If any right or interest of Mortgagee in the Property or any part thereof shall be endangered or questioned or shall be attacked directly or indirectly, Mortgagee (whether or not named as a party to legal proceedings with respect thereto), is hereby authorized and empowered to take such steps as in its discretion may be proper for the defense of any such legal proceedings or the protection of such right or interest of Mortgagee, including but not limited to the employment of independent counsel, the prosecution or defense of litigation, and the compromise or discharge of adverse claims. All expenditures so made of every kind and character shall be a demand obligation (which obligation Mortgagor hereby promises to pay) owing by Mortgagor to Mortgagee, and the party making such expenditures shall be subrogated to all rights of the person receiving such payment.

(c) Taxes and Other Impositions. Mortgagor will pay, or cause to be paid, all taxes, assessments and other charges or levies imposed upon or against or with respect to the Property or the ownership, use, occupancy or enjoyment of any portion thereof, or any utility service thereto, as the same become due and payable, including but not limited to all real estate taxes assessed against the Property or any part thereof, and shall deliver promptly to Mortgagee such evidence of the payment thereof as Mortgagee may require.

(d) Insurance. Mortgagor shall obtain and maintain (or cause to be obtained and maintained) at Mortgagor's sole expense: (1) mortgagee title insurance issued to Mortgagee covering the Premises as required by Mortgagee; (2) property insurance with respect to all insurable Property, against loss or damage by fire, lightning, windstorm, explosion, hail, tornado and such additional hazards as are presently included in "Special Form" (also known as "all-risk") coverage and against any and all acts of terrorism and such other insurable hazards as Mortgagee may require, in an amount not less than 100% of the full replacement cost, including the cost of debris removal, without deduction for depreciation and sufficient to prevent Mortgagor and Mortgagee from becoming a coinsurer, such insurance to be in "builder's risk" completed value (non-reporting) form during and with respect to any

# UNOFFICIAL COPY

construction on the Premises; (3) if and to the extent any portion of the Improvements is, under the Flood Disaster Protection Act of 1973 (“FDPA”), as it may be amended from time to time, in a Special Flood Hazard Area, within a Flood Zone designated A or V in a participating community, a flood insurance policy on the Improvements and any Mortgagor owned contents in an amount required by Mortgagee, but in no event less than the amount sufficient to meet the requirements of applicable law and the FDPA, as such requirements may from time to time be in effect; provided, that if the Secured Indebtedness relates to construction of the Improvements, then the flood insurance policy on contents shall be required upon completion of the Improvements or any unit or component thereof, or as soon thereafter as a flood insurance policy on contents may be obtained; (4) general liability insurance, on an “occurrence” basis, against claims for “personal injury” liability, including bodily injury, death or property damage liability, for the benefit of Mortgagor as named insured and Mortgagee as additional insured; (5) statutory workers’ compensation insurance with respect to any work on or about the Premises (including employer’s liability insurance, if required by Mortgagee), covering all employees of Mortgagor and any contractor; (6) if there is a general contractor, commercial general liability insurance, including products and completed operations coverage, and in other respects similar to that described in clause (4) above, for the benefit of the general contractor as named insured and Mortgagor and Mortgagee as additional insureds, in addition to statutory workers’ compensation insurance with respect to any work on or about the Premises (including employer’s liability insurance, if required by Mortgagee), covering all employees of the general contractor and any contractor; (7) the subcontractor default insurance required by the Loan Agreement; and (8) such other insurance on the Property and endorsements as may from time to time be reasonably required by Mortgagee (including but not limited to soft cost coverage, automobile liability insurance, business interruption insurance or delayed rental insurance, boiler and machinery insurance, earthquake insurance, wind insurance, sinkhole coverage, and/or permit to occupy endorsement) and against other insurable hazards or casualties which at the time are commonly insured against in the case of premises similarly situated, due regard being given to the height, type, construction, location, use and occupancy of buildings and improvements. All insurance policies shall be issued and maintained by insurers, in amounts, with deductibles, limits and retentions, and in forms satisfactory to Mortgagee, and shall require not less than ten (10) days’ prior written notice to Mortgagee of any cancellation for nonpayment of premiums, and not less than thirty (30) days’ prior written notice to Mortgagee of any other cancellation or any change of coverage. All insurance companies must be licensed to do business in the state in which the Property is located, and, except as otherwise provided in the Declaration (after the same is recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), must have an A.M. Best Company financial and performance ratings of A-:IX or better. All insurance policies maintained, or caused to be maintained, by Mortgagor with respect to the Property, except for general liability insurance, shall provide that each such policy shall be primary without right of contribution from any other insurance that may be carried by Mortgagor or Mortgagee and that all of the provisions thereof, except the limits of liability, shall operate in the same manner as if there were a separate policy covering each insured. If any insurer which has issued a policy of title, hazard, liability or other insurance required pursuant to this Mortgage or any other Loan Document becomes insolvent or the subject of any petition, case, proceeding or other action pursuant to any Debtor Relief Law, or if in Mortgagee’s reasonable opinion the financial responsibility of such insurer is or becomes inadequate, Mortgagor shall, in each instance promptly upon its discovery thereof or upon the request of Mortgagee therefor, and at Mortgagor’s expense, promptly obtain and deliver to Mortgagee a like policy (or, if and to the extent permitted by Mortgagee, acceptable evidence of insurance) issued by another insurer, which insurer and policy meet the requirements of this Mortgage or such other Loan Document, as the case may be. Without limiting the discretion of Mortgagee with respect to required endorsements to insurance policies, except as otherwise provided in the Declaration (after the same is recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), all such policies for loss of or damage to the Property shall contain a standard mortgagee clause (without contribution) naming Mortgagee as



# UNOFFICIAL COPY

mortgagee with loss proceeds payable to Mortgagee notwithstanding (i) any act, failure to act or negligence of or violation of any warranty, declaration or condition contained in any such policy by any named or additional insured; (ii) the occupation or use of the Property for purposes more hazardous than permitted by the terms of any such policy; (iii) any foreclosure or other action by Mortgagee under the Loan Documents; or (iv) any change in title to or ownership of the Property or any portion thereof, such proceeds to be held for application as provided in the Loan Documents. The originals of each initial insurance policy (or to the extent permitted by Mortgagee, a copy of the original policy and such evidence of insurance acceptable to Mortgagee) shall be delivered to Mortgagee at the time of execution of this Mortgage, with all premiums fully paid current, and each renewal or substitute policy (or evidence of insurance) shall be delivered to Mortgagee, with all premiums fully paid current, at least ten (10) days before the termination of the policy it renews or replaces. Mortgagor shall pay all premiums on policies required hereunder as they become due and payable and promptly deliver to Mortgagee evidence satisfactory to Mortgagee of the timely payment thereof. If any loss occurs at any time when Mortgagor has failed to perform Mortgagor's covenants and agreements in this paragraph with respect to any insurance payable because of loss sustained to any part of the Property, whether or not such insurance is required by Mortgagee, Mortgagee shall nevertheless be entitled to the benefit of all insurance covering the loss and held by or for Mortgagor, to the same extent as if it had been made payable to Mortgagee. Upon any foreclosure hereof or transfer of title to the Property in extinguishment of the whole or any part of the Secured Indebtedness, all of Mortgagor's right, title and interest in and to the insurance policies referred to in this Section (including unearned premiums) and all proceeds payable thereunder shall thereupon vest in the purchaser at foreclosure or other such transferee, to the extent permissible under such policies. Mortgagee shall have the right (but not the obligation) to make proof of loss for, settle and adjust any claim under, and receive the proceeds of, all insurance for loss of or damage to the Property regardless of whether or not such insurance policies are required by Mortgagee, and the expenses incurred by Mortgagee in the adjustment and collection of insurance proceeds shall be a part of the Secured Indebtedness and shall be due and payable to Mortgagee on demand. Mortgagee shall not be, under any circumstances, liable or responsible for failure to collect or exercise diligence in the collection of any of such proceeds or for the obtaining, maintaining or adequacy of any insurance or for failure to see to the proper application of any amount paid over to Mortgagor. Any such proceeds received by Mortgagee shall, after deduction therefrom of all reasonable expenses actually incurred by Mortgagee in the collection of the same, including attorneys' fees, at Mortgagor's option (unless (x) a Default or Potential Default shall have occurred hereunder, or (y) the initial construction of the Improvements is not yet complete and the amount of such proceeds for any loss exceeds Two Hundred Fifty Thousand and No/100 Dollars (\$250,000); in which event such decision shall be exercised by Mortgagee in its sole discretion, be (1) applied (upon compliance with the terms and conditions hereinafter more particularly set forth) to repair or restoration, of the Property so damaged, or (2) applied to the payment of the Secured Indebtedness in such order and manner as Mortgagee, in its sole discretion, may elect, whether or not due. In any event, the unpaid portion of the Secured Indebtedness shall remain in full force and effect and the payment thereof shall not be excused. Mortgagor shall at all times comply with the requirements of the insurance policies required hereunder and of the issuers of such policies and of any board of fire underwriters or similar body as applicable to or affecting the Property. In the event that, and to the extent that, insurance proceeds are to be applied to the restoration of the Property, each of the following conditions must also be met and complied with:

- (i) Mortgagor presents sufficient evidence to Mortgagee that there are sufficient funds from the insurance proceeds and from equity funds, if needed, to completely restore or repair the Property to its use, value and condition immediately prior to the casualty as well as to maintain relevant debt service coverages and other operating expenses.

# UNOFFICIAL COPY

(ii) Mortgagor presents sufficient evidence to Mortgagee that the Property will be completely restored prior to the Maturity Date.

(iii) An escrow account shall have been established with the Mortgagee composed of such insurance proceeds, and, if necessary, additional deposits made by Mortgagor, which, in the reasonable judgment of Mortgagee, are sufficient to restore the Property to its use, value and condition immediately prior to the casualty. Mortgagee shall be entitled, at the expense of Mortgagor, to consult such professionals as Mortgagee may deem necessary, in its sole discretion, to determine the total costs of restoring the Property. Mortgagor hereby assigns to, and grants Mortgagee a security interest in, such escrow account and the funds therein to secure the payment and performance of the Secured Indebtedness.

(iv) If the Hotel Sale Date has not yet occurred, Mortgagor shall have provided Mortgagee with satisfactory evidence that the Hotel Purchase Agreement and the Hotel Purchase Guaranty remain in full force and effect and that the loss suffered by the Property will not give rise to a right by Hotel Buyer to terminate the Hotel Purchase Agreement or a right to a credit against the purchase price payable by Hotel Buyer under the Hotel Purchase Agreement.

(v) [Intentionally Omitted].

(vi) If the initial construction of the Improvements has been completed, proceeds from rental loss or business interruption insurance, or both, or other moneys of the Mortgagor, must be available to the Mortgagee in such amounts as Mortgagee, in its judgment, considers sufficient to pay the debt service on the Loan, and all property assessments, insurance premiums and other sums becoming due from Mortgagor pursuant to this Mortgage and the other Loan Documents during the time required for restoration.

(vii) All restoration will be conducted under the supervision of an architect or engineer, or both, selected and paid for by Mortgagor but approved in advance by Mortgagee, and by a general contractor who must be reasonably acceptable in all respects to Mortgagee and who shall have executed a guaranteed maximum price or a fixed price contract.

(viii) The restoration will be performed pursuant to plans and specifications approved by Mortgagee.

(ix) If required by Mortgagee in its reasonable discretion, the contractor or contractors responsible for the restoration shall have obtained payment and performance bonds from a corporate surety reasonably acceptable to Mortgagee and naming Mortgagee as dual obligee.

(x) All guaranties of the Loan shall remain in full force and effect and all guarantors shall so confirm to Mortgagee.

(xi) Mortgagor shall have provided Mortgagee with satisfactory evidence that there has been no adverse change in the economic viability of the Property since the date of this Mortgage, such evidence to include, among other things, an appraisal and market study prepared by a firm or firms acceptable to Mortgagee, but at Mortgagor's expense.

(xii) All parties having commitments to provide financing with respect to the Property, to purchase Mortgagor's interest in full or in part in the Property or to purchase the

# UNOFFICIAL COPY

loan secured hereby agree in a manner satisfactory to Mortgagee that their commitments will continue in full force and effect and, if necessary, the expiration of such commitments will be extended by the time necessary to complete the restoration or repair.

(xiii) Mortgagee will not incur any liability to any other person as a result of such use or release of insurance proceeds.

If any of the foregoing conditions set forth above in this Section 2.1(d) are not satisfied within sixty (60) days of receipt of the insurance proceeds, Mortgagee may, in its sole discretion, apply all insurance proceeds to the payment of the Secured Indebtedness. Furthermore, if applied to restoration, all insurance proceeds (and any other funds required to be deposited with Mortgagee) shall be disbursed from time to time in accordance with the terms and conditions of the Loan Agreement, and subject also to the following conditions (which shall control in the event of any conflict with the provisions of such Loan Agreement):

(i) Restoration shall commence within sixty (60) days following receipt of the insurance proceeds by Mortgagee and shall be completed within such time as may reasonably be determined by Mortgagee in view of the extent of the casualty but, in any event, shall be completed within a reasonable period after the date the insurance proceeds are received.

(ii) At the time of each disbursement, no Default shall have occurred.

(iii) Restoration shall be performed in a workmanlike manner and in accordance with all requirements of law.

(iv) With respect to each disbursement and accompanying each request therefor, there shall be delivered to Mortgagee some a Draw Request and all other documentation required for Loan advances pursuant to Exhibit "E" to the Loan Agreement.

(v) Disbursements shall be subject to retainage acceptable to Mortgagee in its reasonable discretion, and the final holdback for retainage shall be disbursed only upon delivery to Mortgagee, in addition to the items required in paragraph (iv) above, of the following:

(1) Final waivers of liens from all contractors and subcontractors.

(2) A certificate of the architect or engineer stating that the restoration has been completed in a good and workmanlike manner, in accordance with the plans and specifications approved by the Mortgagee and in accordance with all applicable laws.

(3) A date down endorsement to the Title Insurance providing such mechanics lien coverage as shall be required by Mortgagee.

(vi) Immediately upon the occurrence of any Default, Mortgagee may apply all insurance proceeds and any other sums deposited with Mortgagee to the repayment of the Secured Indebtedness.

(e) Condemnation. Mortgagor shall notify Mortgagee immediately of any threatened or pending proceeding for condemnation affecting the Property or arising out of damage to the Property, and Mortgagor shall, at Mortgagor's expense, diligently prosecute any such proceedings. Mortgagee shall have the right (but not the obligation) to participate in any such proceeding and to be

# UNOFFICIAL COPY

represented by counsel of its own choice. Except as otherwise provided in the Declaration (after the same is recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), Mortgagee shall be entitled to receive all sums which may be awarded or become payable to Mortgagor for the condemnation of the Property, or any part thereof, for public or quasi-public use, or by virtue of private sale in lieu thereof, and any sums which may be awarded or become payable to Mortgagor for injury or damage to the Property. Mortgagor shall, promptly upon request of Mortgagee, execute such additional assignments and other documents as may be necessary from time to time to permit such participation and to enable Mortgagee to collect and receive for any such sums. All such sums are hereby assigned to Mortgagee, and shall, after deduction therefrom of all reasonable expenses actually incurred by Mortgagee in the collection of the same, including attorneys' fees, at Mortgagor's option (unless a Default or Potential Default shall have occurred, or the initial construction of the Improvements is not yet complete; in which event such decision shall be exercised by Mortgagee in its sole discretion) be (1) applied by Mortgagee (upon compliance with the terms and conditions hereinafter more particularly set forth) to the restoration of the Property, or (2) applied to the payment of the Secured Indebtedness in such order and manner as Mortgagee, in its sole discretion, may elect, whether or not due. In any event, the unpaid portion of the Secured Indebtedness shall remain in full force and effect and the payment thereof shall not be excused. In the event that, and to the extent that, condemnation proceeds are to be applied by Mortgagee to the restoration of the Property, each of the following conditions must also be met and complied with:

(i) Mortgagor presents sufficient evidence to Mortgagee that (A) there are sufficient funds from the condemnation award or proceeds and from equity funds, if needed, to completely restore the Property to an architectural whole as well as to maintain relevant debt service coverages and other operating expenses, and (B) the loss of the property taken will not materially diminish the value of the Property.

(ii) Mortgagor presents sufficient evidence to Mortgagee that the Property will be restored to an architectural whole prior to the Maturity Date.

(iii) An escrow account shall have been established with the Mortgagee composed of such condemnation proceeds, and, if necessary additional deposits made by Mortgagor, which, in the reasonable judgment of Mortgagee, are sufficient to restore the Property to an architectural whole. Mortgagee shall be entitled, at the expense of Mortgagor, to consult such professionals as Mortgagee may deem necessary, in its sole discretion, to determine the total costs of restoring the Property. Mortgagor hereby assigns to, and grants Mortgagee a security interest in, such escrow account and the funds therein to secure the payment and performance of the Secured Indebtedness.

(iv) If the Hotel Sale Date has not yet occurred, Mortgagor shall have provided Mortgagee with satisfactory evidence that the Hotel Purchase Agreement and the Hotel Purchase Guaranty remain in full force and effect and that the condemnation suffered by the Property will not give rise to a right by Hotel Buyer to terminate the Hotel Purchase Agreement or a right to a credit against the purchase price payable by Hotel Buyer under the Hotel Purchase Agreement.

(v) [Intentionally Omitted].

(vi) If the initial construction of the Improvements has been completed, proceeds from rental loss or business interruption insurance, or both, or other moneys of the Mortgagor, must be available to the Mortgagor in such amounts as Mortgagee, in its judgment,

# UNOFFICIAL COPY

considers sufficient to pay the debt service on the Loan, and all property assessments, insurance premiums and other sums becoming due from Mortgagor pursuant to this Mortgage and the other Loan Documents during the time required for restoration.

(vii) All restoration will be conducted under the supervision of an architect or engineer, or both, selected and paid for by Mortgagor but approved in advance by Mortgagee, and by a general contractor who must be reasonably acceptable in all respects to Mortgagee and who shall have executed a guaranteed maximum price or a fixed price contract.

(viii) The restoration will be performed pursuant to plans and specifications approved by Mortgagee.

(ix) If required by Mortgagee in its reasonable discretion, the contractor or contractors responsible for the restoration shall have obtained payment and performance bonds from a corporate surety reasonably acceptable to Mortgagee and naming Mortgagee as dual obligee.

(x) All guaranties of the Loan shall remain in full force and effect and all guarantors shall so confirm to Mortgagee.

(xi) Mortgagor shall have provided Mortgagee with satisfactory evidence that there has been no adverse change in the economic viability of the Property since the date of this Mortgage, such evidence to include, among other things, an appraisal and market study prepared by a firm or firms acceptable to Mortgagee, but at Mortgagor's expense.

(xii) All parties having commitments to provide financing with respect to the Property, to purchase Mortgagor's interest in full or in part in the Property or to purchase the Loan secured hereby agree in a manner satisfactory to Mortgagee that their commitments will continue in full force and effect and, if necessary, the expiration of such commitments will be extended by the time necessary to complete the restoration.

(xiii) Mortgagee will not incur any liability to any other person as a result of such use or release of proceeds.

If any of the foregoing conditions set forth above in this Section 2.1(e) are not satisfied within sixty (60) days of receipt of the condemnation proceeds, Mortgagee may, in its sole discretion, apply all condemnation proceeds to the payment of the Secured Indebtedness. Furthermore, if applied to restoration, all condemnation proceeds (and any other funds required to be deposited with Mortgagee) shall be disbursed from time to time in accordance with the terms and conditions of the Loan Agreement, and subject also to the following conditions (which shall control in the event of any conflict with the provisions of such Loan Agreement):

(i) Restoration shall commence within sixty (60) days following receipt of the condemnation proceeds by Mortgagee and shall be completed within such time as may reasonably be determined by Mortgagee in view of the extent of the condemnation but, in any event, shall be completed within a reasonable period after the date the condemnation proceeds are received.

(ii) At the time of each disbursement, no Default shall have occurred.

# UNOFFICIAL COPY

(iii) Restoration shall be performed in a workmanlike manner and in accordance with all requirements of law.

(iv) With respect to each disbursement and accompanying each request therefor, there shall be delivered to Mortgagee a Draw Request and all other documentation required for Loan advances pursuant to Exhibit "E" to the Loan Agreement.

(v) Disbursements shall be subject to retainage acceptable to Mortgagee in its reasonable discretion, and the final holdback for retainage shall be disbursed only upon delivery to Mortgagee, in addition to the items required in paragraph (iv) above, of the following:

(1) Final waivers of liens from all contractors and subcontractors.

(2) A certificate of the architect or engineer stating that the restoration has been completed in a good and workmanlike manner, in accordance with the plans and specifications approved by the Mortgagee and in accordance with all applicable laws.

(3) A date down endorsement to the Title Insurance providing such mechanics lien coverage as shall be required by Mortgagee.

(vi) Immediately upon the occurrence of any Default, Mortgagee may apply all condemnation proceeds and any other sums deposited with Mortgagee to the repayment of the Secured Indebtedness in such order and manner as Mortgagee, in its sole discretion, may elect.

Notwithstanding the foregoing, in the event any governmental agency or authority shall require or commence any proceedings for the demolition of any buildings or structures comprising a part of the Property, or shall commence any proceedings to condemn or otherwise take pursuant to the power of eminent domain a material portion of the Property, Mortgagee may, at its option, declare the Indebtedness to be immediately due and payable in full and apply any condemnation proceeds to the outstanding balance of the Indebtedness in such order and manner as Mortgagee, in its sole discretion, may elect. In any event the unpaid portion of the Secured Indebtedness shall remain in full force and effect and the payment thereof shall not be excused. Mortgagee shall not be, under any circumstances, liable or responsible for failure to collect or to exercise diligence in the collection of any such sum or for failure to see to the proper application of any amount paid over to Mortgagor. Mortgagee is hereby authorized, in the name of Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree. All costs and expenses (including but not limited to attorneys' fees) incurred by Mortgagee in connection with any condemnation shall be a demand obligation owing by Mortgagor (which Mortgagor hereby promises to pay) to Mortgagee pursuant to this Mortgage.

(f) Compliance with Legal Requirements.

(i) The Property and the use, operation and maintenance thereof and all activities thereon do and shall at all times comply with all applicable Legal Requirements (hereinafter defined). Except as set forth in the Plat and the Declaration (after the same are recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), the Property is not, and shall not be, dependent on any other property or premises or any interest therein other than the Property to fulfill any requirement of any Legal Requirement. Except as set forth in the Plat and the Declaration (after the same are recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), Mortgagor shall not, by act or omission, permit any building or other improvement not subject to the lien of this

# UNOFFICIAL COPY

Mortgage to rely on the Property or any interest therein to fulfill any requirement of any Legal Requirement. No part of the Property constitutes a nonconforming use under any zoning law or similar law or ordinance. Mortgagor has obtained and shall preserve in force all requisite zoning, utility, building, health, environmental and operating permits from the governmental authorities having jurisdiction over the Property.

(ii) If Mortgagor receives a notice or claim from any person that the Property, or any use, activity, operation or maintenance thereof or thereon, is not in compliance with any Legal Requirement, Mortgagor will promptly furnish a copy of such notice or claim to Mortgagee. Mortgagor has received no notice and has no knowledge of any such noncompliance. As used in this Mortgage: (i) the term "Legal Requirement" means any Law (hereinafter defined), agreement, covenant, restriction, easement or condition (including, without limitation of the foregoing, any condition or requirement imposed by any insurance or surety company), as any of the same now exists or may be changed or amended or come into effect in the future; and (ii) the term "Law" means any federal, state or local law, statute, ordinance, code, rule, regulation, license, permit, authorization, decision, order, injunction or decree, domestic or foreign.

(iii) Mortgagor will punctually pay, perform, observe and keep all covenants, obligations and conditions in or pursuant to the Declaration, and will not amend, modify or waive any provision of, or terminate, the Declaration without the prior written consent of Mortgagee. Mortgagor will take such actions as shall be required by Mortgagee to cause Mortgagee to be entitled to all of the mortgagee protections set forth in the Declaration. Without limitation of the foregoing, the following shall require the prior written consent of Mortgagee: (A) the appointment of a Depository, (B) lien waivers and other documentation and title insurance endorsements required to be delivered pursuant to Section 17.1(b)(iii) of the Declaration, and (C) the disposition of funds held by the Depository pursuant to Section 17.2(b) or (c) of the Declaration. To the extent Mortgagor is permitted under the Declaration to direct funds held by the Depository to be disbursed to Mortgagee, Mortgagor shall deliver the necessary direction to Depository to cause such disbursement to be made. All references to the Declaration in this Section 2.1(f)(iii) shall mean the Declaration after the same is recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement.

(g) Maintenance, Repair and Restoration. With due regard given to the construction of the Improvements contemplated by the Loan Agreement, Mortgagor will keep the Property in first class order, repair, operating condition and appearance, causing all necessary repairs, renewals, replacements, additions and improvements to be promptly made, and will not allow any of the Property to be misused, abused or wasted or to deteriorate. Notwithstanding the foregoing, Mortgagor will not, without the prior written consent of Mortgagee, (i) remove from the Property any fixtures or personal property covered by this Mortgage except such as is replaced by Mortgagor by an article of equal suitability and value, owned by Mortgagor, free and clear of any lien or security interest (except that created by this Mortgage), or (ii) make any structural alteration to the Property (except for the initial construction of the Improvements contemplated by the Loan Agreement) or any other alteration thereto which impairs the value thereof other than non-structural or non-mechanical alteration with an aggregate cost in excess of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000). If any act or occurrence of any kind or nature (including any condemnation or any casualty for which insurance was not obtained or obtainable) shall result in damage to or loss or destruction of the Property, Mortgagor shall give prompt notice thereof to Mortgagee and Mortgagor shall promptly, at Mortgagor's sole cost and expense and regardless of whether insurance or condemnation proceeds (if any) shall be available or sufficient for the purpose, secure the Property as necessary and commence

# UNOFFICIAL COPY

and continue diligently to completion to restore, repair, replace and rebuild the Property as nearly as possible to its value, condition and character immediately prior to the damage, loss or destruction.

(h) No Other Liens. Mortgagor will not, without the prior written consent of Mortgagee, create, place or permit to be created or placed, or through any act or failure to act, acquiesce in the placing of, or allow to remain, any deed of trust, mortgage, voluntary or involuntary lien, whether statutory, constitutional or contractual, security interest, encumbrance or charge, or conditional sale or other title retention document, against or covering the Property, or any part thereof, other than the Permitted Encumbrances, regardless of whether the same are expressly or otherwise subordinate to the lien or security interest created in this Mortgage, and should any of the foregoing become attached hereafter in any manner to any part of the Property without the prior written consent of Mortgagee, Mortgagor will cause the same to be promptly discharged and released. Mortgagor will own all parts of the Property and will not acquire any fixtures, equipment or other property (including software embedded therein) forming a part of the Property pursuant to a lease, license, security agreement or similar agreement, whereby any party has or may obtain the right to repossess or remove same, without the prior written consent of Mortgagee. If Mortgagee consents to the voluntary grant by Mortgagor of any mortgage, lien, security interest, or other encumbrance (hereinafter called "Subordinate Lien") covering any of the Property or if the foregoing prohibition is determined by a court of competent jurisdiction to be unenforceable as to a Subordinate Lien, any such Subordinate Lien shall contain express covenants to the effect that: (1) the Subordinate Lien is unconditionally subordinate to this Mortgage and all Leases; (2) if any action (whether judicial or pursuant to a power of sale) shall be instituted to foreclose or otherwise enforce the Subordinate Lien, no tenant of any of the Leases shall be named as a party defendant, and no action shall be taken that would terminate any occupancy or tenancy without the prior written consent of Mortgagee; (3) Rents (as defined hereinafter), if collected by or for the holder of the Subordinate Lien, shall be applied first to the payment of the Secured Indebtedness then due and expenses incurred in the ownership, operation and maintenance of the Property in such order as Mortgagee may determine, prior to being applied to any indebtedness secured by the Subordinate Lien; (4) written notice of default under the Subordinate Lien and written notice of the commencement of any action (whether judicial or pursuant to a power of sale) to foreclose or otherwise enforce the Subordinate Lien or to seek the appointment of a receiver for all or any part of the Property shall be given to Mortgagee with or immediately after the occurrence of any such default or commencement; and (5) neither the holder of the Subordinate Lien, nor any purchaser at foreclosure thereunder, nor anyone claiming by, through or under any of them shall succeed to any of Mortgagor's rights hereunder without the prior written consent of Mortgagee.

(i) Operation of Property. Mortgagor will operate the Property in a good and workmanlike manner and in accordance with all Legal Requirements and will pay all fees or charges of any kind in connection therewith. Mortgagor will keep the Property occupied so as not to impair the insurance carried thereon. Mortgagor will not use or occupy or conduct any activity on, or allow the use or occupancy of or the conduct of any activity on, the Property in any manner which violates any Legal Requirement or which constitutes a public or private nuisance or which makes void, voidable or cancelable, or increases the premium of, any insurance then in force with respect thereto. Mortgagor will not initiate or permit any zoning reclassification of the Property or seek any variance under existing zoning ordinances applicable to the Property or use or permit the use of the Property in such a manner which would result in such use becoming a nonconforming use under applicable zoning ordinances or other Legal Requirement. Except as set forth in the Plat and the Declaration (after the same are recorded in connection with the sale of the Hotel Property pursuant to the Hotel Purchase Agreement), Mortgagor will not impose any easement, restrictive covenant or encumbrance upon the Property, execute or file any subdivision plat or condominium declaration affecting the Property or consent to the annexation of the Property to any municipality, without the prior written consent of



# UNOFFICIAL COPY

Mortgagee. Mortgagor will not do or suffer to be done any act whereby the value of the Property may be lessened in any material respect. Mortgagor will preserve, protect, renew, extend and retain all material rights and privileges granted for or applicable to the Property. Without the prior written consent of Mortgagee, there shall be no drilling or exploration for or extraction, removal or production of any mineral, hydrocarbon, gas, natural element, compound or substance (including sand and gravel) from the surface or subsurface of the Land regardless of the depth thereof or the method of mining or extraction thereof. Mortgagor will cause all debts and liabilities of any character (including without limitation all debts and liabilities for labor, material and equipment (including software embedded therein) and all debts and charges for utilities servicing the Property) incurred in the construction, maintenance, operation and development of the Property to be promptly paid.

(j) Financial Matters. No proceeding under any Debtor Relief Law is pending (or, to Mortgagor's knowledge, threatened) by or against Mortgagor, any Guarantor or any of their respective Affiliates, as a debtor. All reports, statements, plans, budgets, applications, agreements and other data and information heretofore furnished or hereafter to be furnished by or on behalf of Mortgagor or any Guarantor to Mortgagee in connection with the Loan (including, without limitation, all financial statements and financial information) are and will be true, correct and complete in all material respects as of their respective dates and do not and will not omit to state any fact or circumstance necessary to make the statements contained therein not misleading.

(k) Status of Mortgagor; Suits and Claims; Loan Documents. If Mortgagor is a corporation, partnership, limited liability company, or other legal entity, Mortgagor is and will continue to be (i) duly organized, validly existing and in good standing under the laws of its state of organization, (ii) authorized to do business in, and in good standing in, each state in which the Property is located, and (iii) possessed of all requisite power and authority to carry on its business and to own and operate the Property. Each Loan Document executed by Mortgagor has been duly authorized, executed and delivered by Mortgagor, and the obligations thereunder and the performance thereof by Mortgagor in accordance with their terms are and will continue to be within Mortgagor's power and authority (without the necessity of joinder or consent of any other person), are not and will not be in contravention of any Legal Requirement or any other document or agreement to which Mortgagor or the Property is subject, and do not and will not result in the creation of any encumbrance against any assets or properties of Mortgagor, or any other person liable, directly or indirectly, for any of the Secured Indebtedness, except as expressly contemplated by the Loan Documents. There is no suit, action, claim, investigation, inquiry, proceeding or demand pending (or, to Mortgagor's knowledge, threatened) against Mortgagor or against any other person liable directly or indirectly for the Secured Indebtedness or which affects the Property (including, without limitation, any which challenges or otherwise pertains to Mortgagor's title to the Property) or the validity, enforceability or priority of any of the Loan Documents. There is no judicial or administrative action, suit or proceeding pending (or, to Mortgagor's knowledge, threatened) against Mortgagor, or against any other person liable directly or indirectly for the Secured Indebtedness, except as has been disclosed in writing to Mortgagee in connection with the Loan. The Loan Documents constitute legal, valid and binding obligations of Mortgagor (and of each Guarantor) enforceable in accordance with their terms, except as the enforceability thereof may be limited by Debtor Relief Laws and except as the availability of certain remedies may be limited by general principles of equity. Mortgagor is not a "foreign person" within the meaning of the Internal Revenue Code of 1986, as amended, Sections 1445 and 7701 (i.e. Mortgagor is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined therein and in any regulations promulgated thereunder). The Loan is solely for business and/or investment purposes, and is not intended for personal, family, household or agricultural purposes. Mortgagor further warrants that the proceeds of the Loan shall be used for commercial purposes and stipulates that the Loan shall be construed for all purposes as a commercial

# UNOFFICIAL COPY

loan. Mortgagor's exact legal name is correctly set forth at the end of this Mortgage. If Mortgagor is not an individual, Mortgagor is an organization of the type and (if not an unregistered entity) is incorporated in or organized under the laws of the state specified in the introductory paragraph of this Mortgage. Mortgagor will not cause or permit any change to be made in its name, identity (including its trade names or names), or corporate or partnership structure, unless Mortgagor shall have notified Mortgagee in writing of such change at least thirty (30) days prior to the effective date of such change, and shall have first taken all action required by Mortgagee for the purpose of further perfecting or protecting the lien and security interest of Mortgagee in the Property. In addition, Mortgagor shall not change its corporate, limited liability company or partnership structure without first obtaining the prior written consent of Mortgagee. Mortgagor's principal place of business and chief executive office, and the place where Mortgagor keeps its books and records, including recorded data of any kind or nature, regardless of the medium of recording including, without limitation, software, writings, plans, specifications and schematics concerning the Property, has for the preceding four months (or, if less, the entire period of the existence of Mortgagor) been and will continue to be (unless Mortgagor notifies Mortgagee of any change in writing at least thirty (30) days prior to the date of such change) the address of Mortgagor set forth at the end of this Mortgage. If Mortgagor is an individual, Mortgagor's principal residence has for the preceding four months been and will continue to be (unless Mortgagor notifies Mortgagee of any change in writing at least thirty (30) days prior to the date of such change) the address of the principal residence of Mortgagor set forth at the end of this Mortgage. Mortgagor's organizational identification number, if any, assigned by the state of incorporation or organization is correctly set forth on the first page of this Mortgage. Mortgagor shall promptly notify Mortgagee (i) of any change of its organizational identification number, or (ii) if Mortgagor does not now have an organization identification number and later obtains one, of such organizational identification number.

(l) Certain Environmental Matters. Mortgagor shall comply with the terms and covenants of that certain Environmental Indemnity Agreement dated of even date herewith (the "Environmental Agreement").

(m) Further Assurances. Mortgagor will, promptly on request of Mortgagee, (i) correct any defect, error or omission which may be discovered in the contents, execution or acknowledgment of this Mortgage or any other Loan Document; (ii) execute, acknowledge, deliver, procure and record and/or file such further documents (including, without limitation, further deeds of trust, security agreements and assignments of rents or leases) and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of this Mortgage and the other Loan Documents, to more fully identify and subject to the liens and security interests hereof any property intended to be covered hereby (including specifically, but without limitation, any renewals, additions, substitutions, replacements, or appurtenances to the Property) or as deemed advisable by Mortgagee to protect the lien or the security interest hereunder against the rights or interests of third persons; and (iii) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of Mortgagee to enable Mortgagee to comply with the requirements or requests of any agency having jurisdiction over Mortgagee or any examiners of such agencies with respect to the indebtedness secured hereby, Mortgagor or the Property. Mortgagor shall pay all costs connected with any of the foregoing, which shall be a demand obligation owing by Mortgagor (which Mortgagor hereby promises to pay) to Mortgagee pursuant to this Mortgage.

(n) Fees and Expenses. Without limitation of any other provision of this Mortgage or of any other Loan Document and to the extent not prohibited by applicable law, Mortgagor will pay, and will reimburse to Mortgagee on demand to the extent paid by Mortgagee: (i) all appraisal fees, filing, registration and recording fees, recordation, transfer and other taxes,

# UNOFFICIAL COPY

brokerage fees and commissions, abstract fees, title search or examination fees, title policy and endorsement premiums and fees, uniform commercial code search fees, judgment and tax lien search fees, escrow fees, attorneys' fees, architect fees, engineer fees, construction consultant fees, environmental inspection fees, survey fees, and all other out-of-pocket costs and expenses of every character incurred by Mortgagor or Mortgagee in connection with the preparation of the Loan Documents, the evaluation, closing and funding of the Loan, and any and all amendments and supplements to this Mortgage, the Notes or any other Loan Documents or any approval, consent, waiver, release or other matter requested or required hereunder or thereunder, or otherwise attributable or chargeable to Mortgagor as owner of the Property; and (ii) all costs and expenses, including attorneys' fees and expenses, incurred or expended in connection with the exercise of any right or remedy, or the defense of any right or remedy or the enforcement of any obligation of Mortgagor, hereunder or under any other Loan Document.

(o) Indemnification.

(i) Mortgagor will indemnify and hold harmless Mortgagee, the Lenders and any Swap Counterparty and their respective directors, officers, partners, employees and agents and any persons owned or controlled by, owning or controlling, or under common control or affiliated with Mortgagee or any Lender or any Swap Counterparty (collectively, the "Indemnified Parties") from, and against, and reimburse the Indemnified Parties on demand for, any and all Indemnified Matters (hereinafter defined). Without limitation, the foregoing indemnities shall apply to each Indemnified Party with respect to matters which in whole or in part are caused by or arise out of the negligence of such (and/or any other) Indemnified Party. However, such indemnities shall not apply to a particular Indemnified Party to the extent that the subject of the indemnification is caused by or arises out of the gross negligence or willful misconduct of that Indemnified Party. Any amount to be paid under this paragraph (o) by Mortgagor to an Indemnified Party shall be a demand obligation owing by Mortgagor (which Mortgagor hereby promises to pay) to Mortgagee for the benefit of such Indemnified Party pursuant to this Mortgage. Nothing in this paragraph, elsewhere in this Mortgage or in any other Loan Document shall limit or impair any rights or remedies of Mortgagee or any other Indemnified Party (including without limitation any rights of contribution or indemnification) against Mortgagor or any other person under any other provision of this Mortgage, any other Loan Document, any other agreement or any applicable Legal Requirement.

(ii) As used herein, the term "Indemnified Matters" means any and all claims, demands, liabilities (including strict liability), losses, damages (including consequential damages), causes of action, judgments, penalties, fines, costs and expenses (including without limitation, reasonable fees and expenses of attorneys and other professional consultants and experts, and of the investigation and defense of any claim, whether or not such claim is ultimately defeated, and the settlement of any claim or judgment including all value paid or given in settlement) of every kind, known or unknown, foreseeable or unforeseeable, which may be imposed upon, asserted against or incurred or paid by any Indemnified Party at any time and from time to time, whenever imposed, asserted or incurred, because of, resulting from, in connection with, or arising out of any transaction, act, omission, event or circumstance in any way connected with the Property or with this Mortgage or any other Loan Document occurring or arising at any time on or before the Release Date (as hereinafter defined), including but not limited to any bodily injury or death or property damage occurring in or upon or in the vicinity of the Property through any cause whatsoever, any act performed or omitted to be performed hereunder or under any other Loan Document, any breach by Mortgagor of any representation, warranty, covenant, agreement or condition contained in this Mortgage or in any other Loan

# UNOFFICIAL COPY

Document, any Default or any claim under or with respect to the Hotel Purchase Agreement, any Lease or any Permitted Encumbrance. The term "Release Date" as used herein means the earliest of the following: (i) the date on which the indebtedness and obligations secured hereby have been paid and performed in full, the Lenders have no further funding obligations under the Loan Agreement and this Mortgage has been released, (ii) the date on which a court of competent jurisdiction appoints a receiver for the Property; (iii) the date on which Mortgagee becomes a mortgagee in possession pursuant to Section 5.1(c)(iii) of this Mortgage and Mortgagor no longer has possession of the Property, and (iv) the date on which the lien of this Mortgage is fully and finally foreclosed or a conveyance by deed in lieu of such foreclosure is fully and finally effective, and possession of the Property has been given to the purchaser or grantee free of occupancy and claims to occupancy by Mortgagor and Mortgagor's heirs, devisees, representatives, successors and assigns; provided, that if such payment, performance, release, foreclosure or conveyance is challenged, in bankruptcy proceedings or otherwise, the Release Date shall be deemed not to have occurred until such challenge is rejected, dismissed or withdrawn with prejudice. The indemnities in this paragraph (o) shall not terminate upon the Release Date or upon the release, foreclosure or other termination of this Mortgage but will survive the Release Date, foreclosure of this Mortgage or conveyance in lieu of foreclosure, the repayment of the Secured Indebtedness, the termination of any and all Swap Contracts, the discharge and release of this Mortgage and the other Loan Documents, any bankruptcy or other debtor relief proceeding, and any other event whatsoever. The provisions of this paragraph (o) shall not operate to limit the indemnification obligations of Mortgagor under the Environmental Agreement.

(p) Taxes on Note or Mortgage. Mortgagor will promptly pay all income, franchise and other taxes owing by Mortgagor and any stamp, documentary, recordation and transfer taxes or other taxes (unless such payment by Mortgagor is prohibited by law) which may be required to be paid with respect to the Notes, this Mortgage or any other instrument evidencing or securing any of the Secured Indebtedness. In the event of the enactment after this date of any law of any governmental entity applicable to Mortgagee or any Lender, the Notes, the Property or this Mortgage deducting from the value of property for the purpose of taxation any lien or security interest thereon, or imposing upon Mortgagee or the Lenders the payment of the whole or any part of the taxes or assessments or charges or liens herein required to be paid by Mortgagor, or changing in any way the laws relating to the taxation of deeds of trust or mortgages or security agreements or debts secured by deeds of trust or mortgages or security agreements or the interest of the Mortgagee in the property covered thereby, or the manner of collection of such taxes, so as to affect this Mortgage or the Secured Indebtedness, the Mortgagee or the Lenders, then, and in any such event, Mortgagor, upon demand by Mortgagee, shall pay such taxes, assessments, charges or liens, or reimburse Mortgagee therefor; provided, however, that if in the opinion of counsel for Mortgagee (i) it might be unlawful to require Mortgagor to make such payment or (ii) the making of such payment might result in the imposition of interest beyond the maximum amount permitted by law, then and in such event, Mortgagee may elect, by notice in writing given to Mortgagor, to declare all of the Indebtedness hereby to be and become due and payable sixty (60) days from the giving of such notice.

(q) Statement Concerning Notes or Mortgage. Mortgagor shall at any time and from time to time furnish within seven (7) days of request by Mortgagee a written statement in such form as may be required by Mortgagee stating that (i) the Notes, this Mortgage and the other Loan Documents are valid and binding obligations of Mortgagor, enforceable against Mortgagor in accordance with their terms; (ii) the unpaid principal balance of the Notes; (iii) the date to which interest on the Notes is paid; (iv) the Notes, this Mortgage and the other Loan Documents have not been released, subordinated or modified; and (v) there are no offsets or defenses against the

# UNOFFICIAL COPY

enforcement of the Notes, this Mortgage or any other Loan Document. If any of the foregoing statements are untrue or cannot be determined by Mortgagor, Mortgagor shall, alternatively, specify the reasons therefor.

Section 2.2. Performance by Mortgagee on Mortgagor's Behalf. Mortgagor agrees that, if Mortgagor fails to perform any act or to take any action which under any Loan Document Mortgagor is required to perform or take, or to pay any money which under any Loan Document Mortgagor is required to pay, and whether or not the failure then constitutes a Default hereunder or thereunder, and whether or not there has occurred any Default or Defaults hereunder or the Secured Indebtedness has been accelerated, Mortgagee, in Mortgagor's name or its own name, may, but shall not be obligated to, perform or cause to be performed such act or take such action or pay such money, and any expenses so incurred by Mortgagee and any money so paid by Mortgagee shall be a demand obligation owing by Mortgagor to Mortgagee (which obligation Mortgagor hereby promises to pay), shall be a part of the indebtedness secured hereby, and Mortgagee, upon making such payment, shall be subrogated to all of the rights of the person, entity or body politic receiving such payment. Upon reasonable prior notice, Mortgagee and its designees shall have the right to enter upon the Property at any time and from time to time for any such purposes. No such payment or performance by Mortgagee shall waive or cure any Default or waive any right, remedy or recourse of Mortgagee. Any such payment may be made by Mortgagee in reliance on any statement, invoice or claim without inquiry into the validity or accuracy thereof. Each amount due and owing by Mortgagor to Mortgagee pursuant to this Mortgage shall bear interest, from the date such amount becomes due until paid, at the Default Rate for Base Rate Principal but never in excess of the maximum non-usurious amount permitted by applicable law, which interest shall be payable to Mortgagee on demand; and all such amounts, together with such interest thereon, shall automatically and without notice be a part of the indebtedness secured hereby. The amount and nature of any expense by Mortgagee hereunder and the time when paid shall be fully established by the certificate of Mortgagee or any of Mortgagee's officers or agents.

Section 2.3. Absence of Obligations of Mortgagee with Respect to Property. Notwithstanding anything in this Mortgage to the contrary, including, without limitation, the definition of "Property" and/or the provisions of Article 3 hereof, (i) to the extent permitted by applicable law, the Property is composed of Mortgagor's rights, title and interests therein but not Mortgagor's obligations, duties or liabilities pertaining thereto, (ii) Mortgagee neither assumes nor shall have any obligations, duties or liabilities in connection with any portion of the items described in the definition of "Property" herein, either prior to or after obtaining title to such Property, whether by foreclosure sale, the granting of a deed in lieu of foreclosure or otherwise, and (iii) Mortgagee may, at any time prior to or after the acquisition of title to any portion of the Property as above described, advise any party in writing as to the extent of Mortgagee's interest therein and/or expressly disaffirm in writing any rights, interests, obligations, duties and/or liabilities with respect to such Property or matters related thereto. Without limiting the generality of the foregoing, it is understood and agreed that Mortgagee shall have no obligations, duties or liabilities prior to or after acquisition of title to any portion of the Property, as lessee under any lease or purchaser or seller under any contract or option unless Mortgagee elects otherwise by written notification.

Section 2.4. Authorization to File Financing Statements; Power of Attorney. Mortgagor hereby authorizes Mortgagee at any time and from time to time to file any initial financing statements, amendments thereto, and continuation statements with or without signature of Mortgagor as authorized by applicable law, as applicable to the Collateral. For purposes of such filings, Mortgagor agrees to furnish any information requested by Mortgagee promptly upon request by Mortgagee. Mortgagor also ratifies its authorization for Mortgagee to have filed any like initial financing statements, amendments thereto or continuation statements if filed prior to the date of this Mortgage. Mortgagor hereby

# UNOFFICIAL COPY

irrevocably constitutes and appoints Mortgagee and any officer or agent of Mortgagee, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of Mortgagor or in Mortgagor's own name to execute in Mortgagor's name any such documents and to otherwise carry out the purposes of this Section, to the extent that Mortgagor's authorization above is not sufficient. To the extent permitted by law, Mortgagor hereby ratifies all acts said attorneys-in-fact shall lawfully do, have done in the past or cause to be done in the future by virtue hereof. This power of attorney is a power coupled with an interest and shall be irrevocable.

## ARTICLE 3

### Assignment of Rents and Leases

Section 3.1. Assignment. Mortgagor hereby assigns to Mortgagee all Rents, issues and profits and all of Mortgagor's rights in and under all Leases. So long as no Default has occurred, Mortgagor shall have a license (which license shall terminate automatically and without further notice upon the occurrence of a Default) to collect, but not prior to accrual, the Rents under the Leases and, where applicable, subleases, such Rents to be held in trust for Mortgagee after the occurrence and during the continuance of a Default and to otherwise deal with all Leases as permitted by this Mortgage. Upon the revocation of such license, to the extent permitted by applicable law, all Rents shall be paid directly to Mortgagee and not through Mortgagor, all without the necessity of any further action by Mortgagee, including, without limitation, any action to obtain possession of the Land, Improvements or any other portion of the Property or any action for the appointment of a receiver. Mortgagor hereby authorizes and directs the tenants under the Leases to pay Rents to Mortgagee upon written demand by Mortgagee, without further consent of Mortgagor, without any obligation of such tenants to determine whether a Default has in fact occurred and regardless of whether Mortgagee has taken possession of any portion of the Property, and the tenants may rely upon any written statement delivered by Mortgagee to the tenants. Any such payments to Mortgagee shall constitute payments to Mortgagor under the Leases, and Mortgagor hereby irrevocably appoints Mortgagee as its attorney-in-fact to do all things, after a Default, which Mortgagor might otherwise do with respect to the Property and the Leases thereon, including, without limitation, (i) collecting Rents with or without suit and applying the same, less expenses of collection, to any of the obligations secured hereunder or to expenses of operating and maintaining the Property (including reasonable reserves for anticipated expenses), at the option of the Mortgagee, all in such manner as may be determined by Mortgagee, or at the option of Mortgagee, holding the same as security for the payment of the Secured Indebtedness, (ii) leasing, in the name of Mortgagor, the whole or any part of the Property which may become vacant, and (iii) employing agents therefor and paying such agents reasonable compensation for their services. The curing of such Default, unless other Defaults also then exist, shall entitle Mortgagor to recover its aforesaid license to do any such things which Mortgagor might otherwise do with respect to the Property and the Leases thereon and to again collect such Rents. The powers and rights granted in this paragraph shall be in addition to the other remedies herein provided for upon the occurrence of a Default and may be exercised independently of or concurrently with any of said remedies. Nothing in the foregoing shall be construed to impose any obligation upon Mortgagee to exercise any power or right granted in this paragraph or to assume any liability under any Lease of any part of the Property and no liability shall attach to Mortgagee for failure or inability to collect any Rents under any such Lease. The assignment contained in this Section shall become null and void upon the release of this Mortgage. As used herein: (i) "Lease" means each existing or future lease, sublease (to the extent of Mortgagor's rights thereunder) or other agreement under the terms of which any person has or acquires any right to occupy or use the Property, or any part thereof, or interest therein, and each existing or future guaranty of payment or performance thereunder, and all extensions, renewals, modifications and replacements of each such lease, sublease, agreement or guaranty; and (ii) "Rents"

# UNOFFICIAL COPY

means all of the rents, issues and profits, and all revenue, income, profits and proceeds derived and to be derived from the Property or arising from the use or enjoyment of any portion thereof or from any Lease, including but not limited to the proceeds from any negotiated Lease termination or buyout of such Lease, liquidated damages following default under any such Lease, all proceeds payable under any policy of insurance covering loss of rents resulting from untenability caused by damage to any part of the Property, all of Mortgagor's rights to recover monetary amounts from any tenant in bankruptcy including, without limitation, rights of recovery for use and occupancy and damage claims arising out of Lease defaults, including rejections, under any applicable Debtor Relief Law, together with any sums of money that may now or at any time hereafter be or become due and payable to Mortgagor by virtue of any and all royalties, overriding royalties, bonuses, delay rentals and any other amount of any kind or character arising under any and all present and all future oil, gas, mineral and mining Leases covering the Property or any part thereof, and all proceeds and other amounts paid or owing to Mortgagor under or pursuant to any and all contracts and bonds relating to the construction or renovation of the Property.

Section 3.2. Covenants, Representations and Warranties Concerning Leases and Rents. Mortgagor covenants, represents and warrants that: (a) Mortgagor has good title to, and is the owner of the entire landlord's interest in, the Leases and Rents hereby assigned and authority to assign them; (b) all Leases are valid and enforceable, and in full force and effect, and are unmodified except as stated therein; (c) no Rents or Leases have been or will be assigned, mortgaged, pledged or otherwise encumbered and no other person has or will acquire any right, title or interest in such Rents or Leases; (d) no Rents have been waived, released, discounted, set off or compromised except in the normal course of business consistent with the operation of residential properties comparable to the Improvements; (e) except as stated in the Leases, Mortgagor has not received any funds or deposits (other than security deposits) from any tenant for which credit has not already been made on account of accrued Rents; (f) Mortgagor shall perform all of its obligations under the Leases and enforce the tenants' obligations under the Leases to the extent enforcement is prudent under the circumstances; (g) Mortgagor will not execute any Lease except in accordance with the Loan Documents and for actual occupancy by the tenant thereunder; (h) Mortgagor shall as often as requested by Mortgagee, within ten (10) days of each request, deliver to Mortgagee a complete rent roll of the Property in such detail as Mortgagee may require, and deliver to such of the tenants and others obligated under the Leases specified by Mortgagee written notice of the assignment in Section 3.1 hereof in form and content satisfactory to Mortgagee; (i) promptly upon request by Mortgagee, Mortgagor shall deliver to Mortgagee true, correct, and complete copies of the executed originals of all Leases and all records relating thereto; (j) there shall be no merger of the leasehold estates created by the Leases, with the fee estate of the Land without the prior written consent of Mortgagee; and (k) Mortgagee may at any time and from time to time by specific written instrument intended for the purpose, unilaterally subordinate the lien of this Mortgage to any Lease, without joinder or consent of, or notice to, Mortgagor, any tenant or any other person, and notice is hereby given to each tenant under a Lease of such right to subordinate. No such subordination shall constitute a subordination to any lien or other encumbrance, whenever arising, or improve the right of any junior lienholder; and nothing herein shall be construed as subordinating this Mortgage to any Lease.

Section 3.3. No Liability of Mortgagee. Mortgagee's acceptance of this assignment shall not be deemed to constitute Mortgagee a "mortgagee in possession," nor obligate Mortgagee to appear in or defend any proceeding relating to any Lease or to the Property, or to take any action hereunder, expend any money, incur any expenses, or perform any obligation or liability under any Lease, or assume any obligation for any deposit delivered to Mortgagor by any tenant and not as such delivered to and accepted by Mortgagee. Mortgagee shall not be liable for any injury or damage to person or property in or about the Property, or for Mortgagee's failure to collect or to exercise diligence in collecting Rents, but shall be accountable only for Rents that it shall actually receive. Neither the assignment of Leases and Rents nor enforcement of Mortgagee's rights regarding Leases and Rents (including collection of Rents) nor

# UNOFFICIAL COPY

possession of the Property by Mortgagee nor Mortgagee's consent to or approval of any Lease (nor all of the same), shall render Mortgagee liable on any obligation under or with respect to any Lease or constitute affirmation of, or any subordination to, any Lease, occupancy, use or option.

If Mortgagee seeks or obtains any judicial relief regarding Rents or Leases, the same shall in no way prevent the concurrent or subsequent employment of any other appropriate rights or remedies nor shall same constitute an election of judicial relief for any foreclosure or any other purpose. Mortgagee neither has nor assumes any obligations as lessor or landlord with respect to any Lease. The rights of Mortgagee under this Article 3 shall be cumulative of all other rights of Mortgagee under the Loan Documents or otherwise.

## ARTICLE 4

### Default

Section 4.1. Events of Default. The occurrence of any one of the following shall be a default under this Mortgage ("Default"):

- (a) Failure to Pay Indebtedness. Any of the Secured Indebtedness is not paid when due, regardless of how such amount may have become due.
- (b) Nonperformance of Covenants. Any covenant, agreement or condition herein (other than covenants to pay the Secured Indebtedness and other covenants, agreements and conditions expressly addressed in this Section 4.1 or Section 4.1 of the Loan Agreement) is not fully and timely performed, observed or kept, and remains so for a period of thirty (30) days after written notice to Mortgagor; provided, however, that Mortgagor shall have an additional sixty (60) days to cure such failure if and so long as (i) such failure cannot reasonably be cured within the initial thirty (30) period, (ii) Mortgagor has commenced actions to cure such failure within the initial thirty (30) period, and (iii) Mortgagor diligently prosecutes such cure, but in no event shall Mortgagor have more than a total of ninety (90) days after the initial notice of default to cure such default.
- (c) Default Under Other Loan Documents. The occurrence of a default under any other Loan Document which is not cured within the applicable grace period (if any) provided therein; or the occurrence of a default under any Swap Contract which is not cured within the applicable grace period (if any) provided therein, including an Early Termination Event as defined in such Swap Contract.
- (d) Representations. Any statement, representation or warranty in any of the Loan Documents, or in any financial statement or any other writing heretofore or hereafter delivered to Mortgagee or any Lender in connection with the Secured Indebtedness is false, misleading or erroneous in any material respect on the date hereof or on the date as of which such statement, representation or warranty is made.
- (e) Transfer of the Property. Any sale, lease, conveyance, assignment, pledge, encumbrance, or transfer of all or any part of the Property or any interest therein, voluntarily or involuntarily, whether by operation of law or otherwise, except: (i) sales or transfers of items of the Accessories which have become obsolete or worn beyond practical use and which have been replaced by adequate substitutes, owned by Mortgagor, having a value substantially equal to or greater than the replaced items when new; and (ii) the grant, in the ordinary course of business, of a leasehold interest



# UNOFFICIAL COPY

in a part of the Improvements to a tenant for occupancy, not containing a right or option to purchase and not in contravention of any provision of this Mortgage or of any other Loan Document. Mortgagee may, in its sole discretion, waive a Default under this paragraph, but it shall have no obligation to do so, and any waiver may be conditioned upon such one or more of the following (if any) which Mortgagee may require: the grantee's integrity, reputation, character, creditworthiness and management ability being satisfactory to Mortgagee and the Lenders in their sole judgment and grantee executing, prior to such sale or transfer, a written assumption agreement containing such terms as Mortgagee may require, a principal paydown on the Notes, an increase in the rate of interest payable under the Notes, a transfer fee, a modification of the term of the Notes, and any other modification of the Loan Documents which Mortgagee may require. NOTICE - THE DEBT SECURED HEREBY IS SUBJECT TO CALL IN FULL AND ANY AND ALL SWAP CONTRACTS ARE SUBJECT TO TERMINATION OR THE TERMS THEREOF BEING MODIFIED IN THE EVENT OF SALE OR CONVEYANCE OF THE PROPERTY.

(f) [Intentionally Omitted].

(g) Transfer of Ownership of Mortgagor. The sale, pledge, encumbrance, assignment or transfer, voluntarily or involuntarily, whether by operation of law or otherwise, of any interest in Mortgagor (if Mortgagor is not a natural person but is a corporation, partnership, limited liability company, trust or other legal entity), without the prior written consent of Mortgagee (including, without limitation, if Mortgagor is a partnership or joint venture, the withdrawal from or admission into it of any general partner or joint venturer).

(h) Grant of Easement, Etc. Without the prior written consent of Mortgagee, Mortgagor grants any easement (other than a temporary easement for construction or other similar purposes on adjacent property that is reasonably acceptable to Mortgagee) or dedication, files any plat, condominium declaration, or restriction, or otherwise encumbers the Property, or seeks or permits any zoning reclassification or variance, unless such action is expressly permitted by the Loan Documents or does not affect the Property.

(i) Abandonment. The owner of the Property abandons any of the Property.

(j) Default Under Other Lien. A default or event of default occurs under any lien, security interest or assignment covering the Property or any part thereof (whether or not Mortgagee has consented, and without hereby implying Mortgagee's consent, to any such lien, security interest or assignment not created hereunder), or the holder of any such lien, security interest or assignment declares a default or institutes foreclosure or other proceedings for the enforcement of its remedies thereunder.

(k) Destruction. The Property is so demolished, destroyed or damaged that, in the reasonable opinion of Mortgagee, it cannot be restored or rebuilt with available funds to a profitable condition within a reasonable period of time and in any event, prior to the Maturity Date (without, after the occurrence of such demolition, destruction or damage, such Maturity Date being subject to extension as provided in this Mortgage), notwithstanding the satisfaction of the conditions set forth in Section 2.1(d) hereof; provided, that if no other Default has occurred, Mortgagor shall have ninety (90) days from the date of the occurrence of such demolition, destruction or damage to pay the Secured Indebtedness in full prior to such being a Default under this Mortgage.

(l) [Intentionally Omitted].

# UNOFFICIAL COPY

(m) Liquidation, Etc. The liquidation, termination, dissolution, merger, consolidation or failure to maintain good standing in the State of Illinois and/or the state of incorporation or organization, if different (or in the case of an individual, the death or legal incapacity) of the Mortgagor, any owner of the Property or any person obligated to pay any part of the Secured Indebtedness; provided, that in the case of failure to maintain good standing, the entity not in good standing shall have thirty (30) days to restore its good standing before a Default shall occur.

(n) [Intentionally Omitted].

(o) Enforceability; Priority. Any Loan Document shall for any reason without Mortgagee's specific written consent cease to be in full force and effect, or shall be declared null and void or unenforceable in whole or in part, or the validity or enforceability thereof, in whole or in part, shall be challenged or denied by any party thereto other than Mortgagee; or the liens, mortgages or security interests of Mortgagee in any of the Property become unenforceable in whole or in part, or cease to be of the priority herein required, or the validity or enforceability thereof, in whole or in part, shall be challenged or denied by Mortgagor or any person obligated to pay any part of the Secured Indebtedness.

Section 4.2. Notice and Cure. If any provision of this Mortgage or any other Loan Document provides for Mortgagee to give to Mortgagor any notice regarding a Default or incipient Default, then if Mortgagee shall fail to give such notice to Mortgagor as provided, the sole and exclusive remedy of Mortgagor for such failure shall be to seek appropriate equitable relief to enforce the agreement to give such notice and to have any acceleration of the maturity of the Notes and the Secured Indebtedness postponed or revoked and foreclosure proceedings in connection therewith delayed or terminated pending or upon the curing of such Default in the manner and during the period of time permitted by such agreement, if any, and Mortgagor shall have no right to damages or any other type of relief not herein specifically set out against Mortgagee, all of which damages or other relief are hereby waived by Mortgagor. Nothing herein or in any other Loan Document shall operate or be construed to add on or make cumulative any cure or grace periods specified in any of the Loan Documents.

## ARTICLE 5

### Remedies

Section 5.1. Certain Remedies. If a Default shall occur, Mortgagee may (but shall have no obligation to) exercise any one or more of the following remedies, without notice (unless notice is required by applicable statute):

(a) Acceleration. Mortgagee may at any time and from time to time declare any or all of the Indebtedness immediately due and payable. Upon any such declaration, such Indebtedness shall thereupon be immediately due and payable, without presentment, demand, protest, notice of protest, notice of acceleration or of intention to accelerate or any other notice or declaration of any kind, all of which are hereby expressly waived by Mortgagor. Without limitation of the foregoing, upon the occurrence of a Default described in clauses (A), (C) or (D) of subparagraph (i) or in any clause of subparagraph (ii) of paragraph (w) of Section 4.1 of the Loan Agreement with respect to Borrower, all of the Indebtedness shall thereupon be immediately due and payable, without presentment, demand, protest, notice of protest, declaration or notice of acceleration or intention to accelerate, or any other notice, declaration or act of any kind, all of which are hereby expressly waived

# UNOFFICIAL COPY

by Mortgagor. Swap Contracts are subject to termination by the applicable Swap Counterparty in accordance with the provisions thereof.

(b) Enforcement of Assignment of Rents. In addition to the rights of Mortgagee under Article 3 hereof, prior or subsequent to taking possession of any portion of the Property or taking any action with respect to such possession, Mortgagee may: (1) to the extent permitted by applicable law, collect and/or sue for the Rents in Mortgagee's own name, give receipts and releases therefor, and after deducting all expenses of collection, including attorneys' fees and expenses, apply the net proceeds thereof to the Secured Indebtedness in such manner and order as Mortgagee may elect and/or to the operation and management of the Property, including the payment of management, brokerage and attorney's fees and expenses; and (2) require Mortgagor to transfer all security deposits and records thereof to Mortgagee together with original counterparts of the Leases.

(c) Foreclosure and Other Remedies.

(i) Foreclosure. If a Default has occurred hereunder, or when the indebtedness hereby secured, or any part thereof, shall become due, whether by acceleration or otherwise, Mortgagee shall have the right to foreclose the lien hereof for such indebtedness or part thereof and pursue all remedies afforded to a mortgagee under and pursuant to the Illinois Mortgage Foreclosure Law, 755 ILCS 5/15-1101 et seq., as amended from time to time (the "Act").

(ii) Receiver. Upon, or at any time prior or after, the filing of any complaint to foreclose the lien of this Mortgage or instituting any other foreclosure of the liens and security interests provided for in this Mortgage or any other legal proceedings under this Mortgage, Mortgagee may, at Mortgagee's sole option, to the extent permitted by applicable law, make application to a court of competent jurisdiction for appointment of a receiver pursuant to Section 15-1702 of the Act for all or any part of the Property as a matter of strict right and without notice to Mortgagor, and Mortgagor does hereby irrevocably consent to such appointment, waives any and all notices of and defenses to such appointment and agrees not to oppose any application therefor by Mortgagee, but nothing herein is construed to deprive Mortgagee of any other right, remedy or privilege Mortgagee may now have under the law to have a receiver appointed; provided that the appointment of such receiver, trustee or other appointee by virtue of any court order, statute or regulation shall not impair or in any manner prejudice the rights of Mortgagee to receive payment of all of the Rents, issues, deposits and profits pursuant to other terms and provisions set forth in this Mortgage. To the extent permitted by applicable law, such appointment may be made either before or after sale, without notice; without regard to the solvency or insolvency, at the time of application for such receiver, of the person or persons, if any, liable for the payment of the Secured Indebtedness; without regard to the value of the Property at such time and whether or not the same is then occupied as a homestead; without bond being required of the applicant; and Mortgagee or any employee or agent thereof may be appointed as such receiver. Such receiver shall have all powers and duties prescribed by Section 15-1704 of the Act, including the power to take possession, control and care of the Property and to collect all Rents, issues, deposits, profits and avails thereof during the pendency of such foreclosure suit and apply all funds received toward the Secured Indebtedness, and in the event of a sale and a deficiency where Mortgagor has not waived its statutory rights of redemption, during the full statutory period of redemption, as well as during any further times when Mortgagor or its administrators, legal representatives, successors or assigns, except for the intervention of such receiver, would be entitled to collect such Rents, issues, deposits, profits and avails, and shall have all other powers that may be necessary or useful in such cases for the

# UNOFFICIAL COPY

protection, possession, control, management and operation of the Property during the whole of any such period. To the extent permitted by law, such receiver may extend or modify any then existing Leases and make new Leases of the Property or any part thereof, which extensions, modifications and new Leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the Maturity Date, it being understood and agreed that any such Leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Property are subject to the lien hereof, and upon the purchaser or purchasers at any such foreclosure sale, notwithstanding any redemption from sale, discharge of indebtedness, satisfaction of foreclosure decree or issuance of certificate of sale or deed to any purchaser. Without limiting the foregoing, any receiver shall have the power and authority to sell and convey the Hotel Property pursuant to the Hotel Purchase Agreement, including without limitation executing deeds and other closing documents required by the Hotel Purchase Agreement or otherwise necessary or desirable in connection therewith, and shall have the power and authority to do all things necessary or desirable to effectuate any of the foregoing. Mortgagor acknowledges that it has entered into the Hotel Purchase Agreement with the intent that conveyance of the Hotel Property occur in accordance therewith and waives any right to object to a receiver being so empowered.

(iii) Mortgagee in Possession. In any case in which under the provisions of this Mortgage Mortgagee has a right to institute foreclosure proceedings, whether before or after the whole principal sum secured hereby is declared to be immediately due as aforesaid, or whether before or after the institution of legal proceedings to foreclose the lien hereof or before or after judgment thereunder, and at all times until confirmation of sale, Mortgagor shall forthwith, upon demand of Mortgagee, surrender to Mortgagee and Mortgagee shall be entitled to take and upon Mortgagee's request to the court to be placed in actual possession of, Mortgagee shall be placed in possession of the Property or any part thereof, personally, or by its agent or attorneys as provided in Subsections (b)(2) and (c) of Section 1701 of the Act. In such event, to the extent permitted by applicable law, Mortgagee in its discretion may, with or without force and with or without process of law, enter upon and take and maintain or may apply to the court in which a foreclosure is pending to be placed in possession of all or any part of said Property, together with all documents, books, records, papers and accounts of Mortgagor or then owner of the Property relating thereto, and may exclude Mortgagor, its agents or servants, wholly therefrom and may, as attorney in fact or agent of Mortgagor, or in its own name as Mortgagee and under the powers herein granted, hold, operate, manage and control the Property and conduct the business, if any, thereof, either personally or by its agents, and with full power to use such measures, legal or equitable, as in its discretion or in the discretion of its successors or assigns may be deemed proper or necessary to enforce the payment or security of the avails, Rents, issues, and profits of the Property, including actions for the recovery of rent, actions in forcible detainer and actions in distress for Rent, and with full power: (a) to cancel or terminate any Lease or sublease for any cause or on any ground which would entitle Mortgagor to cancel the same; (b) to elect to disaffirm any Lease or sublease which is then subordinate to the lien hereof; (c) to extend or modify any then existing Leases and to make new Leases, which extensions, modifications and new Leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the maturity date of the indebtedness secured hereby and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such Leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Property are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the mortgage indebtedness, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed

# UNOFFICIAL COPY

to any purchaser; (d) to enter into any management, leasing or brokerage agreements covering the Property; (e) to make all necessary or proper repairs, decorating, renewals, replacements, alterations, additions, betterments and improvements to the Property as to it may seem judicious; (f) to insure and reinsure the same and all risks incidental to Mortgagee's possession, operation and management thereof; and (g) to receive all of such avails, Rents, issues and profits; Mortgagor hereby granting to Mortgagee full power and authority to exercise each and every of the rights, privileges and powers herein granted at any and all times hereafter, without notice to Mortgagor. Without limiting the generality of the foregoing provisions of this Section, Mortgagee shall also have all power, authority and duties as provided in Section 15-1703 of the Act.

(iv) Protective Advances. All advances, disbursements and expenditures (collectively "advances") made by Mortgagee or the Lenders before and during foreclosure, prior to sale, and where applicable, after sale, for the following purposes, including interest thereon at the Default Rate for Base Rate Principal, are hereinafter referred to as "Protective Advances" and shall constitute additional indebtedness hereunder and shall be secured by the lien hereof:

(A) any amount for restoration or rebuilding in excess of the actual or estimated proceeds of insurance or condemnation award for the purpose of such repair or replacement;

(B) advances in accordance with the terms of this Mortgage to: (i) protect, preserve or restore the Property; (ii) preserve the lien of this Mortgage or the priority thereof; or (iii) enforce this Mortgage, as referred to in Subsection (b)(5) of Section 15-1302 of the Act;

(C) payments of (i) when due installments of principal, interest or other obligations in accordance with the terms of any Prior Encumbrance (as hereinafter defined); (ii) when due installments of real estate taxes and other impositions; (iii) other obligations authorized by this Mortgage; or (iv) with court approval any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, all as referred to in Section 15-1505 of the Act;

(D) attorneys' fees and other costs incurred in connection with the foreclosure of this Mortgage as referred to in Sections 1504(d)(2) and 15-1510 of the Act and in connection with any other litigation or administrative proceeding to which the Mortgagee may be or become or be threatened or contemplated to be a party, including probate and bankruptcy proceedings, or in the preparation for the commencement or defense of any such suit or proceeding; including filing fees, appraisers' fees, outlays for documents and expert evidence, witness fees, stenographer's charges, publication costs, and costs (which may be estimated as to items to be expended after entry of judgment) of procuring all such abstracts of title, title charges and examinations, foreclosure minutes, title insurance policies, appraisals, and similar data and assurances with respect to title and value as Mortgagee may deem reasonably necessary either to prosecute or defend such suit or, in case of foreclosure, to evidence to bidders at any sale which may be had pursuant to the foreclosure judgment the true condition of the title to or the value of the Property;

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

# UNOFFICIAL COPY

(F) payment by Mortgagee of impositions as required of Mortgagor by this Mortgage;

(G) Mortgagee's advances of any amount required to make up a deficiency in deposits for installments of impositions, as may be required of Mortgagor under this Mortgage;

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

(I) expenses incurred and expenditures made by Mortgagee for any one or more of the following: (1) if any of the Property consists of an interest in a leasehold estate under a Lease or sublease, rentals or other payments required to be made by the lessee under the terms of the Lease or sublease; (2) premiums upon casualty and liability insurance made by Mortgagee whether or not Mortgagee or a receiver is in possession, if reasonably required, without regard to the limitation to maintaining of insurance in effect at the time any receiver or Mortgagee takes possession of the Property imposed by Subsection (c)(1) of Section 15-1704 of the Act, (3) payments required or deemed by Mortgagee to be for the benefit of the Property or required to be made by the owner of the Property under any grant or declaration of easement, easement agreement, reciprocal easement agreement, agreement with any adjoining land owners or other instruments creating covenants or restrictions for the benefit of or affecting the Property; (4) shared or common expense assessments payable to any association or corporation in which the owner of the premises is a member in any way affecting the Property; (5) operating deficits incurred by Mortgagee in possession or reimbursed by Mortgagee to any receiver; (6) fees and costs incurred to obtain an environmental assessment report relating to the Property; and (7) any monies expended in excess of the face amount of the Notes.

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

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

(A) determination of the amount of indebtedness secured by this Mortgage at any time;

(B) the indebtedness found due and owing to the Mortgagee in the judgment of foreclosure and any subsequent amendment of such judgment, supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after entry of such judgment, it being hereby agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;

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

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

# UNOFFICIAL COPY

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

All moneys paid for Protective Advances or any of the other purposes authorized in this Mortgage, the Loan Agreement or any other Loan Documents (including, without limitation, monies expended pursuant to Section 2.2 of this Mortgage and Section 4.2 of the Loan Agreement) and all expenses paid or incurred in connection therewith, including attorneys' fees, and any other moneys advanced by Mortgagee to protect the Property and the lien hereof, shall be so much additional indebtedness secured hereby, and shall become immediately due and payable without notice and with interest thereon at the Default Rate for Base Rate Principal. Inaction of Mortgagee shall never be considered as a waiver of any right accruing to it on account of any Default on the part of Mortgagor.

Should the proceeds of the Loan or any part thereof, or any amount paid out or advanced under the Loan Documents by Mortgagee or the Lenders, be used directly or indirectly to pay off, discharge or satisfy, in whole or in part, any senior mortgage (as described in Subsection (i) of Section 15-1505 of the Act) or any other lien or encumbrance upon the Property or any part thereof on a parity with or prior or superior to the lien hereof ("Prior Encumbrance"), then as additional security hereunder, Mortgagee shall be subrogated to any and all rights, equal or superior titles, liens and equities, owned or claimed by any owner or holder of said outstanding liens, charges and indebtedness, however remote, regardless of whether said liens, charges and indebtedness are acquired by assignment or have been released of record by the holder thereof upon payment.

(v) Waivers and Other Matters.

(A) Mortgagor acknowledges that the Property does not constitute agricultural real estate, as said term is defined in Section 15-1201 of the Act or residential real estate as defined in Section 15-1219 of the Act. To the extent permitted by applicable law, Mortgagor hereby waives any and all rights of reinstatement and redemption with respect to any foreclosure of this Mortgage on behalf of Mortgagor and on behalf of each and every person acquiring any interest in or title to the Property of any nature whatsoever, subsequent to the date of this Mortgage. The foregoing waiver of all rights to reinstatement and redemption is made pursuant to the provisions of Section 15-1601(b) of the Act.

(B) At all times, regardless of whether any Loan proceeds have been disbursed, this Mortgage secures (in addition to the amounts secured hereby) the payment of any and all Loan commissions, service charges, liquidated damages, expenses and advances due to or incurred by Mortgagee and the Lenders in connection with the Loan secured hereby; provided, however, that in no event shall the total amount secured hereby exceed Six Hundred Thirty Million Dollars (\$630,000,000).

(C) At the option of Mortgagee, this Mortgage shall become subject and subordinate, in whole or in part (but not with respect to priority of entitlement to insurance proceeds or any condemnation proceeds), to any and all Leases of all or any part of the Property upon the execution by Mortgagee and recording thereof, at any time hereafter in the appropriate official records of the County wherein the Property is situated, of a unilateral declaration to that effect.

# UNOFFICIAL COPY

(d) Uniform Commercial Code. Without limitation of Mortgagee's rights of enforcement with respect to the Collateral or any part thereof in accordance with the procedures for foreclosure of real estate, Mortgagee may exercise its rights of enforcement with respect to the Collateral or any part thereof under the Illinois Uniform Commercial Code, as in effect from time to time (or under the Uniform Commercial Code in force, from time to time, in any other state to the extent the same is applicable law) and in conjunction with, in addition to or in substitution for those rights and remedies: (1) Mortgagee may enter upon Mortgagor's premises to take possession of, assemble and collect the Collateral or, to the extent and for those items of the Collateral permitted under applicable law, to render it unusable; (2) Mortgagee may require Mortgagor to assemble the Collateral and make it available at a place Mortgagee designates which is mutually convenient to allow Mortgagee to take possession or dispose of the Collateral; (3) written notice mailed to Mortgagor as provided herein at least five (5) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; provided that, if Mortgagee fails to comply with this clause (3) in any respect, its liability for such failure shall be limited to the liability (if any) imposed on it as a matter of law under the Illinois Uniform Commercial Code, as in effect from time to time (or under the Uniform Commercial Code, in force from time to time, in any other state to the extent the same is applicable law); (4) in the event of a foreclosure sale, whether made by Mortgagee under the terms hereof, or under judgment of a court, the Collateral and the other Property may, at the option of Mortgagee, be sold as a whole; (5) it shall not be necessary that Mortgagee take possession of the Collateral or any part thereof prior to the time that any sale pursuant to the provisions of this Section is conducted and it shall not be necessary that the Collateral or any part thereof be present at the location of such sale; (6) with respect to application of proceeds from disposition of the Collateral under Section 5.2 hereof, the costs and expenses incident to disposition shall include the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and the reasonable attorneys' fees and legal expenses including, without limitation, the allocated costs for in-house legal services incurred by Mortgagee; (7) any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the Secured Indebtedness or as to the occurrence of any Default, or as to Mortgagee having declared all of such indebtedness to be due and payable, or as to notice of time, place and terms of sale and of the properties to be sold having been duly given, or as to any other act or thing having been duly done by Mortgagee, shall be taken as prima facie evidence of the truth of the facts so stated and recited; (8) Mortgagee may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Mortgagee, including the sending of notices and the conduct of the sale, but in the name and on behalf of Mortgagee; (9) Mortgagee may comply with any applicable state or federal law or regulatory requirements in connection with a disposition of the Collateral, and such compliance will not be considered to affect adversely the commercial reasonableness of any sale of the Collateral; (10) Mortgagee may sell the Collateral without giving any warranties as to the Collateral and specifically disclaim any warranties of title, merchantability, fitness for a specific purpose or the like and this procedure will not be considered to affect adversely the commercial reasonableness any sale of the Collateral; (11) Mortgagor acknowledges that a private sale of the Collateral may result in less proceeds than a public sale; and (12) Mortgagor acknowledges that the Collateral may be sold at a loss to Mortgagor, and that, in such event, Mortgagee shall have no liability or responsibility to Mortgagor for such loss.

(e) Lawsuits. Mortgagee may proceed by a suit or suits in equity or at law, whether for collection of the indebtedness secured hereby, the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for any foreclosure hereunder or for the sale of the Property under the judgment or decree of any court or courts of competent jurisdiction.



# UNOFFICIAL COPY

(f) Entry on Property. Mortgagee is authorized, prior or subsequent to the institution of any foreclosure proceedings, to the fullest extent permitted by applicable law, to enter upon the Property, or any part thereof, and to take possession of the Property and all books and records, and all recorded data of any kind or nature, regardless of the medium of recording including, without limitation, all software, writings, plans, specifications and schematics relating thereto, and to exercise without interference from Mortgagor any and all rights which Mortgagor has with respect to the management, possession, operation, protection or preservation of the Property. Mortgagee shall not be deemed to have taken possession of the Property or any part thereof except upon the exercise of its right to do so, and then only to the extent evidenced by its demand and overt act specifically for such purpose. All costs, expenses and liabilities of every character incurred by Mortgagee in managing, operating, maintaining, protecting or preserving the Property shall constitute a demand obligation of Mortgagor (which obligation Mortgagor hereby promises to pay) to Mortgagee pursuant to this Mortgage. If necessary to obtain the possession provided for above, Mortgagee may invoke any and all legal remedies to dispossess Mortgagor. In connection with any action taken by Mortgagee pursuant to this Section, Mortgagee shall not be liable for any loss sustained by Mortgagor resulting from any failure to let the Property or any part thereof, or from any act or omission of Mortgagee in managing the Property unless such loss is caused by the willful misconduct and bad faith of Mortgagee, nor shall Mortgagee be obligated to perform or discharge any obligation, duty or liability of Mortgagor arising under any Lease or other agreement relating to the Property or arising under any Permitted Encumbrance or otherwise arising. Mortgagor hereby assents to, ratifies and confirms any and all actions of Mortgagee with respect to the Property taken under this Section.

(g) Termination of Commitment to Lend. Mortgagee may terminate any commitment or obligation to lend or disburse funds under any Loan Document.

(h) Other Rights and Remedies. Mortgagee may exercise any and all other rights and remedies which Mortgagee may have under the Loan Documents, or at law or in equity or otherwise.

Section 5.2. Proceeds of Foreclosure. The proceeds of any foreclosure sale of the Property shall be distributed and applied in accordance with the provisions of Subsection (c) of Section 15-1512 of the Act. The judgment of foreclosure or order confirming the sale shall provide (after application pursuant to Subsections (a) and (b) of said Section 15-1512) for application of sale proceeds in the manner set forth in the Loan Agreement.

Section 5.3. Foreclosure as to Matured Debt. Upon the occurrence of a Default, Mortgagee shall have the right to proceed with foreclosure of the liens and security interests hereunder without declaring the entire Secured Indebtedness due, and in such event any such foreclosure sale may be made subject to the unmatured part of the Secured Indebtedness; and any such sale shall not in any manner affect the unmatured part of the Secured Indebtedness, but as to such unmatured part this Mortgage shall remain in full force and effect just as though no sale had been made. The proceeds of such sale shall be applied as provided in Section 5.2 hereof. Several sales may be made hereunder without exhausting the right of sale for any unmatured part of the Secured Indebtedness.

Section 5.4. Remedies Cumulative. All rights and remedies provided for herein and in any other Loan Document are cumulative of each other and of any and all other rights and remedies existing at law or in equity, and Mortgagee and the Lenders shall, in addition to the rights and remedies provided herein or in any other Loan Document, be entitled to avail themselves of all such other rights and remedies as may now or hereafter exist at law or in equity for the collection of the Secured Indebtedness and the enforcement of the covenants herein and the foreclosure of the liens and security interests

# UNOFFICIAL COPY

evidenced hereby, and the resort to any right or remedy provided for hereunder or under any such other Loan Document or provided for by law or in equity shall not prevent the concurrent or subsequent employment of any other appropriate right or rights or remedy or remedies.

Section 5.5. Discretion as to Security. Mortgagee may resort to any security given by this Mortgage or to any other security now existing or hereafter given to secure the payment of the Secured Indebtedness, in whole or in part, and in such portions and in such order as may seem best to Mortgagee in its sole and uncontrolled discretion, and any such action shall not in anywise be considered as a waiver of any of the rights, benefits, liens or security interests evidenced by this Mortgage.

Section 5.6. Mortgagor's Waiver of Certain Rights. To the full extent Mortgagor may do so, Mortgagor agrees that Mortgagor will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force providing for any appraisal, valuation, stay, extension or redemption, homestead, moratorium, reinstatement, marshaling or forbearance, and Mortgagor, for Mortgagor, Mortgagor's heirs, devisees, representatives, successors and assigns, and for any and all persons ever claiming any interest in the Property, to the extent permitted by applicable law, hereby waives and releases all rights of redemption, valuation, appraisal, stay of execution, notice of intention to mature or declare due the whole of the Secured Indebtedness, notice of election to mature or declare due the whole of the Secured Indebtedness and all rights to a marshaling of assets of Mortgagor, including the Property, or to a sale in inverse order of alienation in the event of foreclosure of the liens and/or security interests hereby created. Mortgagor shall not have or assert any right under any statute or rule of law pertaining to the marshaling of assets, sale in inverse order of alienation, the exemption of homestead, the administration of estates of decedents, or other matters whatsoever to defeat, reduce or affect the right of Mortgagee under the terms of this Mortgage to a sale of the Property for the collection of the Secured Indebtedness without any prior or different resort for collection, or the right of Mortgagee under the terms of this Mortgage to the payment of the Secured Indebtedness out of the proceeds of sale of the Property in preference to every other claimant whatsoever. Mortgagor waives any right or remedy which Mortgagor may have or be able to assert pursuant to any provision of Illinois law pertaining to the rights and remedies of sureties. If any law referred to in this Section and now in force, of which Mortgagor or Mortgagor's heirs, devisees, representatives, successors or assigns or any other persons claiming any interest in the Property might take advantage despite this Section, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this Section.

## ARTICLE 6

### Miscellaneous

Section 6.1. Scope of Mortgage. This Mortgage is a mortgage of both real and personal property, a security agreement, an assignment of rents and leases, a financing statement and fixture filing and a collateral assignment, and also covers proceeds and fixtures.

Section 6.2. Fixture Financing Statement. From the date of its recording, this Mortgage shall be effective as a fixture financing statement within the purview of Section 9-502(b) of the Uniform Commercial Code of the State of Illinois with respect to the Collateral and all replacements of such property, all substitutions for such property, additions to such property, and the proceeds thereof. The addresses of Mortgagor (Debtor) and Mortgagee (Secured Party) are set forth below. This Mortgage is to be filed for recording with the Recorder of Deeds of the county or the counties where the Property is located. For this purpose, the following information is set forth:

# UNOFFICIAL COPY

- (a) Name and Address of Debtor:

New Water Park LLC  
 c/o DRW Trading Group  
 540 West Madison Street  
 Chicago, Illinois 60661-2555

- (b) Name and Address of Secured Party:

Bank of America, N.A., as Administrative Agent  
 135 South LaSalle Street, 6<sup>th</sup> Floor  
 Chicago, Illinois 60603

- (c) This document covers goods which are or are to become fixtures.

- (d) Debtor is the record owner of the Property.

- (e) Debtor's chief executive office is located in the State of Illinois.

- (f) Debtor's state of formation is Delaware.

(g) Debtor's exact legal name is as set forth in the first paragraph of this Mortgage.

- (h) Debtor's organizational identification number is 4770082.

- (i) Debtor agrees that:

(i) Where Collateral is in possession of a third party, Mortgagor will join with Mortgagee in notifying the third party of Mortgagee's interest and obtaining an acknowledgment from the third party that it is holding such Collateral for the benefit of Mortgagee;

(ii) Mortgagor will cooperate with Mortgagee in obtaining control with respect to Collateral consisting of: deposit accounts, investment property, letter of credit rights and electronic chattel paper; and

(iii) Until the Secured Indebtedness is paid in full, Mortgagor will not change the state where it is located or change its company name without giving Mortgagee at least thirty (30) days prior written notice in each instance.

Section 6.3. Security Agreement and Financing Statement. This Mortgage constitutes a security agreement from Mortgagor to Mortgagee for the benefit of the Lenders and any Swap Counterparty under the Uniform Commercial Code of the State of Illinois. This Mortgage shall also be effective as a financing statement with respect to any other Property as to which a security interest may be perfected by the filing of a financing statement and may be filed as such in any appropriate filing or recording office. The respective mailing addresses of Mortgagor and Mortgagee are set forth in the opening paragraph of this Mortgage. A carbon, photographic or other reproduction of this Mortgage or any other financing statement relating to this Mortgage shall be sufficient as a financing statement for any of the purposes referred to in this Section. Mortgagor hereby irrevocably authorizes Mortgagee at

# UNOFFICIAL COPY

any time and from time to time to file any initial financing statements, amendments thereto and continuation statements as authorized by applicable Law, reasonably required by Mortgagee to establish or maintain the validity, perfection and priority of the security interests granted in this Mortgage. The foregoing authorization includes Mortgagor's irrevocable authorization for Mortgagee at any time and from time to time to file any initial financing statements and amendments thereto that indicate the Accessories (a) as "all assets" of Mortgagor or words of similar effect, regardless of whether any particular asset comprised in the Accessories falls within the scope of the Uniform Commercial Code of the State of Illinois or the jurisdiction where the initial financing statement or amendment is filed, or (b) as being of an equal or lesser scope or with greater detail.

Section 6.4. Notice to Account Debtors. In addition to the rights granted elsewhere in this Mortgage, Mortgagee may at any time notify the account debtors or obligors of any accounts, chattel paper, general intangibles, negotiable instruments or other evidences of indebtedness included in the Collateral to pay Mortgagee directly.

Section 6.5. Waiver by Mortgagee. Mortgagee may at any time and from time to time by a specific writing intended for the purpose: (a) waive compliance by Mortgagor with any covenant herein made by Mortgagor to the extent and in the manner specified in such writing; (b) consent to Mortgagor's doing any act which hereunder Mortgagor is prohibited from doing, or to Mortgagor's failing to do any act which hereunder Mortgagor is required to do, to the extent and in the manner specified in such writing; (c) release any part of the Property or any interest therein from the lien and security interest of this Mortgage, or (d) release any party liable, either directly or indirectly, for the Secured Indebtedness or for any covenant herein or in any other Loan Document, without impairing or releasing the liability of any other party. No such act shall in any way affect the rights or powers of Mortgagee hereunder except to the extent specifically agreed to by Mortgagee in such writing.

Section 6.6. No Impairment of Security. The lien, security interest and other security rights of Mortgagee hereunder or under any other Loan Document shall not be impaired by any indulgence, moratorium or release granted by Mortgagee including, but not limited to, any renewal, extension or modification which Mortgagee may grant with respect to any Secured Indebtedness, or any surrender, compromise, release, renewal, extension, exchange or substitution which Mortgagee may grant in respect of the Property, or any part thereof or any interest therein, or any release or indulgence granted to any endorser, guarantor or surety of any Secured Indebtedness. The taking of additional security by Mortgagee shall not release or impair the lien, security interest or other security rights of Mortgagee hereunder or affect the liability of Mortgagor or of any endorser, guarantor or surety, or improve the right of any junior lienholder in the Property (without implying hereby Mortgagee's consent to any junior lien).

Section 6.7. Acts Not Constituting Waiver by Mortgagee. Mortgagee may waive any Default without waiving any other prior or subsequent Default. Mortgagee may remedy any Default without waiving the Default remedied. Neither failure by Mortgagee to exercise, nor delay by Mortgagee in exercising, nor discontinuance of the exercise of any right, power or remedy (including but not limited to the right to accelerate the maturity of the Secured Indebtedness or any part thereof) upon or after any Default shall be construed as a waiver of such Default or as a waiver of the right to exercise any such right, power or remedy at a later date. No single or partial exercise by Mortgagee of any right, power or remedy hereunder shall exhaust the same or shall preclude any other or further exercise thereof, and every such right, power or remedy hereunder may be exercised at any time and from time to time. No modification or waiver of any provision hereof nor consent to any departure by Mortgagor therefrom shall in any event be effective unless the same shall be in writing and signed by Mortgagee and then such waiver or consent shall be effective only in the specific instance, for the purpose for which given and to

# UNOFFICIAL COPY

the extent therein specified. No notice to nor demand on Mortgagor in any case shall of itself entitle Mortgagor to any other or further notice or demand in similar or other circumstances. Remittances in payment of any part of the Secured Indebtedness other than in the required amount in immediately available U.S. funds shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Mortgagee in immediately available U.S. funds and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Mortgagee of any payment in an amount less than the amount then due on any Secured Indebtedness shall be deemed an acceptance on account only and shall not in any way excuse the existence of a Default hereunder notwithstanding any notation on or accompanying such partial payment to the contrary.

Section 6.8. Mortgagor's Successors. If the ownership of the Property or any part thereof becomes vested in a person other than Mortgagor, Mortgagee may, without notice to Mortgagor, deal with such successor or successors in interest with reference to this Mortgage and to the Secured Indebtedness hereby in the same manner as with Mortgagor, without in any way vitiating or discharging Mortgagor's liability hereunder or for the payment of the indebtedness or performance of the obligations secured hereby. No transfer of the Property, no forbearance on the part of Mortgagee, and no extension of the time for the payment of the Secured Indebtedness hereby given by Mortgagee shall operate to release, discharge, modify, change or affect, in whole or in part, the liability of Mortgagor hereunder for the payment of the indebtedness or performance of the obligations secured hereby or the liability of any other person hereunder for the payment of the indebtedness secured hereby. Each Mortgagor agrees that it shall be bound by any modification of this Mortgage or any of the other Loan Documents made by Mortgagee and any subsequent owner of the Property, with or without notice to such Mortgagor, and no such modifications shall impair the obligations of such Mortgagor under this Mortgage or any other Loan Document. Nothing in this Section or elsewhere in this Mortgage shall be construed to imply Mortgagee's consent to any transfer of the Property.

Section 6.9. Place of Payment; Forum; Waiver of Jury Trial. All Secured Indebtedness which may be owing hereunder at any time by Mortgagor shall be payable at the place designated in the Loan Agreement or the applicable Swap Contract. Mortgagor hereby irrevocably submits generally and unconditionally for itself and in respect of its property to the non-exclusive jurisdiction of any Illinois state court, or any United States federal court, sitting in Cook County, Illinois is payable, over any suit, action or proceeding arising out of or relating to this Mortgage or the Secured Indebtedness. Mortgagor hereby irrevocably waives, to the fullest extent permitted by law, any objection that Mortgagor may now or hereafter have to the laying of venue in any such court and any claim that any such court is an inconvenient forum. Nothing herein shall affect the right of Mortgagee to serve process in any manner permitted by law or limit the right of Mortgagee to bring proceedings against Mortgagor in any other court or jurisdiction. **TO THE FULLEST EXTENT PERMITTED BY LAW, MORTGAGOR WAIVES THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY ACTION, SUIT OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT.**

Section 6.10. Subrogation to Existing Liens. To the extent that proceeds of the Loan are used to pay indebtedness secured by any outstanding lien, security interest, charge or prior encumbrance against the Property, such proceeds have been advanced by Mortgagee at Mortgagor's request, and Mortgagee shall be subrogated to any and all rights, security interests and liens owned by any owner or holder of such outstanding liens, security interests, charges or encumbrances, however remote, irrespective of whether said liens, security interests, charges or encumbrances are released, and all of the same are recognized as valid and subsisting and are renewed and continued and merged herein to secure the Secured Indebtedness, but the terms and provisions of this Mortgage shall govern and control the

# UNOFFICIAL COPY

manner and terms of enforcement of the liens, security interests, charges and encumbrances to which Mortgagee is subrogated hereunder. It is expressly understood that, in consideration of the payment of such indebtedness by Mortgagee, Mortgagor hereby waives and releases all demands and causes of action for offsets and payments in connection with the said indebtedness.

Section 6.11. Application of Payments to Certain Indebtedness. If any part of the Secured Indebtedness cannot be lawfully secured by this Mortgage or if any part of the Property cannot be lawfully subject to the lien and security interest hereof to the full extent of such indebtedness, then all payments made shall be applied on said indebtedness first in discharge of that portion thereof which is not secured by this Mortgage.

Section 6.12. Nature of Loan. The Loan is being made solely for the purpose of carrying on or acquiring a business or commercial enterprise.

Section 6.13. Release of Mortgage. If all of the Secured Indebtedness shall be paid as the same becomes due and payable and all of the covenants, warranties, undertakings and agreements made in this Mortgage are kept and performed, and all Swap Contracts and all other obligations, if any, of Mortgagee and the Lenders for further advances have been terminated, then, and in that event only, all rights under this Mortgage shall terminate (except to the extent expressly provided herein with respect to indemnifications, representations and warranties and other rights which are to continue following the release hereof) and the Property shall become wholly clear of the liens, security interests, conveyances and assignments evidenced hereby, and such liens and security interests shall be released by Mortgagee in due form at Mortgagor's cost. Without limitation, all provisions herein for indemnity of Mortgagee, the Lenders and any Swap Counterparty shall survive discharge of the Secured Indebtedness, the termination of any and all Swap Contracts and any foreclosure, release or termination of this Mortgage.

Section 6.14. Notices. All notices, requests, consents, demands and other communications required or which any party desires to give hereunder shall be given and deemed delivered in the manner set forth in the Loan Agreement.

Section 6.15. Invalidity of Certain Provisions. A determination that any provision of this Mortgage is unenforceable or invalid shall not affect the enforceability or validity of any other provision and the determination that the application of any provision of this Mortgage to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to other persons or circumstances.

Section 6.16. Gender; Titles; Construction. Within this Mortgage, words of any gender shall be held and construed to include any other gender, and words in the singular number shall be held and construed to include the plural, unless the context otherwise requires. Titles appearing at the beginning of any subdivisions hereof are for convenience only, do not constitute any part of such subdivisions, and shall be disregarded in construing the language contained in such subdivisions. The use of the words "herein," "hereof," "hereunder" and other similar compounds of the word "here" shall refer to this entire Mortgage and not to any particular Article, Section, paragraph or provision. The term "person" and words importing persons as used in this Mortgage shall include firms, associations, partnerships (including limited partnerships), joint ventures, trusts, corporations, limited liability companies and other legal entities, including public or governmental bodies, agencies or instrumentalities, as well as natural persons.

Section 6.17. Reporting Compliance. Mortgagor agrees to comply with any and all reporting requirements applicable to the Loan which are set forth in any law, statute, ordinance, rule, regulation,

# UNOFFICIAL COPY

order or determination of any governmental authority, including but not limited to The International Investment Survey Act of 1976, The Agricultural Foreign Investment Disclosure Act of 1978, The Foreign Investment in Real Property Tax Act of 1980 and the Tax Reform Act of 1986 and further agrees upon request of Mortgagee to furnish Mortgagee with evidence of such compliance.

Section 6.18. Mortgagee's Consent. Except where otherwise expressly provided herein, in any instance hereunder where the approval, consent or the exercise of judgment of Mortgagee is required or requested, (a) the granting or denial of such approval or consent and the exercise of such judgment shall be within the sole discretion of Mortgagee, and Mortgagee shall not, for any reason or to any extent, be required to grant such approval or consent or exercise such judgment in any particular manner, regardless of the reasonableness of either the request or Mortgagee's judgment, and (b) no approval or consent of Mortgagee shall be deemed to have been given except by a specific writing intended for the purpose and executed by an authorized representative of Mortgagee.

Section 6.19. [Intentionally Omitted].

Section 6.20. Execution; Recording. This Mortgage has been executed in several counterparts, all of which are identical, and all of which counterparts together shall constitute one and the same instrument. The date or dates reflected in the acknowledgments hereto indicate the date or dates of actual execution of this Mortgage, but such execution is as of the date shown on the first page hereof, and for purposes of identification and reference the date of this Mortgage shall be deemed to be the date reflected on the first page hereof. Mortgagor will cause this Mortgage and all amendments and supplements thereto and substitutions therefor and all financing statements and continuation statements relating thereto to be recorded, filed, re-recorded and refiled in such manner and in such places as Mortgagee shall reasonably request and will pay all such recording, filing, re-recording and re-filing taxes, fees and other charges.

Section 6.21. Successors and Assigns. The terms, provisions, covenants and conditions hereof shall be binding upon Mortgagor, and the heirs, devisees, representatives, successors and assigns of Mortgagor, and shall inure to the benefit of Mortgagee and shall constitute covenants running with the Land. All references in this Mortgage to Mortgagor shall be deemed to include all such heirs, devisees, representatives, successors and assigns of Mortgagor.

Section 6.22. Modification or Termination. The Loan Documents may only be modified or terminated by a written instrument or instruments intended for that purpose and executed by the party against which enforcement of the modification or termination is asserted. Any alleged modification or termination which is not so documented shall not be effective as to any party.

Section 6.23. No Partnership, Etc. The relationship between Mortgagee and the Lenders, on one hand, and Mortgagor, on the other, is solely that of lender and borrower. Neither Mortgagee nor any Lender has any fiduciary or other special relationship with Mortgagor. Nothing contained in the Loan Documents is intended to create any partnership, joint venture, association or special relationship between Mortgagor and Mortgagee and the Lenders or in any way make Mortgagee and the Lenders co-principals with Mortgagor with reference to the Property. All agreed contractual duties between Mortgagee and the Lenders and Mortgagor are set forth herein and in the other Loan Documents and any additional implied covenants or duties are hereby disclaimed. Any inferences to the contrary of any of the foregoing are hereby expressly negated.

Section 6.24. Applicable Law. THIS MORTGAGE, AND ITS VALIDITY, ENFORCEMENT AND INTERPRETATION, SHALL BE GOVERNED BY AND CONSTRUED, INTERPRETED AND

# UNOFFICIAL COPY

ENFORCED IN ACCORDANCE WITH AND PURSUANT TO THE LAWS OF THE STATE OF ILLINOIS (WITHOUT REGARD TO ANY CONFLICT OF LAWS PRINCIPLES) AND APPLICABLE UNITED STATES FEDERAL LAW, EXCEPT AS OTHERWISE REQUIRED BY MANDATORY PROVISIONS OF LAW AND EXCEPT TO THE EXTENT THAT REMEDIES PROVIDED BY THE LAWS OF ANY JURISDICTION OTHER THAN THE STATE OF ILLINOIS ARE GOVERNED BY THE LAWS OF SUCH OTHER JURISDICTION.

Section 6.25. Use of Proceeds. Mortgagor represents and warrants to Mortgagee (a) that the proceeds of the Loan will be used for the purposes specified in 815 ILCS 205/4(1)(c) (or any substitute, amended or replacement statute), and that the Secured Indebtedness constitutes a business loan which comes within the purview of said 815 ILCS 205/4(1)(c), and (b) that the Loan is an exempted transaction under the Truth in Lending Act, 15 U.S.C. §1601 et seq.

Section 6.26. Future Advances and Other Amounts Secured; Maximum Indebtedness. Mortgagor acknowledges and agrees that this Mortgage secures the entire principal amount of the Loan and interest accrued thereon, regardless of whether any or all of the Loan proceeds are disbursed on or after the date hereof, and regardless of whether the outstanding principal is repaid in whole or part or are future advances made at a later date, any and all litigation and other expenses and any other amounts as provided herein or in any of the other Loan Documents, including, without limitation, the payment of any and all loan commissions, service charges, liquidated damages, expenses and advances due to or paid or incurred by Mortgagee and the Lenders in connection with the Loan, all in accordance with the loan commitment issued in connection with this transaction and the Loan Documents. Under no circumstances, however, shall the total indebtedness secured hereby exceed Six Hundred Thirty Million Dollars (\$630,000,000). It is agreed that any future advances made by Mortgagee and the Lenders for the benefit of Mortgagor from time to time under this Mortgage or the other Loan Documents and whether or not such advances are obligatory or are made at the option of Mortgagee, made at any time from and after the date of this Mortgage, and all interest accruing thereon shall be equally secured by this Mortgage and shall have the same priority as all amounts, if any, advanced as of the date hereof and shall be subject to all of the terms and provisions of this Mortgage. This Mortgage shall be valid and have priority to the extent of the full amount of the Secured Indebtedness over all subsequent liens and encumbrances, including statutory liens, excepting solely taxes and assessments levied on the Property given priority by law.

Section 6.27. Interest Rate; Maturity Date. The Loan bears interest at variable rates as more particularly described in Exhibit C attached hereto and made a part hereof. The Loan has an initial maturity date of December 13, 2015, subject to two one year extension options on the terms and conditions set forth in the Loan Agreement.

Section 6.28. Deed in Trust. If title to the Property or any part thereof is now or hereafter becomes vested in a trustee, any prohibition or restriction contained herein against the creation of any lien on the Property shall be construed as a similar prohibition or restriction against the creation of any lien on or security interest in the beneficial interest of such trust.

Section 6.29. Collateral Protection Act. Unless Mortgagor provides Mortgagee with evidence of the insurance required by this Mortgage or any other Loan Document, Mortgagee may purchase insurance at Mortgagor's expense to protect Mortgagee's interest in the Property or any other collateral for the Secured Indebtedness. This insurance may, but need not, protect Mortgagor's interests. The coverage Mortgagee purchases may not pay any claim that Mortgagor makes or any claim that is made against Mortgagor in connection with the Property or any other collateral for the Secured Indebtedness. Mortgagor may later cancel any insurance purchased by Mortgagee, but only after providing Mortgagee



# UNOFFICIAL COPY

with evidence that Mortgagor has obtained insurance as required under this Mortgage or any other Loan Document. If Mortgagee purchases insurance for the Property or any other collateral for the Secured Indebtedness, Mortgagor shall be responsible for the costs of that insurance, including interest in any other charges that Mortgagee may lawfully impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the Secured Indebtedness. The costs of the insurance may be more than the cost of insurance that Mortgagor may be able to obtain on its own. For purposes of the Illinois Collateral Protection Act, 815 ILCS 180/1 et seq., Mortgagor hereby acknowledges Mortgagee's right pursuant to this Section to obtain collateral protection insurance.

Section 6.30. Forbidden Entity. Mortgagor hereby certifies that it is not a "forbidden entity" as that term is defined in Section 22.6 of the Illinois Deposit of State Moneys Act, 15 ILCS 520/22.6; Public Act 094-0079.

Section 6.31. Rights of Tenants. Mortgagee shall have the right and option to commence a civil action to foreclose this Mortgage and to obtain a decree of foreclosure and sale subject to the rights of any tenant or tenants of the Premises having an interest in the Premises prior to that of Mortgagee. The failure to join any such tenant or tenants of the Premises as party defendant or defendants in any such civil action or the failure of any decree of foreclosure and sale to foreclose their rights shall not be asserted by Mortgagor as a defense in any civil action instituted to collect the Secured Indebtedness, or any part thereof or any deficiency remaining unpaid after foreclosure and sale of the Premises, any statute or rule of law at any time existing to the contrary notwithstanding.

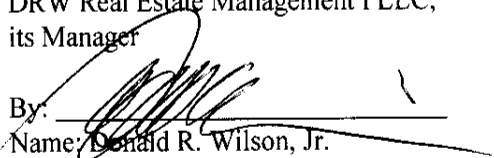
Section 6.32. Construction Mortgage. The Notes evidence a debt created by one or more disbursements to be made by Mortgagee and the Lenders to Mortgagor to finance the cost of the construction of certain improvements upon the Premises in accordance with the provisions of the Loan Agreement, and this Mortgage is a construction mortgage as such term is defined in Section 9-334(h) of the Uniform Commercial Code. The terms and conditions recited and set forth in the Loan Agreement are fully incorporated in this Mortgage and made a part hereof. Upon the occurrence of any Default, Mortgagee may at its option declare the Indebtedness immediately due and payable, or complete the construction of said improvements and enter into the necessary contracts therefore, in which case all money expended shall be so much additional indebtedness secured hereby and any money expended in excess of the amount of the original principal shall be immediately due and payable with interest until paid at the Default Rate for Base Rate Principal. In the event of a conflict between the terms of the Loan Agreement and this Mortgage, the provisions of the Loan Agreement shall apply and take precedence over this Mortgage. All future advances shall be made within twenty (20) years of the date hereof.

# UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has executed this instrument as of the date first written on page 1 hereof.

NEW WATER PARK LLC, a Delaware  
limited liability company

By: DRW Real Estate Management I LLC,  
its Manager

By:   
Name: Donald R. Wilson, Jr.  
Title: Manager

State of Illinois )  
County of McLean )

I, Melissa Eades, a notary public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Donald R. Wilson, Jr., the Manager of DRW Real Estate Management I LLC, as the Manager of New Water Park LLC, 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 in his capacity as said Manager as his free and voluntary act, and as the free and voluntary act of New Water Park LLC, for the uses and purposes therein set forth.

Given under my hand and official seal, this 5 day of December, 2012.

Melissa Eades  
Notary Public

My commission expires: 8/7/2016



# UNOFFICIAL COPY

## EXHIBIT A

### LAND

#### [Legal Description]

Real property in the City of Chicago, County of Cook, State of Illinois, described as follows:

Parcel 1:

That part of Lots 1 and 2 in Block 8 in Cityfront Center, being a resubdivision in the North Fraction of Section 10, Township 39 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois, according to the plat thereof recorded on February 24, 1987 as Document 87106320, bounded and described as follows: Beginning at a point on the East line of Block 8 (said East line being also the West line of North New Street) which is 175.00 feet, as measured along said East line, South of the North line of said Block 8 and running thence southwardly along said East line of Block 8, a distance of 115.00 feet; thence westwardly along a line parallel with the North line of Block 8, a distance of 215.00 feet to an intersection with the West line of said Lots 1 and 2; thence northwardly along said West line of Lots 1 and 2, a distance of 115.00 feet, thence eastwardly along a line parallel with said North line of Block 8, a distance of 215.00 feet to the point of beginning.

Parcel 2:

That part of Lot 2 in Block 8 of Cityfront Center, being a resubdivision in the North Fraction of Section 10, Township 39 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois, according to the plat thereof recorded on February 24, 1987 as Document 87106320, bounded and described as follows: Beginning at a point at the East line of Block 8 (said East line being also the West line of North New Street) which is 290.00 feet, as measured along said East line, South of the North line of said Block 8 and running thence southwardly along said East line of Block 8, a distance of 38.25 feet; thence westwardly along a line parallel with the North line of Block 8, a distance of 215.00 feet to an intersection with the West line of said Lot 2; thence northwardly along said West line of Lot 2, a distance of 38.25 feet; thence eastwardly along a line parallel with said North line of Block 8, a distance of 215.00 feet to the point of beginning.

Parcel 3:

The part of Lot 1 in Block 8 in Cityfront Center, being a resubdivision in the North Fraction of Section 10, Township 39 North, Range 14, East of the Third Principal Meridian in Cook County, Illinois, according to the plat thereof recorded on February 24, 1987 as Document 87106320, bounded and described as follows: Beginning at a point on the East line of Block 8 (said East line being also the West line of North New Street) which is 160.00 feet, as measured along said East line, South of the North line of said Block 8 and running thence southwardly along said East line of Block 8, a distance of 15.00 feet; thence westwardly along a line parallel with the North line of Block 8, a distance of 215.00 feet to an intersection with the West line of said Lot 1; thence northwardly along said West line of Lot 1, a distance of 15.00 feet; thence eastwardly along a line parallel with said North line of Block 8, a distance of 215.00 feet to the point of beginning.

# UNOFFICIAL COPY

Parcel 4:

Lot 2 in Block 8 (Except the North 91.75 feet thereof) in Cityfront Center, being a resubdivision of the North Fraction of Section 10, Township 39 North, Range 14 East of the Third Principal Meridian, according to the plat thereof recorded February 24, 1987 as Document 87106320 in Cook County, Illinois.

THE ABOVE DESCRIBED PARCELS 1 THROUGH 4, INCLUSIVE, MAY ALSO BE DESCRIBED AS FOLLOWS:

Lot 1 (except the North 160.00 feet thereof) and Lot 2 in Block 8 in Cityfront Center, being a resubdivision of the North Fraction of Section 10, Township 39 North, Range 14 East of the Third Principal Meridian, according to the plat thereof recorded February 24, 1987 as Document 87106320 in Cook County, Illinois.

Common Address: 455 North Park Drive, Chicago, Illinois

P.I.N.: 17-10-219-019-0000 Vol. 501  
17-10-219-020-0000 Vol. 501  
17-10-219-018-0000 Vol. 501  
17-10-219-021-0000 Vol. 501

# UNOFFICIAL COPY

## EXHIBIT B PERMITTED ENCUMBRANCES

1. General real estate taxes for the year 2012 and subsequent years which are not yet due and payable.

Permanent Index Numbers:

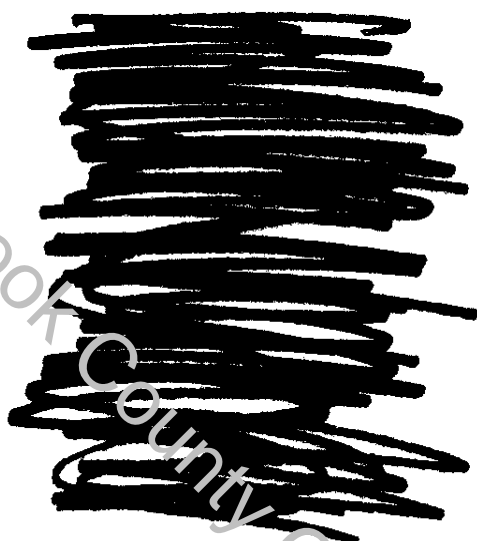
17-10-219019-0000 Vol. 501 (Affects Parcel 1)  
 17-10-219-020-0000 Vol. 501 (Affects Parcel 2)  
 17-10-219-018-0000 Vol. 501 (Affects Parcel 3 and other property)  
 17-10-219-021-0000 Vol. 501 (Affects Parcel 4)

2. Memorandum of Agreement dated May 29, 2008 by and between TFC Park Street LLC and Cityfront Hotel Associates Limited Partnership recorded June 2, 2008 as document 0815435227; as amended by First Amendment to Memorandum dated \_\_\_\_\_ and recorded \_\_\_\_\_ as document \_\_\_\_\_ made by and between Cityfront Hotel Associates Limited Partnership and New Water Park, LLC.
3. Covenants, conditions and restrictions contained in Declaration of Protective Covenants, Conditions and Restrictions for Cityfront Center East, Chicago, Illinois, dated as of August 31, 1989 and recorded August 31, 1989 as Document 89410218, as amended by First Amendment to Declaration of Protective Covenants, Conditions and Restrictions for Cityfront Center East, Chicago, Illinois, dated December 18, 1989 and recorded December 20, 1989 as document 89608952.
4. Terms, conditions and provisions of a certain Mutual Grant of Easements dated December 18, 1986 and recorded February 14, 1987 as document 87106321 made by and between the Chicago Dock and Canal Trust, the Equitable Life Insurance Society of the United States and the City of Chicago to the extent such portions are located on the Land, in accordance with the Ordinance recorded as document 87106319, as further descended by reference to Exception (13) on page 1 of 4 of Survey No. N-128906 dated July 27, 2012 by National Survey Service, Inc.
5. Terms, conditions and provisions of an Agreement Regarding Development Rights dated April 18, 1997 and recorded April 18, 1997 as document 97272956 by and between the Chicago Dock and Canal Trust and the Hotel Land Company, L.L.C.
6. Restrictive Covenant Agreement made by and between TFC Park Street LLC (Fordham) and 319 E. Illinois Street, LLC (Hanover) recorded July 16, 2007 as document 0719733072.
7. Mutual Consent and Agreement dated July 6, 2012 and recorded July 9, 2012 as document 1219144071 made by and between 465 N. Park Drive, LLC and New Water Park, LLC, and the terms and provision contained therein.

# UNOFFICIAL COPY

8. Terms and obligations of grantee under Temporary Construction Easement dated August 3, 2012 and recorded August 14, 2012 as document 1222734076 made by and between 465 N. Park Drive, LLC and New Water Park LLC; as amended and restated by Amended and Restated Temporary Construction Easement dated December 7, 2012 and recorded \_\_\_\_\_ as document \_\_\_\_\_.

Property of Cook County Clerk's Office



# UNOFFICIAL COPY

## EXHIBIT C

### INTEREST PROVISIONS

1.1 Interest Rates. The Principal Debt from day to day outstanding which is not past due shall bear interest at a rate per annum equal to the following (computed as provided in Section 1.1.3 below) as applicable:

- (a) On Base Rate Principal, on any day, the Base Rate; and
- (b) On LIBOR Rate Principal, for the applicable Interest Period, the applicable LIBOR Rate.

1.1.1 Interest Rate Elections.

(a) Subject to the conditions and limitations in this Exhibit C, Mortgagor may by written notice to Mortgagee in the form specified by Mortgagee (a “Rate Election Notice”):

- (i) Elect, for a new advance of funds, that such Principal Debt will be Base Rate Principal, LIBOR Rate Principal or a combination thereof;
- (ii) Elect to convert, on a LIBOR Business Day, all or part of Base Rate Principal into LIBOR Rate Principal;
- (iii) Elect to convert, on the last day of the Interest Period applicable thereto, all or part of any LIBOR Rate Principal into Base Rate Principal; or
- (iv) Elect to continue, commencing on the last day of the Interest Period applicable thereto, any LIBOR Rate Principal.

If, for any reason, an effective election is not made in accordance with the terms and conditions hereof for any principal advance or for any LIBOR Rate Principal for which the corresponding Interest Period is expiring, or to convert Base Rate Principal to LIBOR Rate Principal, then the sums in question will be Base Rate Principal until an effective LIBOR Rate Election is thereafter made for such sums.

(b) Each Rate Election Notice must be received by Mortgagee not later than 10:00 a.m., Administrative Agent’s Time on the applicable date as follows:

- (i) With respect to an advance of or conversion to Base Rate Principal, one (1) Business Day prior to the proposed date of advance or conversion; and
- (ii) With respect to an advance of, conversion to or continuation of LIBOR Rate Principal, three (3) LIBOR Business Days prior to the proposed date of advance, conversion or continuation.

Unless otherwise specified herein, no conversion from LIBOR Rate Principal may be made other than at the end of the corresponding Interest Period. Each Rate Election Notice shall stipulate: (A) the amount of the advance or of the Principal Debt to be converted or continued; (B) the nature of the proposed advance, conversion or continuation, which shall be either Base Rate Principal, LIBOR Rate Principal or a combination thereof, and in the case of a conversion or continuation, the nature of the Principal Debt to be

# UNOFFICIAL COPY

converted or continued; and (C) in the case of LIBOR Rate Principal, the proposed commencement date and duration of the Interest Period. All such notices shall be irrevocable once given, and shall be deemed to have been given only when actually received by Mortgagee in writing in form specified by Mortgagee.

(c) Mortgagee shall promptly notify Mortgagor and Lenders of the interest rate applicable to each portion of the Principal Debt other than a Base Rate Principal upon determination of same.

1.1.2 General Conditions Precedent to LIBOR Rate Election. In addition to any other conditions herein, a LIBOR Rate Election shall not be permitted if:

(a) A Default has occurred and has not been waived by Mortgagee or a Potential Default has occurred and is continuing; or

(b) After giving effect to the requested LIBOR Rate Election, the sum of all LIBOR Rate Principal plus all Base Rate Principal would exceed the combined Commitments; or

(c) The requested LIBOR Rate Election would cause more than five (5) LIBOR Rate Elections by Mortgagor to be in effect at any one time; or

(d) The amount of LIBOR Rate Principal requested in the LIBOR Rate Election is other than \$1,000,000 or a larger integral multiple of \$100,000; or

(e) The requested interest period does not conform to the definition of Interest Period herein; or

(f) Any of the circumstances referred to in Section 1.1.4 or 1.1.5 below shall apply with respect to the requested LIBOR Rate Election or the requested LIBOR Rate Principal.

1.1.3 Computations and Determinations. All interest shall be computed on the basis of a year of 360 days and paid for the actual number of days elapsed (including the first day but excluding the last day). Mortgagee shall determine each interest rate applicable to the Principal Debt in accordance with this Exhibit C and its determination thereof shall be conclusive in the absence of manifest error. The books and records of Mortgagee shall be prima facie evidence of all sums owing to Lenders from time to time under the Loan, but the failure to record any such information shall not limit or affect the obligations of Mortgagor under the Loan Documents.

1.1.4 Illegality. If any Lender determines that any Law has made it unlawful, or that any Governmental Authority has asserted that it is unlawful, for any Lender or its Lending Office to make, maintain or fund advances whose interest is determined by reference to the London Interbank Offered Rate, or to determine or charge interest rates based upon the London Interbank Offered Rate, or any Governmental Authority has imposed material restrictions on the authority of such Lender to purchase or sell, or to take deposits of, U.S. Dollars in the London interbank eurodollar market, then, on notice thereof by such Lender to Mortgagor through Mortgagee, (a) any obligation of such Lender to make or continue LIBOR Rate Advances or to convert Base Rate Principal to LIBOR Rate Principal shall be suspended, and (b) if such notice asserts the illegality of such Lender making or maintaining Base Rate Advances the interest rate on which is determined by reference to the LIBOR Daily Floating Rate component of the Base Rate, the interest rate on which Base Rate Advances of such Lender shall, if necessary to avoid such illegality, be determined by Mortgagee without reference to the LIBOR Daily Floating Rate component of the Base Rate, in each case until such Lender notifies Mortgagee and Mortgagor that the circumstances giving rise to such determination no longer exist. Upon receipt of such



# UNOFFICIAL COPY

notice, (x) Mortgagor shall, upon demand from such Lender (with a copy to Mortgagee), prepay or, if applicable, convert all LIBOR Rate Principal of such Lender to Base Rate Principal (the interest rate on which Base Rate Principal of such Lender shall, if necessary to avoid such illegality, be determined by Mortgagee without reference to the LIBOR Daily Floating Rate component of the Base Rate), either on the last day of the Interest Period therefor, if such Lender may lawfully continue to maintain such LIBOR Rate Principal to such day, or immediately, if such Lender may not lawfully continue to maintain such LIBOR Rate Principal and (y) if such notice asserts the illegality of such Lender determining or charging interest rates based upon the LIBOR Daily Floating Rate, Mortgagee shall during the period of such suspension compute the Base Rate applicable to such Lender without reference to the LIBOR Daily Floating Rate component thereof until Mortgagee is advised in writing by such Lender that it is no longer illegal for such Lender to determine or charge interest rates based upon the LIBOR Daily Floating Rate.

1.1.5 Inability to Determine Rates. If Required Lenders determine that for any reason in connection with any LIBOR Rate Election or a conversion to or continuation of any LIBOR Rate Principal that (a) U.S. Dollar deposits are not being offered to banks in the London interbank eurodollar market for the applicable amount and Interest Period of such LIBOR Rate Election or LIBOR Rate Principal, (b) adequate and reasonable means do not exist for determining the London Interbank Offered Rate for any requested Interest Period with respect to a proposed LIBOR Rate Advance or the LIBOR Daily Floating Rate in connection with any existing or proposed Base Rate Principal, or (c) the LIBOR Rate for any LIBOR Rate Election will not adequately and fairly reflect the cost to Lenders of funding such LIBOR Rate Advance, Mortgagee will promptly so notify Mortgagor and each Lender. Thereafter, (x) the obligation of Lenders to make or maintain LIBOR Rate Advances shall be suspended, and (y) in the event of a determination described in the preceding sentence with respect to the LIBOR Daily Floating Rate component of the Base Rate, the utilization of the LIBOR Daily Floating Rate component in determining the Base Rate shall be suspended, in each case until Mortgagee (upon the instruction of Required Lenders) revokes such notice. Upon receipt of such notice, Mortgagor may revoke any pending LIBOR Rate Election for a borrowing of, conversion to or continuation of LIBOR Rate Principal or, failing that, will be deemed to have converted such LIBOR Rate Election into a request for a Base Rate Advance in the amount specified therein.

1.1.6 Increased Costs.

(a) If any Change in Law shall:

(i) impose, modify or deem applicable any reserve, special deposit, compulsory loan, insurance charge or similar requirement against assets of, deposits with or for the account of, or credit extended or participated in by, any Lender (except any reserve requirement reflected in the LIBOR Rate);

(ii) subject Mortgagee or any Lender to any Taxes on its loans, loan principal, letters of credit, commitments, or other obligations, or its deposits, reserves, other liabilities or capital attributable thereto; or

(iii) impose on any Lender or the London interbank eurodollar market any other condition, cost or expense affecting the Loan Agreement or any Note or the LIBOR Rate Advances made by such Lender;

and the result of any of the foregoing shall be to increase the cost to such Lender of making, converting to, continuing or maintaining any advance the interest on which is determined by reference to the London Interbank Offered Rate or the LIBOR Daily Floating Rate (or of maintaining its obligation to make any

# UNOFFICIAL COPY

such advance), or to reduce the amount of any sum received or receivable by such Lender hereunder (whether of principal, interest or any other amount) then, upon request of such Lender, Mortgagor will pay to such Lender such additional amount or amounts as will compensate such Lender for such additional costs incurred or reduction suffered.

(b) Capital Requirements. If any Lender determines that any Change in Law affecting such Lender or any Lending Office of such Lender or such Lender's holding company, if any, regarding capital or liquidity requirements has or would have the effect of reducing the rate of return on such Lender's capital or on the capital of such Lender's holding company, if any, as a consequence of the Loan Agreement, any Note, the Commitments of such Lender or the advances made by such Lender, to a level below that which such Lender or such Lender's holding company could have achieved but for such Change in Law (taking into consideration such Lender's policies and the policies of such Lender's holding company with respect to capital adequacy), then from time to time Mortgagor will pay to such Lender such additional amount or amounts as will compensate such Lender or such Lender's holding company for any such reduction suffered.

(c) Certificates for Reimbursement. A certificate of a Lender setting forth the amount or amounts necessary to compensate such Lender or its holding company, as the case may be, as specified in Subsection (a) or (b) of this Section and delivered to Mortgagor shall be conclusive absent manifest error. Mortgagor shall pay such Lender, as the case may be, the amount shown as due on any such certificate within 10 days after receipt thereof.

(d) Delay in Responses. Failure or delay on the part of any Lender to demand compensation pursuant to the foregoing provisions of this Section 1.1.6 shall not constitute a waiver of such Lender's right to demand such compensation, provided that Mortgagor shall not be required to compensate a Lender pursuant to the foregoing provisions of this Section for any increased costs incurred or reductions suffered more than nine months prior to the date that such Lender notifies Mortgagor of the Change in Law giving rise to such increased costs or reductions and of such Lender's intention to claim compensation therefor (except that, if the Change in Law giving rise to such increased costs or reductions is retroactive, then the nine-month period referred to above shall be extended to include the period of retroactive effect thereof).

1.1.7 Late Charge. If Mortgagor shall fail to make any payment due hereunder or under the terms of any Note (other than payment due at maturity) within fifteen (15) days after the date such payment is due, Mortgagor shall pay to the applicable Lender or Lenders on demand a late charge equal to four percent (4%) of such payment. Such fifteen (15) day period shall not be construed as in any way extending the due date of any payment. The "late charge" is imposed for the purpose of defraying the expenses of a Lender incident to handling such defaulting payment. This charge shall be in addition to, and not in lieu of, any other remedy Lenders may have and is in addition to any fees and charges of any agents or attorneys which Mortgagee or Lenders may employ upon the occurrence of a Default, whether authorized herein or by Law.

1.2 Prepayment. Mortgagor may prepay the principal balance of this Loan, in full at any time or in part from time to time, provided that: (i) Mortgagee shall have actually received from Mortgagor prior written notice of Mortgagor's intent to prepay, the amount of principal which will be prepaid (the "Prepaid Principal"), and the date on which the prepayment will be made; (ii) each prepayment shall be in the amount of \$1,000 or larger integral multiple of \$1,000 (unless the prepayment retires the outstanding balance of the Loan in full); (iii) each prepayment shall be in the amount of 100% of the Prepaid Principal, plus accrued unpaid interest thereon to the date of prepayment, plus any other sums which have become due to Mortgagee and Lenders under the Loan Documents on or before the date

# UNOFFICIAL COPY

of prepayment but have not been paid; and (iv) no portion of LIBOR Rate Principal may be prepaid except on the last day of the Interest Period applicable thereto, unless (x) the prior written consent of Mortgagee is obtained which consent, if given, shall provide, without limitation, the manner and order in which the prepayment is to be applied to the Indebtedness, and (y) Mortgagor pays any Consequential Loss as a result thereof, in accordance with Section 1.3 below. If the Loan is prepaid in full, any commitment of Lenders for further advances shall automatically terminate.

1.3 Compensation for Losses. Upon demand by any Lender (with a copy to Mortgagee) from time to time, Mortgagor shall, within ten (10) days following demand therefor, compensate such Lender for and hold such Lender harmless from any loss, cost or expense incurred by it as a result of:

(a) any continuation, conversion, payment or prepayment of any LIBOR Rate Principal on a day other than the last day of the Interest Period for such LIBOR Rate Principal (whether voluntary, mandatory, automatic, by reason of acceleration, or otherwise, including, but not limited to, acceleration upon any transfer or conveyance of any right, title or interest in the Property giving Mortgagee on behalf of Lenders the right to accelerate the maturity of the Loan as provided in this Mortgage); or

(b) any failure by Mortgagor (for a reason other than the failure of such Lender to make a LIBOR Rate Advance) to prepay, borrow, continue or convert any LIBOR Rate Principal on the date or in the amount notified by Mortgagor in any LIBOR Rate Election or otherwise;

including any loss of revenue, profit or yield, as determined by such Lender in its judgment reasonably exercised (collectively, "Consequential Loss"). Mortgagor shall also pay any customary administrative fees charged by such Lender in connection with the foregoing.

For purposes of calculating amounts payable by Mortgagor to Lenders under this Section 1.3, each Lender shall be deemed to have funded each LIBOR Rate Advance made by it at the London Interbank Offered Rate for such advance by a matching deposit or other borrowing in the London interbank eurodollar market for comparable amount and for a comparable period, whether or not such LIBOR Rate Advance was in fact so funded. The foregoing notwithstanding, the amounts of the Consequential Loss shall never be less than zero or greater than is permitted by applicable Law. The obligations of Mortgagor under this Section shall survive any termination of the Loan Documents and payment of the Loan and shall not be waived by any delay by Mortgagee or Lenders in seeking such compensation.

1.4 Default Rate. After the occurrence of a Default (including the expiration of any applicable cure period), upon the request of the Required Lenders, Mortgagee, without notice or demand, may raise the rate of interest accruing on the outstanding principal balance under any Loan Document by five hundred (500) basis points above the rate of interest otherwise applicable ("Default Rate"), independent of whether Mortgagee accelerates the outstanding principal balance under any Loan Document; provided that the application of such Default Rate shall be automatic and shall not require the request of the Required Lenders or any action by Mortgagee in the event of any Default arising from any failure by Mortgagor to pay principal on the Loan when due or the occurrence of any event described in Section 4.1(w)(i) or (ii) of the Loan Agreement.

The following capitalized terms used in this Exhibit C shall have the meanings set forth below:

"**Adjusted LIBOR Rate**" means the quotient obtained by dividing (i) the applicable London Interbank Offered Rate by (ii) 1.00 minus the LIBOR Reserve Percentage, where,

# UNOFFICIAL COPY

“London Interbank Offered Rate” means, with respect to any applicable Interest Period with respect to a LIBOR Rate Advance, the rate per annum equal to (a) LIBOR, as published by Reuters (or other commercially available source providing quotations of LIBOR as may be designated by Mortgagee from time to time) at approximately 11:00 a.m., London time, two (2) London Banking Days prior to the commencement of such Interest Period, for U.S. Dollar deposits (for delivery on the first day of such Interest Period) with a term equivalent to such Interest Period, or (b) if such rate is not available at such time for any reason, the rate per annum determined by Mortgagee to be the rate at which deposits in U.S. Dollars for delivery on the first day of such Interest Period in same day funds in the approximate amount of the LIBOR Rate Advance being made, continued or converted and with a term equivalent to such Interest Period would be offered by Bank of America’s London Branch to major banks in the London interbank eurodollar market at their request at approximately 11:00 a.m. (London time) two (2) London Banking Days prior to the commencement of such Interest Period; and

“LIBOR Reserve Percentage” means, with respect to any applicable Interest Period, for any day that percentage (expressed as a decimal) which is in effect on such day, as prescribed by the Board of Governors of the Federal Reserve System (or any successor) for determining the maximum reserve requirement (including basic, supplemental, emergency, special and marginal reserves) generally applicable to financial institutions regulated by the Federal Reserve Board whether or not applicable to any Lender, in respect of “Eurocurrency liabilities” (or in respect of any other category of liabilities which includes deposits by reference to which the interest rate on LIBOR Rate Principal is determined), whether or not any Lender has any Eurocurrency liabilities. The LIBOR Rate shall be adjusted automatically as of the effective date of each change in the LIBOR Reserve Percentage.

“**Administrative Agent’s Time**” has the meaning set forth in the Loan Agreement.

“**Alternative Hotel Payment**” has the meaning set forth in the Loan Agreement.

“**Bank of America**” means Bank of America, N.A. and its successors.

“**Base Rate**” means, on any day, a fluctuating rate per annum equal to the Base Rate Margin plus the highest of: (a) the Federal Funds Rate plus ½ of 1%, (b) the rate of interest in effect for such day as publicly announced by Bank of America as its “Prime Rate,” and (c) the LIBOR Daily Floating Rate plus 1.00%.

“**Base Rate Advance**” means an advance of the Loan by a Lender to Mortgagor which bears interest at an applicable Base Rate at the time in question.

“**Base Rate Margin**” means two percent (2.0%) per annum; provided, however, that so long as no Default has occurred and is continuing, the Base Rate Margin shall reduce to one and twenty five hundredths percent (1.25%) per annum on the date on which all of the following conditions are satisfied: (i) either (A) the Hotel Sale Date has occurred, Mortgagor has made the prepayment of the Loan required by Section 2.17 of the Loan Agreement, and Mortgagee has received any Hotel Excess Net Sale Proceeds Deposit pursuant to Section 2.17 of the Loan Agreement, or (B) if a Hotel Buyer Default has occurred (and closing has not occurred under the Hotel Purchase Agreement), Mortgagee has received the Alternative Hotel Payment, and (ii) construction of the Improvements has been completed in accordance with the requirements of the Loan Documents as evidenced by satisfaction of all of the conditions for the final advance of the Loan for the Improvements pursuant to Section 5 of Exhibit “E” to the Loan Agreement.

# UNOFFICIAL COPY

“**Base Rate Principal**” means, at any time, the Principal Debt minus the portion, if any, of such Principal Debt which is LIBOR Rate Principal.

“**Business Day**” has the meaning set forth in the Loan Agreement.

“**Change in Law**” means the occurrence, after the date of the Loan Agreement, of any of the following: (a) the adoption or taking effect of any Law, (b) any change in any Law or in the administration, interpretation, implementation or application thereof by any Governmental Authority, or (c) the making or issuance of any request, rule, guideline, or directive (whether or not having the force of Law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, (x) the Dodd-Frank Wall Street Reform and Consumer Protection Act and (y) all requests, rules, guidelines, or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority), or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law”, regardless of the date enacted, adopted, or issued.

“**Commitment**” has the meaning set forth in the Loan Agreement.

“**Default**” has the meaning set forth in the Loan Agreement.

“**Federal Funds Rate**” means, for any day, the rate per annum equal to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers on such day, as published by the Federal Reserve Bank on the Business Day next succeeding such day; *provided* that (a) if such day is not a Business Day, the Federal Funds Rate for such day shall be such rate on such transactions on the next preceding Business Day as so published on the next succeeding Business Day, and (b) if no such rate is so published on such next succeeding Business Day, the Federal Funds Rate for such day shall be the average rate (rounded upwards to the next higher 1/100 of 1%) charged to Bank of America on such day on such transactions as determined by Mortgagee.

“**Governmental Authority**” has the meaning set forth in the Loan Agreement.

“**Hotel Buyer Default**” has the meaning set forth in the Loan Agreement.

“**Hotel Excess Net Sale Proceeds Deposit**” has the meaning set forth in the Loan Agreement.

“**Hotel Purchase Agreement**” has the meaning set forth in the Loan Agreement.

“**Hotel Sale Date**” has the meaning set forth in the Loan Agreement.

“**Improvements**” means all on-site and off-site improvements to the Land for the high-rise mixed use development to be constructed on the Land in accordance with the Plans, together with all appurtenances, all furniture, fixtures and equipment and all other property now or later to be located on the Land and/or in such improvements.

“**Indebtedness**” means any and all indebtedness to Mortgagee or the Lenders evidenced, governed or secured by, or arising under, any of the Loan Documents, including the Loan.

“**Interest Period**” means with respect to any LIBOR Rate Principal, the period commencing on the date such LIBOR Rate Principal is disbursed or on the date on which the Principal Debt or any portion thereof is

# UNOFFICIAL COPY

converted into or continued as such LIBOR Rate Principal, and ending on the date one (1), two (2) or three (3) months thereafter, as elected by Mortgagor in the applicable Rate Election Notice; *provided* that:

- (i) Each Interest Period must commence on a LIBOR Business Day;
- (ii) In the case of the continuation of LIBOR Rate Principal, the Interest Period applicable after the continuation of such LIBOR Rate Principal shall commence on the last day of the preceding Interest Period;
- (iii) The last day for each Interest Period and the actual number of days during the Interest Period shall be determined by Mortgagee using the practices of the London interbank eurodollar market; and
- (iv) No Interest Period shall extend beyond the Maturity Date, and any Interest Period which begins before the Maturity Date and would otherwise end after the Maturity Date shall instead end on the Maturity Date.

“**Law**” or “**Laws**” has the meaning set forth in the Loan Agreement.

“**Lending Office**” has the meaning set forth in the Loan Agreement.

“**LIBOR**” means the British Bankers Association LIBOR Rate or the successor thereto if the British Bankers Association is no longer making a LIBOR rate available.

“**LIBOR Business Day**” has the meaning set forth in the Loan Agreement.

“**LIBOR Daily Floating Rate**” means, for any interest calculation with respect to a Base Rate Advance on any date, the rate per annum equal to (a) LIBOR, at approximately 11:00 a.m., London time determined two (2) London Banking Days prior to such date for U.S. Dollar deposits being delivered in the London interbank eurodollar market for a term of one month commencing that day or (b) if such published rate is not available at such time for any reason, the rate per annum determined by Mortgagee to be the rate at which deposits in U.S. Dollars for delivery on the date of determination in same day funds in the approximate amount of the Base Rate Advance being made or maintained and with a term equal to one month would be offered by Bank of America’s London Branch to major banks in the London interbank eurodollar market at their request at the date and time of determination.

“**LIBOR Margin**” means three percent (3.0%) per annum; *provided, however*, that so long as no Default has occurred and is continuing, the LIBOR Margin shall reduce to two and twenty five hundredths percent (2.25%) per annum on the date on which all of the following conditions are satisfied: (i) either (A) the Hotel Sale Date has occurred, Mortgagor has made the prepayment of the Loan required by Section 2.17 of the Loan Agreement, and Mortgagee has received any Hotel Excess Net Sale Proceeds Deposit pursuant to Section 2.17 of the Loan Agreement, or (B) if a Hotel Buyer Default has occurred (and closing has not occurred under the Hotel Purchase Agreement), Mortgagee has received the Alternative Hotel Payment, and (ii) construction of the Improvements has been completed in accordance with the requirements of the Loan Documents as evidenced by satisfaction of all of the conditions for the final advance of the Loan for the Improvements pursuant to Section 5 of Exhibit “E” of the Loan Agreement.

“**LIBOR Rate**” means for any applicable Interest Period for any LIBOR Rate Principal, a simple rate per annum equal to the LIBOR Margin plus the Adjusted LIBOR Rate.

# UNOFFICIAL COPY

“**LIBOR Rate Advance**” means an advance of the Loan by a Lender to Mortgagor which bears interest at an applicable LIBOR Rate at the time in question.

“**LIBOR Rate Election**” means an election by Mortgagor of an applicable LIBOR Rate in accordance with this Exhibit C.

“**LIBOR Rate Principal**” means any portion of the Principal Debt which bears interest at an applicable LIBOR Rate at the time in question.

“**London Banking Day**” means a day on which dealings in U.S. Dollar deposits are conducted by and between banks in the London interbank eurodollar market.

“**Maturity Date**” means December 18, 2015, as it may be earlier terminated or extended in accordance with the terms of the Loan Agreement.

“**Plans**” has the meaning set forth in the Loan Agreement.

“**Potential Default**” has the meaning set forth in the Loan Agreement.

“**Prime Rate**” means a rate set by Bank of America based upon various factors including Bank of America’s costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such Prime Rate announced by Bank of America shall take effect at the opening of business on the day specified in the public announcement of such change.

“**Principal Debt**” means the aggregate unpaid principal balance of the Loan at the time in question.

“**Required Lenders**” has the meaning set forth in the Loan Agreement.

“**Taxes**” has the meaning set forth in the Loan Agreement.