

# UNOFFICIAL COPY

## Illinois Anti-Predatory Lending Database Program

Doc#: 1823519299 Fee: \$114.00  
Karen A. Yarbrough  
Cook County Recorder of Deeds  
Date: 08/23/2018 11:36 AM Pg: 1 of 34

### Certificate of Exemption



Report Mortgage Fraud  
844-768-1713

The property identified as: **PIN:** 29-29-409-018-0000

**Address:**

**Street:** 17450 S Halsted St

**Street line 2:**

**City:** Homewood

**State:** IL

**ZIP Code:** 60430

**Lender:** ASSOCIATED BANK, NATIONAL ASSOCIATION

**Borrower:** GMX MIDLAND HOMEWOOD II, LLC

*CCH 1801205 L0 LEO*

**Loan / Mortgage Amount:** \$825,000.00

This property is located within the program area and is exempt from the requirements of 765 ILCS 77/70 et seq. because it is commercial property.

**Certificate number:** 16E4B468-35D4-4ABE-B635-86473057FC23

**Execution date:** 8/21/2018

**UNOFFICIAL COPY**

**This document prepared by and after  
recording return to:**

Keating Muething & Klekamp PLL  
One East Fourth Street, Suite 1400  
Cincinnati, Ohio 45202  
Attn: Kalman Steinberg, Esq.

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

**THIS AMENDED AND RESTATED CONSTRUCTION MORTGAGE, SECURITY AGREEMENT, FIXTURE FILING AND ASSIGNMENT OF LEASES AND RENTS** (this "Mortgage") is made as of August 21, 2018, by **GMX MIDLAND HOMEWOOD II, LLC**, an Ohio limited liability company (the "Borrower"), for the benefit of **ASSOCIATED BANK, NATIONAL ASSOCIATION**, a national banking association, its successors and assigns (the "Lender").

This Mortgage amends and restates, in its entirety, that certain Mortgage, Security Agreement, Fixture Filing and Assignment of Leases and Rents dated as of October 4, 2017, from Borrower to Lender, recorded in the Office of the Cook County, Illinois Recorder of Deeds on October 11, 2017 as Document No. 1728445075, securing the original principal amount of Eight Hundred Twenty-Five Thousand and 00/100 Dollars (\$825,000.00) (as renewed, extended, replaced, supplemented, amended, restated or otherwise modified from time to time, the "Original Mortgage"). This amendment and restatement of the Original Mortgage shall in no manner constitute a repayment, satisfaction, or novation of the obligations set forth in the Original Mortgage, which obligations shall remain outstanding for all purposes as of the date originally undertaken. Borrower acknowledges and agrees that, as of the date hereof, the Original Mortgage is enforceable and in full force and effect and that Borrower has no defenses to the enforcement of the Original Mortgage or claims against Lender and hereby waives the same.

**WITNESSETH:**

Lender is making a loan to Borrower (the "Loan") in an amount not to exceed Four Million Five Hundred Fifty Thousand and 00/100 Dollars (\$4,550,000.00) pursuant to that certain Amended and Restated Construction Loan Agreement of even date herewith by and between Borrower and Lender, the provisions of which are incorporated herein by reference to the same extent as if fully set forth herein (said Loan Agreement and any and all extensions and renewals thereof, amendments thereto and substitutions or replacements therefor is referred to herein as the "Loan Agreement"; any terms not defined herein shall have the meanings ascribed to such terms in the Loan Agreement). The Loan is evidenced by that certain Amended and Restated Promissory Note dated as of even date herewith in the principal amount of \$4,550,000.00 from Borrower to Lender (the "Note"). The Loan is due and payable in full on September 1, 2020 (the "Maturity Date"), except as such date may be extended to September 1 2021, pursuant to the terms of the Note or accelerated pursuant to the terms hereof or of any other Loan Document (as hereinafter defined). This Mortgage encumbers certain real estate

# UNOFFICIAL COPY

located in Cook County, Illinois, legally described on Exhibit A attached hereto, and payment of the Note is secured by this Mortgage, financing statements and other security documents (this Mortgage, the Note, the Loan Agreement and all other documents evidencing or securing the Loan (as amended, modified, replaced or restated from time to time) are collectively hereinafter referred to as the "Loan Documents"). The Loan bears interest at a variable rate of interest.

To secure (i) the payment when and as due and payable of the principal of and interest on the Loan or so much thereof as may be advanced from time to time, and any and all late charges, and all other indebtedness evidenced by or owing under the Note and any of the other Loan Documents, together with any extensions, modifications, renewals or refinancings of any of the foregoing, (ii) the payment of all other indebtedness which this Mortgage by its terms secures, and (iii) the performance and observance of the covenants and agreements contained in this Mortgage, the Loan Agreement, the Note and each of the other Loan Documents, and (iv) all obligations and liabilities of the Borrower to Lender under the Interest Rate Protection Agreements and the Letter of Credit Documents, if any (all of such indebtedness, obligations and liabilities identified in (i), (ii), (iii) and (iv) above being hereinafter referred to as the "Debt"), the Borrower does hereby GRANT, SELL, CONVEY, MORTGAGE and ASSIGN unto the Lender, its successors and assigns, and does hereby grant to Lender, its successors and assigns a security interest in, all and singular the properties, rights, interests and privileges described in Granting Clauses I, II, III, IV, V, VI, VII, and VIII below, all of same being collectively referred to herein as the "Mortgaged Property":

## GRANTING CLAUSE I:

THE LAND located in Cook County, Illinois which is legally described on Exhibit A attached hereto and made a part hereof (the "Land").

## GRANTING CLAUSE II:

TOGETHER WITH all buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or for any such buildings, structures and improvements and all of the right, title and interest of the Borrower now or hereafter acquired in and to any of the foregoing (the "Improvements");

## GRANTING CLAUSE III:

TOGETHER WITH all easements, rights of way, strips and gores of land, streets, ways, alleys, sidewalks, vaults, passages, sewer rights, waters, water courses, water drainage and reservoir rights and powers (whether or not appurtenant), all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments, easements, franchises, appendages and appurtenances whatsoever, in any way belonging, relating or appertaining to the Land or the Improvements, whether now owned or hereafter acquired by the Borrower, including without limitation all existing and future mineral, oil and gas rights which are appurtenant to or which have been used in connection with the Land, all existing and future water stock relating to the Land or the Improvements, all existing and future share of stock respecting water and water

# UNOFFICIAL COPY

rights pertaining to the Land or the Improvements or other evidence of ownership thereof, and the reversions and remainders thereof (the "Appurtenant Rights");

## GRANTING CLAUSE IV:

TOGETHER WITH all machinery, apparatus, equipment, fittings and fixtures of every kind and nature whatsoever, and all furniture, furnishings and other personal property now or hereafter owned by the Borrower and forming a part of, or used or obtained for use in connection with, the Land or the Improvements or any present or future operation, occupancy, maintenance or leasing thereof; including, but without limitation, any and all heating, ventilating and air conditioning equipment and systems, antennae, appliances, apparatus, awnings, basins, bathtubs, bidets, boilers, bookcases, cabinets, carpets, communication systems, coolers, curtains, dehumidifiers, dishwashers, disposals, doors, drapes, drapery rods, dryers, ducts, dynamos, elevators, engines, equipment, escalators, fans, fittings, floor coverings, furnaces, furnishings, furniture, hardware, heaters, humidifiers, incinerators, lighting, machinery, motors, ovens, pipes, plumbing and electric equipment, pool equipment, pumps, radiators, ranges, recreational facilities and equipment, refrigerators, screens, sprinklers, stokers, stoves, shades, shelving, sinks, security systems, toilets, ventilators, wall coverings, washers, windows, window covering, wiring and all extensions, renewals or replacements thereof or substitutions therefor or additions thereto, whether or not the same are or shall be attached to the Land or the Improvements in any manner (collectively, the "Fixtures"); it being agreed that all of said property owned by the Borrower and placed on the Land or on or in the Improvements (whether affixed or annexed thereto or not) shall, so far as permitted by law, conclusively be deemed to be real property and conveyed hereby for purposes of this Mortgage.

## GRANTING CLAUSE V:

TOGETHER WITH the following (the "Personal Property");

All personal property of every nature whatsoever now or hereafter owned by Borrower or used in connection with the Land or the improvements thereon, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements thereof and all of the right, title and interest of Borrower in and to any such personal property together with the benefit of any deposits or payments now or hereafter made on such personal property by Borrower or on its behalf, including without limitation, any and all Goods, Investment Property, Instruments, Chattel Paper, Documents, Letter of Credit Rights, Accounts, Deposit Accounts, Commercial Tort Claims and General Intangibles, each as defined in the Uniform Commercial Code of the State of Ohio (the "Code");

All proceeds of the foregoing, including, without limitation, all judgments, awards of damages and settlements hereafter made resulting from condemnation proceeds or the taking of the Land or improvements thereon or any portion thereof under the power of eminent domain, any proceeds of any policies of insurance, maintained with respect to the Land or improvements thereon or proceeds of any sale, option or contract to sell the Land or improvements thereon or any portion thereof;

# UNOFFICIAL COPY

Any and all additions and accessories to all of the foregoing and any and all proceeds (including proceeds of insurance, eminent domain or other governmental takings and tort claims), renewals, replacements and substitutions of all of the foregoing;

All of the books and records pertaining to the foregoing;

## GRANTING CLAUSE VI:

TOGETHER WITH all right, title and interest which the Borrower hereafter may acquire in and to all leases and other agreements now or hereafter entered into for the occupancy or use of the Land, the Appurtenant Rights, the Improvements, the Fixtures and the Personal Property or any portion thereof, whether written or oral (herein collectively referred to as the "Leases"), and all rents, issues, incomes and profits in any manner arising thereunder (herein collectively referred to as the "Rents"), and all right, title and interest which the Borrower now has or hereafter may acquire in and to any bank accounts, security deposits, and any and all other amounts held as security under the Leases, reserving to the Borrower any statutory rights;

## GRANTING CLAUSE VII:

TOGETHER WITH any and all Awards and Insurance Proceeds, as each are hereinafter respectively defined, or proceeds of any sale, option or contract to sell the Mortgaged Property or any portion thereof (provided that no right, consent or authority to sell the Mortgaged Property or any portion thereof shall be inferred or deemed to exist by reason hereof); and the Borrower hereby authorizes, directs and empowers the Lender, at its option, on the Borrower's behalf, or on behalf of the successors or assigns of the Borrower, to adjust, compromise, claim, collect and receive such proceeds; to give acquittances therefor; and, after deducting expenses of collection, including reasonable attorneys' fees, costs and disbursements, to apply the Net Proceeds, as hereinafter defined, to the extent not utilized for the Restoration of the Mortgaged Property as provided in the Loan Agreement hereof, to payment of the Debt, notwithstanding the fact that the same may not then be due and payable or that the Debt is otherwise adequately secured; and the Borrower agrees to execute and deliver from time to time such further instruments as may be requested by the Lender to confirm such assignment to the Lender of any such proceeds;

## GRANTING CLAUSE VIII:

TOGETHER WITH all estate, right, title and interest, homestead or other claim or demand, as well in law as in equity, which the Borrower now has or hereafter may acquire of, in and to the Mortgaged Property, or any part thereof, and any and all other property of every kind and nature from time to time hereafter (by delivery or by writing of any kind) conveyed, pledged, assigned or transferred as and for additional security hereunder by the Borrower or by anyone on behalf of the Borrower to the Lender;

TO HAVE AND TO HOLD the Mortgaged Property, unto the Lender, and its successors and assigns, IN FEE SIMPLE forever; subject, however, to those encumbrances which the Lender has approved in the Loan Agreement or otherwise approved in writing (the "Permitted Encumbrances");

# UNOFFICIAL COPY

UPON CONDITION that, subject to the terms hereof and until the occurrence of an Event of Default hereunder, the Borrower shall be permitted to possess and use the Mortgaged Property;

SUBJECT to the covenants and conditions hereinafter set forth.

PROVIDED, NEVERTHELESS, that if (i) the Borrower shall pay and perform in full when due the Debt and shall duly and timely perform and observe all of the covenants and conditions herein and in the other Loan Documents required to be performed and observed by the Borrower, and (ii) the Lender shall have no further obligation to make any further disbursements of the Loan to or for the benefit of Borrower, then the Lender shall execute and deliver to the Borrower such instruments as may be reasonably requested by the Borrower which are sufficient to release this Mortgage.

THE BORROWER FURTHER COVENANTS AND AGREES AS FOLLOWS:

1. Representations of Borrower. Borrower hereby represents and warrants to the Lender as follows:

(a) Borrower (i) is a limited liability company duly formed and validly existing under the laws of the State of Ohio and has complied with all conditions prerequisite to its doing business in the State of Illinois; (ii) has the power and authority to own its property and to carry on its business as now being conducted; (iii) is qualified to do business in every jurisdiction in which the nature of its business or its property makes such qualification necessary; and (iv) is in compliance with all laws, regulations, ordinances and orders of public authorities applicable to it.

(b) The Borrower has good and marketable title to an indefeasible fee simple estate in the Mortgaged Property, subject to no liens, charges or encumbrances, other than the Permitted Encumbrances; that it has good, right and lawful authority to mortgage the Mortgaged Property in the manner and form herein provided; that this Mortgage is and shall remain a valid and enforceable lien on the Mortgaged Property subject only to the Permitted Encumbrances; that Borrower and its successors and assigns shall defend the same and the priority of this lien forever against the lawful claims and demands of all persons whomsoever, and that this covenant shall not be extinguished by any foreclosure hereof but shall run with the Land.

(c) The Borrower has and shall maintain title to the collateral for the Loan, including any additions or replacements thereto, free of all security interests, liens and encumbrances, other than the security interest hereunder.

(d) No person who owns twenty percent (20.00%) or more of the equity interests in the Borrower, or otherwise controls the Borrower or any of its subsidiaries, is listed on the Specially Designated Nationals and Blocked Person List or other similar lists maintained by the Office of Foreign Assets Control ("OFAC"), the Department of the Treasury or included in any Executive Orders, and the proceeds of the Loan will not violate any of the foreign asset control regulations of OFAC or any enabling statute or Executive Order relating thereto.

# UNOFFICIAL COPY

## 2. Borrower's Covenants.

(a) Payment of Debt. The Borrower shall, prior to the expiration of any grace period: (i) pay the Debt when due, and (ii) duly and punctually perform and observe all of the covenants and conditions to be performed or observed by the Borrower as provided in the Note, the Loan Agreement, this Mortgage and the other Loan Documents.

(b) Repair/Maintenance. The Borrower shall (i) promptly repair, restore, replace or rebuild any portion of the Mortgaged Property which may be damaged or destroyed whether or not Insurance Proceeds (as hereinafter defined) are available or sufficient for that purpose; (ii) keep the Mortgaged Property in good condition and repair, free from waste; (iii) pay all operating costs and expenses of the Mortgaged Property when due; (iv) comply with all legal requirements applicable to all or any portion of the Mortgaged Property, or the use and occupancy, thereof (subject to the right of the Borrower to contest the enforceability or applicability of any such legal requirements in good faith, diligently and at its expense by appropriate proceedings which shall not subject the Borrower or the Lender to any risk of civil or criminal liability and which shall operate during the pendency thereof to prevent the imposition or foreclosure of any lien upon, or any interference with the availability, use or occupancy of, the Mortgaged Property or any part thereof), and observe and comply with any conditions and requirements necessary to preserve and extend any and all rights, licenses, permits (including without limitation zoning variances, special exceptions and nonconforming uses), privileges, franchises and concessions that are applicable to all or any portion of the Mortgaged Property or the use and occupancy thereof; (v) refrain from any action, and correct any condition known to the Borrower, which would materially increase the risk of fire or other hazard to the Mortgaged Property or any portion thereof; and (vi) cause the Mortgaged Property to be managed in a competent and professional manner.

(c) Alteration of Mortgaged Property. Without the prior written consent of the Lender, the Borrower shall not cause, suffer or permit (i) any material alteration of the Mortgaged Property, except as required by any applicable legal requirement or as otherwise contemplated by the Loan Agreement; (ii) any change in the zoning classification or intended use or occupancy of the Mortgaged Property, including without limitation any change which would increase any fire or other hazard; (iii) any change in the identity of the Borrower or the person or entity responsible for managing the Mortgaged Property; or (iv) any modification of the licenses, permits, privileges, franchises, covenants, conditions or declarations of use applicable to the Mortgaged Property, except as required to operate the Mortgaged Property in the manner required hereunder.

(d) Compliance with Laws. The Borrower shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental authority or court applicable to the Borrower or to the Mortgaged Property or any part thereof.

## 3. Liens, Contest and Defense of Title.

# UNOFFICIAL COPY

(a) The Borrower shall not create or suffer or permit any lien, charge or encumbrance to attach to or be filed against the Mortgaged Property or any part thereof, or interest thereon, or any other rights and properties conveyed, mortgaged, transferred and granted hereunder (except for Permitted Encumbrances), whether such lien, charge or encumbrance is on a parity, inferior or superior to the lien of this Mortgage, including liens for labor or materials with respect to the Mortgaged Property ("Mechanic's Liens").

(b) Notwithstanding paragraph (a) of this Section, the Borrower may in good faith and with reasonable diligence contest the validity or amount of any Mechanic's Liens and defer payment and discharge thereof during the pendency of such contest, provided that: (i) such contest shall prevent the sale or forfeiture of the Mortgaged Property, or any part thereof or any interest therein, to satisfy such Mechanic's Liens and shall not result in a forfeiture or impairment of the lien of this Mortgage; and (ii) within ten (10) days after the Borrower has been notified of the filing of any such Mechanic's Liens, the Borrower shall have notified the Lender in writing of the Borrower's intention to contest such Mechanic's Liens, or to cause such other party to contest such Mechanic's Liens, and shall have obtained a title insurance endorsement over such Mechanic's Liens in form and substance reasonably satisfactory to the Lender, insuring the Lender against loss or damage by reason of such Mechanic's Liens; provided that in lieu of such title insurance endorsement the Borrower may deposit and keep on deposit with the Lender (or such depository as may be designated by the Lender) a sum of money sufficient, in the judgment of the Lender, to pay in full such Mechanic's Liens and all interest thereon. Any such deposits are to be held without any allowance of interest and may be used by the Lender in its sole discretion to protect the priority of this Mortgage. In case the Borrower shall fail to maintain such title insurance or deposit, or to prosecute or cause the prosecution of such contest with reasonable diligence, or to pay or cause to be paid the amount of the Mechanic's Lien, plus any interest finally determined to be due upon the conclusion of such contest; then the Lender may, at its option, apply any money and liquidate any securities then on deposit with the Lender (or other depository designated by the Lender) in payment of or on account of such Mechanic's Liens, or that part thereof then unpaid, together with all interest thereon according to any written bill, notice or statement, without inquiring into the amount, validity or enforceability thereof. If the amount of money so deposited shall (in Lender's reasonable judgment) be insufficient for the payment in full of such Mechanic's Liens, together with all interest thereon, then the Borrower shall forthwith, upon demand, deposit with the Lender (or other depository designated by the Lender) the sum which shall (in Lender's reasonable judgment, when added to the funds then on deposit with Lender) be necessary to make such payment in full (or such other security as shall be reasonably satisfactory to Lender). If a Mechanic's Lien claim is ultimately resolved in the claimant's favor, then the monies so deposited shall be applied in full payment of such Mechanic's Lien or that part thereof then unpaid, together with all interest thereon (provided no Event of Default shall then exist) when the Lender has been furnished with satisfactory evidence of the amount of payment to be made. Any excess monies remaining on deposit with the Lender (or other depository) under this Section 3(b) shall be paid to the Borrower, provided that no Event of Default shall then exist.



# UNOFFICIAL COPY

(c) If the lien and security interest of the Lender in or to the Mortgaged Property, or any part thereof, shall be endangered or shall be attacked, directly or indirectly, the Borrower shall immediately notify the Lender and shall appear in and defend any action or proceeding purporting to affect the Mortgaged Property, or any part thereof, and shall file and prosecute such proceedings and take all actions necessary to preserve and protect such title, lien and security interest in and to the Mortgaged Property.

#### 4. Payment and Contest of Taxes.

(a) The Borrower shall pay or cause to be paid when due and before any penalty attaches, all general and special taxes, assessments, water charges, sewer charges, and other fees, taxes, charges and assessments of every kind and nature whatsoever levied or assessed against the Mortgaged Property, or any part thereof, or any interest therein, or any income or revenue therefrom, or any obligation or instrument secured hereby, and all installments thereof (collectively, the "Taxes"), on or before the date such Taxes are due, except to the extent Lender makes payments with Borrower's deposits under Section 23 hereof, and the Borrower shall discharge any claim or lien relating to Taxes upon the Mortgaged Property. The Borrower shall provide the Lender with copies of paid receipts for Taxes, if requested by the Lender, within ten (10) days after being requested to do so by the Lender.

(b) Notwithstanding paragraph (a) of this Section, the Borrower may, in good faith and with reasonable diligence, contest or cause to be contested the validity or amount of any such Taxes, provided that: (i) no Event of Default has occurred; (ii) such proceeding shall stay the collection of the applicable Taxes from Borrower and from the Mortgaged Property or Borrower shall have paid all of the applicable Taxes under protest, (iii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any other instrument to which Borrower is subject and shall not constitute a default thereunder, (iv) neither the Mortgaged Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost so long as the contest is being pursued, and (v) Borrower shall have deposited with Lender adequate reserves for the payment of the applicable Taxes, together with all interest and penalties thereon, unless Borrower has paid all of the applicable Taxes under protest, or Borrower shall have furnished such other security as may be accepted by Lender, in its sole and absolute discretion, to insure the payment of any contested Taxes, together with all interest and penalties thereon. If the Borrower fails to prosecute such contest with reasonable diligence or fails to maintain sufficient funds as hereinabove provided, the Lender may, at its option, liquidate any securities and apply the monies then on deposit with the Lender (or other depository), in payment of, or on account of, such Taxes, or any portion thereof then unpaid, including all penalties and interest thereon according to any written bill, notice or statement, without inquiry as to the amount, validity or enforceability thereof. If the amount of money and any such security so deposited shall (in the Lender's reasonable judgment) at any time be insufficient for the payment in full of such Taxes, together with all penalties and interest which are or might become due thereon, the Borrower shall forthwith, upon demand, either deposit with the Lender (or other depository designated by the Lender) a sum (or such other

# UNOFFICIAL COPY

security as shall be reasonably satisfactory to the Lender) which when added to the funds then on deposit, shall (in the Lender's reasonable judgment) be sufficient to make such payment in full, or, if the Lender (or other depository) has applied funds so deposited on account of such Taxes, restore such deposit to an amount satisfactory to the Lender. After final disposition of such contest and upon the Borrower's written request and delivery to the Lender of an official bill for such Taxes, the Lender (or other depository) shall liquidate any securities and apply the monies, if any, then on deposit under this Section 4 to the payment of such Taxes or that part thereof then unpaid and the balance, if any, in excess of the amount required to be on deposit with the Lender (or other depository) under Section 23 hereof shall be refunded to the Borrower after such final disposition, provided that no Event of Default shall then exist.

## 5. Change in Tax Laws.

(a) If, by the laws of the United States of America, or of any state or municipality having jurisdiction over the Lender, the Borrower or the Mortgaged Property, any tax is imposed or becomes due in respect of the Note or this Mortgage (excluding income, excise or franchise taxes imposed upon the Lender, except as provided in Section 5(c) below), or any liens on the Mortgaged Property created thereby, then the Borrower shall pay such tax in the manner required by such law.

(b) If any law, statute, rule, regulation, order or court decree effects a deduction from the value of the Mortgaged Property for the purpose of taxation by creating any lien thereon, or imposing upon the Lender any liability for the payment of all or any part of the Taxes required to be paid by the Borrower, or changing in any way the laws relating to the taxation of mortgages or deeds of trusts or debts secured by mortgages or deeds of trust or the interest of the Lender in the Mortgaged Property, or the manner of collection of Taxes so as to adversely affect this Mortgage, the Debt, or the Lender, then, and in any such event, the Borrower, upon demand by the Lender, shall pay such Taxes, or reimburse the Lender therefor on demand, unless the Lender determines, in the Lender's sole judgment, that such payment or reimbursement by the Borrower is unlawful or that the payment might, in the Lender's judgment, constitute usury or render the Debt wholly or partially usurious; in which event the Lender may elect to declare the Debt to be due and payable within the lesser of (i) thirty (30) days after written notice, or (ii) such shorter period as may be required to ensure compliance by Lender with applicable law.

(c) Nothing contained herein shall require the Borrower to pay any income, franchise or excise tax imposed upon the Lender, excepting only such income, franchise or excise tax which may be levied against the income of the Lender as a complete or partial substitute for Taxes required to be paid by the Borrower hereunder.

6. Insurance Coverage. For so long as this Mortgage is in effect, Borrower shall continuously maintain insurance in accordance with the provisions of the Loan Agreement.

## 7. The Lender's Performance of the Borrower's Obligations.

# UNOFFICIAL COPY

(a) Upon the occurrence and during the continuance of an Event of Default hereunder, the Lender may, but without any obligation to do so, upon simultaneous notice to the Borrower, make any payment or perform any act which the Borrower is required to make or perform hereunder or under any other Loan Document (whether or not the Borrower is personally liable therefor) in any form and lawful manner deemed expedient to the Lender, including without limitation, the right to enter into possession of the Mortgaged Property, or any portion thereof, and to take any action (including without limitation the release of any information regarding the Mortgaged Property, the Borrower and the obligations secured hereby) which the Lender deems necessary or desirable in connection therewith, all at the sole cost and expense of the Borrower. The Lender, in addition to any rights or powers granted or conferred hereunder but without any obligation to do so, may complete construction of, rent, operate, and manage the Mortgaged Property, or any part thereof, including payment of management fees and other operating costs and expenses, of every kind and nature in connection therewith, so that the Mortgaged Property shall be operational and usable for their intended purposes. All monies paid, and all reasonable expenses paid or incurred in connection therewith, including but not limited to reasonable costs of surveys, evidence of title, court costs and attorneys' fees and expenses and other monies advanced by the Lender to protect the Mortgaged Property and the lien hereof, to complete construction of, rent, operate and manage the Mortgaged Property or to pay any such operating costs and expenses thereof or to keep the Mortgaged Property operational and usable for their intended purposes shall be so much additional Debt, and shall become immediately due and payable on demand, and with interest thereon at the Default Rate.

(b) The Lender, in making any payment, may do so according to any written bill, notice, statement or estimate, without inquiry into the amount, validity or enforceability thereof.

(c) Nothing contained herein shall be construed to require the Lender to advance or expend monies for any purpose mentioned herein, or for any other purposes.

## 8. Security Agreement.

(a) Grant of Security Interest. Borrower hereby grants to Lender a security interest in the Personal Property to secure the Debt. This Mortgage constitutes a security agreement with respect to all Personal Property in which Lender is granted a security interest hereunder, and Lender shall have all of the rights and remedies of a secured party under the Code, as well as all other rights and remedies available at law or in equity.

(b) Perfection. Borrower hereby consents to any instrument that may be requested by Lender to publish notice or protect, perfect, preserve, continue, extend, or maintain the security interest and lien, and the priority thereof, of this Mortgage or the interest of Lender in the Mortgaged Property, including, without limitation, deeds of trust, security agreements, financing statements, continuation statements, and instruments of similar character, and Borrower shall pay or cause to be paid (i) all filing and recording taxes and fees incident to each such filing or recording, (ii) all expenses, including without limitation, actual attorneys' fees and costs (of both in house and

# UNOFFICIAL COPY

outside counsel), incurred by Lender in connection with the preparation and acknowledgement of all such instruments, and (iii) all federal, state, county and municipal stamp taxes and other taxes, duties, imposts, assessments, and charges arising out of or in connection with the delivery of such instruments. Borrower hereby consents to, and hereby ratifies, the filing of any financing statements relating to the Loan made prior to the date hereof. Borrower hereby irrevocably constitutes and appoints Lender as the attorney-in-fact of Borrower, to file with the appropriate filing office any such instruments. In addition, Borrower hereby authorizes Lender to cause any financing statement or fixture filing to be filed or recorded without the necessity of obtaining the consent of Borrower.

(c) Place of Business. Borrower maintains its chief executive office as set forth as the address of Borrower in Section 28 below, and Borrower will notify Lender in writing of any change in its place of business within five (5) days of such change.

(d) Fixture Filing. This Mortgage is intended to be a financing statement within the purview of Section 9-502(b) of the Code and will be recorded as a "fixture filing" in accordance with the Code.

(e) Representations and Warranties. The Borrower represents and warrants that: (i) the Borrower is the record owner of the Mortgaged Property; (ii) the Borrower's chief executive office is located in the State of Ohio; (iii) the Borrower's state of organization is the State of Ohio; (iv) the Borrower's exact legal name is as set forth on Page 1 of this Mortgage; (v) the Borrower's organizational identification number is 4075880, (vi) Borrower is the owner of the Personal Property subject to no liens, charges or encumbrances other than the lien hereof, (vii) the Personal Property will not be removed from the Mortgaged Property without the consent of the Lender, and (viii) no financing statement covering any of the Personal Property or any proceeds thereof is on file in any public office except pursuant hereto.

9. Restrictions on Transfer. For the purpose of protecting the Lender's security, and keeping the Mortgaged Property free from subordinate financing liens, the Borrower agrees that it, the members of Borrower, and the members, partners or stockholders of any entity controlling, directly or indirectly, Borrower, will not:

(a) sell, assign, transfer, hypothecate, grant a security interest in or convey title to (i) the Mortgaged Property or any part thereof, or (ii) any membership interest in Borrower, or (iii) any membership interest, partnership interest or stock in any entity controlling, directly or indirectly, Borrower;

(b) obtain any financing, all or a part of which, will be secured by (i) the Mortgaged Property, or (ii) any membership interest in Borrower, or (iii) any membership interest, partnership interest or stock in any entity controlling, directly or indirectly, Borrower; or

(c) convert the Borrower from one type of legal entity into another type of legal entity,

# UNOFFICIAL COPY

without, in each instance, the Lender's prior written consent. Notwithstanding the foregoing or anything in this Mortgage or the other Loan Documents to the contrary, the following are permitted without the Lender's consent and without payment of any fee and shall not constitute an Event of Default hereunder or under any of the Loan Documents (collectively, "Permitted Transfers"): sales, assignments, bequests, and other transfers of any direct or indirect beneficial ownership interest in the Borrower, so long as: (i) MAP Homewood II, LLC, an Ohio limited liability company ("MAP Homewood") remains a Member in Borrower and continues to be the Borrower's Operating Manager, and John I. Silverman continues to have operational control of MAP Homewood as Executive Manager pursuant to MAP Homewood's Operating Agreement, (ii) John I. Silverman, or any "family member" (as defined below) of John I. Silverman continues to own a majority of the ownership units in MAP Homewood, and John I. Silverman continues to have operational control of MAP Homewood as Executive Manager pursuant to MAP Homewood's Operating Agreement. "Family member" means a person's spouse, children (whether natural or adopted), grandchildren (whether natural or adopted), parents, brothers, sisters, or children (whether natural or adopted) of brothers or sisters, or a trustee holding legal title to the applicable interest for any of the foregoing as a beneficiary. Notwithstanding anything to the contrary set forth in this Section, in no event shall any transfer(s) of membership interests in either the Borrower or MAP Homewood result in any new person or entity (i.e. a person or entity other than John I. Silverman) owning twenty percent (20%) or more of the membership interests of Borrower and/or MAP Homewood without the Lender's prior written consent. Any violation of this Section shall be deemed a "Prohibited Transfer."

10. Events of Default. Any one or more of the following events shall constitute an "Event of Default" under this Mortgage:

(a) If the Borrower shall fail (i) to make any payment of principal or interest under the Note within five (5) days of the date when due, or (ii) to make any other payment under the Loan Documents within five (5) days of the date when due or, if no date is stated, five (5) days after demand (or such shorter period as may be expressly provided for herein or therein); or

(b) If a Prohibited Transfer shall occur; or

(c) Borrower fails to perform or cause to be performed any other obligation or observe any other condition, covenant, term, agreement or provision required to be performed or observed by Borrower contained in this Mortgage and not specifically referred to elsewhere in this Section 10; provided, however, that if such failure by its nature can be cured, then so long as the continued operation and safety of the Mortgaged Property, and the priority, validity and enforceability of the liens created by this Mortgage or any of the other Loan Documents and the value of the Mortgaged Property are not impaired, threatened or jeopardized, then Borrower shall have a period ("Cure Period") of thirty (30) days after Borrower obtains actual knowledge of such failure or receives written notice of such failure to cure the same and an Event of Default shall not be deemed to exist during the Cure Period (provided, however, such period shall be limited to ten (10) days if such failure can be cured by the payment of money), provided further that if Borrower commences to cure such failure during the Cure Period and is diligently and in good faith attempting to effect such cure, the Cure Period shall be

# UNOFFICIAL COPY

extended for thirty (30) additional days, but in no event shall the Cure Period be longer than sixty (60) days in the aggregate ; or

(d) If any Event of Default occurs under any other Loan Document.

11. Remedies. Upon the occurrence of an Event of Default (regardless of the pendency of any proceeding which has or might have the effect of preventing Borrower from complying with the terms of this instrument), and in addition to such other rights as may be available under any other Loan Document or under applicable law, but subject at all times to any mandatory legal requirements:

(a) Acceleration. Lender may declare the outstanding principal balance of the Note and all unpaid indebtedness of Borrower hereby secured, including interest then accrued thereon, to be forthwith due and payable, whereupon the same shall become and be forthwith due and payable, without other notice or demand of any kind; provided, however, if the Event of Default is under Section 8(e) of the Loan Agreement, all unpaid indebtedness of Borrower hereby secured shall be immediately due and payable without any action by Lender.

(b) Uniform Commercial Code. Lender shall, with respect to the Personal Property, have all the rights, options and remedies of a secured party under the Code, including without limitation, the right to the possession of any such property or any part thereof, and the right to enter with legal process any premises where any such property may be found. Any requirement of said Code for reasonable notification shall be met by mailing written notice to Borrower at its address set forth in Section 28 hereof at least ten (10) days prior to the sale or other event for which such notice is required. Any such sale may be held as part of and in conjunction with any foreclosure sale of the other properties and rights constituting the Mortgaged Property in order that the Mortgaged Property, including the Personal Property, may be sold as a single parcel if the Lender elects. The Borrower hereby agrees that if the Lender demands or attempts to take possession of the Personal Property or any portion thereof in exercise of its rights and remedies hereunder, the Borrower will promptly turn over and deliver possession thereof to the Lender, and the Borrower authorizes, to the extent the Borrower may now or hereafter lawfully grant such authority, the Lender, its employees and agents, and potential bidders or purchasers to enter upon the Mortgaged Property or any other office, building or property where the Personal Property or any portion thereof may at the time be located (or believed to be located) and the Lender may (i) remove the same therefrom or render the same inoperable (with or without removal from such location); (ii) repair, operate, use or manage the Personal Property or any portion thereof; (iii) maintain, repair or store the Personal Property or any portion thereof; (iv) view, inspect and prepare the Personal Property or any portion thereof for sale, lease or disposition; (v) sell, lease, dispose of or consume the same or bid thereon; or (vi) incorporate the Personal Property or any portion thereof into the Land or the Improvements or Fixtures and sell, convey or transfer the same. The expenses of retaking, selling and otherwise disposing of the Personal Property, including reasonable attorneys' fees and legal expenses incurred in connection therewith, shall constitute so much additional Debt and shall be payable upon demand with interest at the Default Rate.

# UNOFFICIAL COPY

(c) Foreclosure. Lender may proceed to protect and enforce the rights of Lender hereunder (i) by any action at law, suit in equity or other appropriate proceedings, whether for the specific performance of any agreement contained herein, or for an injunction against the violation of any of the terms hereof, or in aid of the exercise of any power granted hereby or by law, or (ii) by the foreclosure of this Mortgage. In any suit to foreclose the lien hereof, there shall be allowed and included as additional Debt in the decree of sale, all expenditures and expenses authorized by the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 et. seq., as from time to time amended (the "Act") and all other expenditures and expenses which may be paid or incurred by or on behalf of Lender for reasonable attorney's fees, appraiser's fees, outlays for documentary and expert evidence, stenographer's charges, publication costs, and costs (which may be reasonably estimated as to items to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and insurance with respect to title as Lender may deem reasonably necessary either to prosecute such suit or to evidence to bidders at sales which may be had pursuant to such decree the true conditions of the title to or the value of the Mortgaged Property. All expenditures and expenses of the nature mentioned in this paragraph, and such other expenses and fees as may be incurred in the protection of the Mortgaged Property and Rents and income therefrom and the maintenance of the lien of this Mortgage, including the reasonable fees of any attorney employed by Lender in any litigation or proceedings affecting this Mortgage, the Note or the Mortgaged Property, including bankruptcy proceedings, or in preparation of the commencement or defense of any proceedings or threatened suit or proceeding, or otherwise in dealing specifically therewith, shall be so much additional Debt and shall be immediately due and payable by Borrower, with interest thereon at the Default Rate until paid.

(d) Appointment of Receiver. Lender shall, as a matter of right, without notice and without giving bond to Borrower or anyone claiming by, under or through it, and without regard to the solvency or insolvency of Borrower or the then value of the Mortgaged Property, be entitled to have a receiver appointed pursuant to the Act of all or any part of the Mortgaged Property and the Rents, issues and profits thereof, with such power as the court making such appointment shall confer, and Borrower hereby consents to the appointment of such receiver and shall not oppose any such appointment. Any such receiver may, to the extent permitted under applicable law, without notice, enter upon and take possession of the Mortgaged Property or any part thereof by summary proceedings, ejectment or otherwise, and may remove Borrower or other persons and any and all property therefrom, and may hold, operate and manage the same and receive all earnings, income, Rents, issues and proceeds accruing with respect thereto or any part thereof, whether during the pendency of any foreclosure or until any right of redemption shall expire or otherwise.

(e) Taking Possession, Collecting Rents, Etc. Upon demand by Lender, Borrower shall surrender to Lender and Lender may enter and take possession of the Mortgaged Property or any part thereof personally, by its agent or attorneys or be placed in possession pursuant to court order as mortgagee in possession or receiver as provided in the Act, and Lender, in its discretion, personally, by its agents or attorneys or pursuant to court order as mortgagee in possession or receiver as provided in the Act may enter

# UNOFFICIAL COPY

upon and take and maintain possession of all or any part of the Mortgaged Property, together with all documents, books, records, papers, and accounts of Borrower relating thereto, and may exclude Borrower and any agents and servants thereof wholly therefrom and may, on behalf of Borrower, or in its own name as Lender and under the powers herein granted:

(i) hold, operate, manage and control all or any part of the Mortgaged Property and conduct the business, if any, thereof, either personally or by its agents, with full power to use such measures, legal or equitable, as in its discretion may be deemed proper or necessary to enforce the payment or security of the Rents, issues, deposits, profits, and avails of the Mortgaged Property, including without limitation actions for recovery of rent, actions in forcible detainer, and actions in distress for rent, all without notice to Borrower;

(ii) cancel or terminate any lease or sublease of all or any part of the Mortgaged Property for any cause or on any ground that would entitle Borrower to cancel the same;

(iii) elect to disaffirm any lease or sublease of all or any part of the Mortgaged Property made subsequent to this Mortgage without Lender's prior written consent;

(iv) extend or modify any then existing Leases and make new Leases of all or any part of the Mortgaged Property, 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 Loan and 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 Borrower, all persons whose interests in the Mortgaged Property are subject to the lien hereof, and the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the Debt, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any such purchaser,

(v) make all necessary or proper repairs, renewals, replacements, alterations, additions, betterments, and improvements in connection with the Mortgaged Property as may seem judicious to Lender, to insure and reinsure the Mortgaged Property and all risks incidental to Lender's possession, operation and management thereof, and to receive all Rents, issues, deposits, profits, and avails therefrom;

(vi) apply the net income, after allowing a reasonable fee for the collection thereof and for the management of the Mortgaged Property, to the payment of Taxes, Premiums and other charges applicable to the Mortgaged Property, or in reduction of the Debt in such order and manner as Lender shall select, in its sole discretion; and



# UNOFFICIAL COPY

(vii) receive and collect the Rents, issues, profits and revenues of the Mortgaged Property personally or through a receiver (appointed in accordance with Section 11(d) above) so long as an Event of Default shall exist and during the pendency of any foreclosure proceedings and during any redemption period, and the Borrower agrees to consent to a receiver if it is believed necessary or desirable by the Lender to enforce its rights under this subsection. The collection of Rents, issues, profits or revenues of the Mortgaged Property by the Lender shall in no way waive the right of the Lender to foreclose this Mortgage in the event of any said Event of Default.

Nothing herein contained shall be construed as constituting Lender a mortgagee in possession in the absence of the actual taking of possession of the Mortgaged Property. The right to enter and take possession of the Mortgaged Property and use any Personal Property therein, to manage, operate, conserve and improve the same, and to collect the Rents, issues and profits thereof, shall be in addition to all other rights or remedies of Lender hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof or under the other Loan Documents. The expenses (including any receiver's fees, reasonable counsel fees, costs and agent's compensation) incurred pursuant to the powers herein contained shall be secured hereby which expenses Borrower promises to pay upon demand together with interest thereon at the Default Rate. Lender shall not be liable to account to Borrower for any action taken pursuant hereto other than to account for any Rents actually received by Lender. Without taking possession of the Mortgaged Property, Lender may, in the event the Mortgaged Property become vacant or are abandoned, take such steps as it deems appropriate to protect and secure the Mortgaged Property (including hiring watchmen therefor) and all costs incurred in so doing shall constitute so much additional Debt payable upon demand with interest thereon at the Default Rate.

(f) Indemnity. The Borrower hereby agrees to indemnify, defend, protect and hold harmless the Lender and its employees, officers and agents from and against any and all liabilities, claims and obligations which may be incurred, asserted or imposed upon them or any of them as a result of or in connection with any use, operation, or lease of any of the Mortgaged Property, or any part thereof, or as a result of the Lender seeking to obtain performance of any of the obligations due with respect to the Mortgaged Property; provided, however, that the foregoing indemnity shall not extend to such liabilities, claims or obligations as result from the gross negligence or intentional misconduct of the Lender, its employees, officers or agents.

## 12. Compliance with Illinois Mortgage Foreclosure Law.

(a) In the event that any provision in this Mortgage shall be inconsistent with any provision of the Act, the provisions of the Act shall take precedence over the inconsistent provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act.

(b) If any provision of this Mortgage shall grant to Lender any rights or remedies upon the occurrence of an Event of Default which are more limited than the rights that would otherwise be vested in Lender under the Act in the absence of said

# UNOFFICIAL COPY

provision, Lender shall be vested with the rights granted in the Act to the full extent permitted by law.

(c) Without limiting the generality of the foregoing, all expenses incurred by Lender to the extent reimbursable under Sections 5/15-1510 and 5/15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether enumerated in Sections 11(c) or 14 of this Mortgage, shall be added to the Debt and shall be immediately due and payable by Borrower, with interest thereon at the Default Rate until paid or shall be included in the judgment of foreclosure.

13. Waiver of Right to Redeem - Waiver of Appraisal, Valuation, Etc. Borrower shall not and will not apply for or avail itself of any appraisal, valuation, stay, extension or exemption laws, or any so-called "Moratorium Laws," now existing or hereafter enacted in order to prevent or hinder the enforcement or foreclosure of this Mortgage, but hereby waives the benefit of such Moratorium Laws. Borrower for itself and all who may claim through or under it waives any and all right to have the property and estates comprising the Mortgaged Property marshalled upon any foreclosure of the lien hereof and agrees that any court having jurisdiction to foreclose such lien may order the Mortgaged Property sold as an entirety. In the event of any sale made under or by virtue of this instrument, the whole of the Mortgaged Property may be sold in one parcel as an entirety or in separate lots or parcels at the same or different times, all as the Lender may determine in its sole discretion. Lender shall have the right to become the purchaser at any sale made under or by virtue of this instrument and Lender so purchasing at any such sale shall have the right to be credited upon the amount of the bid made therefor by Lender with the amount payable to Lender out of the net proceeds of such sale. In the event of any such sale, the outstanding principal amount of the Loan and the other Debt, if not previously due, shall be and become immediately due and payable without demand or notice of any kind. Borrower acknowledges that the Mortgaged Property does not constitute agricultural real estate, as defined in Section 5/15-1201 of the Act, or residential real estate, as defined in Section 5/15-1219 of the Act. To the fullest extent permitted by law, Borrower, on behalf of Borrower, and each and every person acquiring any interest in, or title to the Mortgaged Property described herein subsequent to the date of this Mortgage, and on behalf of all other persons to the extent permitted by applicable law, hereby voluntarily and knowingly waives (i) any and all rights of redemption pursuant to Section 5/15-1601(b) of the Act, and (ii) any and all rights of reinstatement.

14. Costs and Expenses of Foreclosure. In any suit to foreclose the lien hereof there shall be allowed and included as additional indebtedness in the decree for sale all expenditures and expenses which may be paid or incurred by or on behalf of Lender for appraiser's fees, outlays for documentary and expert evidence, stenographic charges, publication costs and costs (which may be estimated as to items to be expended after the entry of the decree) of procuring all such abstracts of title, title searches and examination, guarantee policies, and similar data and assurances with respect to title as Lender may deem to be reasonably necessary either to prosecute any foreclosure action or to evidence to the bidder at any sale pursuant thereto the true condition of the title to or the value of the Mortgaged Property, and reasonable attorneys' fees, all of which expenditures shall become so much additional Debt which Borrower agrees to pay and all of such expenditures shall be immediately due and payable with interest thereon from the date of expenditure until paid at the Default Rate.

# UNOFFICIAL COPY

## 15. Protective Advances.

(a) Advances, disbursements and expenditures made by Lender for the following purposes, whether before and during a foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, shall, in addition to those otherwise authorized by this Mortgage, constitute "Protective Advances":

(i) all advances by Lender in accordance with the terms of this Mortgage to: (A) preserve or maintain, repair, restore or rebuild the improvements upon the Mortgaged Property; (B) preserve the lien of this Mortgage or the priority thereof; or (C) enforce this Mortgage, as referred to in Subsection (b)(5) of Section 5/15-1302 of the Act;

(ii) payments by Lender of: (A) when due, installments of principal, interest or other obligations in accordance with the terms of any prior lien or encumbrance; (B) when due, installments of Taxes and assessments, general and special and all other Taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the mortgaged real estate or any part thereof; (C) other obligations authorized by this Mortgage; or (D) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title to the Mortgaged Property, as referred to in Section 5/15-1505 of the Act;

(iii) advances by Lender in settlement or compromise of any claims asserted by claimants under any prior liens;

(iv) reasonable attorneys' fees and other costs incurred: (A) in connection with the foreclosure of this Mortgage as referred to in Section 5/15-1504(d)(2) and 5/15-1510 of the Act; (B) in connection with any action, suit or proceeding brought by or against the Lender for the enforcement of this Mortgage or arising from the interest of the Lender hereunder or under any of the other Loan Documents; or (C) in the preparation for the commencement or defense of any such foreclosure or other action;

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

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

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

(viii) expenses incurred and expenditures made by Lender for any one or more of the following: (A) Premiums for casualty and liability insurance paid by

# UNOFFICIAL COPY

Lender whether or not Lender or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining of existing insurance in effect at the time any receiver or mortgagee takes possession of the mortgaged real estate imposed by Subsection (c)(1) of Section 5/15-1704 of the Act; (B) repair or Restoration of damage or destruction in excess of available Insurance Proceeds or condemnation awards; (C) payments required or deemed by Lender to be for the benefit of the Mortgaged Property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Mortgaged Property; (D) shared or common expense assessments payable to any association or corporation in which the owner of the mortgaged real estate is a member in any way affecting the Mortgaged Property; (E) pursuant to any lease or other agreement for occupancy of the mortgaged real estate.

(b) All Protective Advances shall be so much additional Debt, and shall become immediately due and payable without notice and with interest thereon from the date of the advance until paid at the Default Rate.

(c) This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b)(5) of Section 5/15-1202 of the Act.

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

- (i) determination of the amount of Debt at any time;
- (ii) indebtedness found due and owing to the Lender in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;
- (iii) determination of amounts deductible from sale proceeds pursuant to Section 5/15-1512 of the Act;
- (iv) application of income in the hands of any receiver or mortgagee in possession; and
- (v) computation of any deficiency judgment pursuant to Subsections (b)(2) and (e) of Section 5/15-1508 and Section 5/15-1511 of the Act.

16. Application of Proceeds. The proceeds of any foreclosure sale of the Mortgaged Property or of any sale of property pursuant to Section 11(c) hereof shall be distributed in the following order of priority: First, on account of all costs and expenses incident to the foreclosure or other proceedings including all such items as are mentioned in Sections 11(c) and Section 14

# UNOFFICIAL COPY

hereof; second, to all items, other than principal and interest evidenced by the Note, which under the terms hereof constitute Debt with interest thereon as herein provided; third, to all unpaid interest on the Note; fourth, to all unpaid principal on the Note; fifth, to whomsoever shall be lawfully entitled to the same.

## 17. Rights Cumulative.

(a) Each right, power and remedy herein conferred upon the Lender is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter provided by law or in equity, and each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time concurrently or independently and as often and in such order as may be deemed expedient by the Lender.

(b) By accepting payment of any sums secured by this Mortgage after the due date thereof, by accepting performance of any of the Borrower's obligations hereunder after such performance is due, or by making any payment or performing any act on behalf of the Borrower which the Borrower was obligated but failed to perform or pay, the Lender shall not waive, nor be deemed to have waived, its rights to require payment when due of all sums secured hereby and the due, punctual and complete performance of the Borrower's obligations under this Mortgage, the Note, and all other Loan Documents. No waiver or modification of any of the terms of this Mortgage shall be binding on the Lender unless set forth in writing signed by the Lender and any such waiver by the Lender of any Event of Default by the Borrower under this Mortgage shall not constitute a waiver of any other Event of Default under the same or any other provision hereof. If the Lender holds any additional security for any of the obligations secured hereby, it may pursue its rights or remedies with respect to such security at its option either before, contemporaneously with, or after a sale of the Mortgaged Property or any portion thereof.

(c) No act or omission by the Lender shall release, discharge, modify, change or otherwise affect the liability of Borrower under the Note, this Mortgage, or any of the other Loan Documents, or any other obligation of the Borrower, or any subsequent purchaser of the Mortgaged Property or any part thereof, or any maker, co-signer, endorser, surety or guarantor, or preclude the Lender from exercising any right, power or privilege herein granted or intended to be granted in the event of any Event of Default then made or of any subsequent Event of Default, or alter the security interest or lien of this Mortgage or any of the other Loan Documents except as expressly provided in an instrument or instruments executed by the Lender. The exercise of one right, power or remedy shall not be a waiver of the right to exercise at the same time or thereafter any other right, power or remedy; and no delay or omission of the Lender in the exercise of any right, power or remedy accruing hereunder or under any of the other Loan Documents or arising otherwise shall impair any such right, power or remedy, or be construed to be a waiver of any Event of Default or acquiescence therein. Except as otherwise specifically required herein, notice of the exercise of any right, remedy or power granted to the Lender by this Mortgage is not required to be given.

## 18. Successors and Assigns; Assignment.

# UNOFFICIAL COPY

(a) This Mortgage and each and every provision hereof shall be binding upon the Borrower and its successors and assigns (including, without limitation, each and every record owner from time to time of the Mortgaged Property or any other person having an interest therein), and shall inure to the benefit of the Lender and its successors and assigns.

(b) All of the covenants of this Mortgage shall run with the Land and be binding on any successor owners of the Land. In the event that the ownership of the Mortgaged Property or any portion thereof becomes vested in a person or persons other than the Borrower, the Lender may, without notice to the Borrower, deal with such successor or successors in interest of the Borrower with reference to this Mortgage and the Debt in the same manner as with the Borrower without in any way releasing or discharging the Borrower from its obligations hereunder. The Borrower will give immediate written notice to the Lender of any conveyance, transfer or change of ownership of the Mortgaged Property, but nothing in this Section shall vary or negate the provisions of Section 9 hereof.

(c) The rights and obligations of Borrower under this Mortgage may not be assigned and any purported assignment by Borrower shall be null and void. Lender shall have the right to sell, assign or transfer portions of its right, title and/or interest in and to this Mortgage and the other Loan Documents (including the sale of participation interests therein), without the consent or approval of Borrower, and Borrower agrees to cooperate in all respects with Lender in connection therewith, including, without limitation, the execution of all documents and instruments reasonably requested by Lender or such transferee provided that such documents and instruments do not materially adversely affect any of Borrower's duties or obligations under this Mortgage and the other Loan Documents.

19. Execution of Separate Security Agreements, Financing Statements, Etc.: Estoppel Letter; Corrective Documents.

(a) The Borrower will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, conveyances, notes, mortgages, security agreements, financing statements and assurances as the Lender shall reasonably require for the better assuring, conveying, mortgaging, assigning and confirming unto the Lender all property mortgaged hereby or property intended so to be, whether now owned by the Borrower or hereafter acquired. Without limitation of the foregoing, the Borrower will assign to the Lender, upon request, as further security for the Debt, its interest in all agreements, contracts, licenses and permits affecting the Mortgaged Property, such assignments to be made by instruments reasonably satisfactory to the Lender, but no such assignment shall be construed as a consent by the Lender to any agreement, contract, license or permit or to impose upon the Lender any obligations with respect thereto.

(b) From time to time, the Borrower will furnish, within ten (10) days after request from the Lender, a written and duly acknowledged statement of the amount due

# UNOFFICIAL COPY

under the Note and this Mortgage and whether any alleged offsets or defenses exist against the Debt.

(c) The Borrower and the Lender shall, at the request of the other, promptly correct any defect, error or omission which may be discovered in the contents of this Mortgage or in the execution or acknowledgment hereof or in any other instrument executed in connection herewith or in the execution or acknowledgment of such instrument and will execute and deliver any and all additional instruments as may be requested by the Lender or the Borrower, as the case may be, to correct such defect, error or omission.

20. Subrogation. If any part of the Debt is used directly or indirectly to pay off, discharge or satisfy, in whole or in part, any prior lien or encumbrance upon the Mortgaged Property or any part thereof, then by advancing the monies to make such payment, the Lender shall be subrogated to the rights of the holder thereof in and to such other lien or encumbrance and any additional security held by such holder, and shall have the benefit of the priority of the same.

21. Governing Law. Except where the law of the State of Illinois is expressly referenced in this Mortgage, this Mortgage and all obligations secured hereby are governed by and to be construed in accordance with the internal laws, but otherwise without regard to the conflicts of law provisions, of the State of Ohio. The parties stipulate and agree that the State of Ohio has a substantial relationship to the underlying transactions related to this Mortgage and the parties involved. Notwithstanding the foregoing, the parties stipulate and agree that the laws of the State of Illinois govern issues of lien creation and priority, and the procedures for foreclosure and for enforcing, in the State of Illinois, provisional remedies directly related to the real property and the Rents encumbered hereby, including, without limitation, appointment of a receiver.

22. Business Loan.

(a) The Borrower declares, represents, certifies and agrees that the proceeds of the Note will be used solely for business purposes and that the loan is exempt from interest limitations pursuant to the provisions of 815 ILCS 205/4 and is an exempted transaction under the Truth in Lending Act, 15 U.S.C. Section 1601 et seq.

(b) All rights, remedies and powers provided by this Mortgage may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law, and all the provisions of this Mortgage are intended to be subject to all applicable mandatory provisions of law which may be controlling and to be limited to the extent necessary so that they will not render this Mortgage invalid or unenforceable under the provisions of any applicable law.

23. Escrow Deposits. Upon the occurrence and during the continuance of an Event of Default, and without limiting the effect of Sections 4 and 5 hereof, the Lender may require that the Borrower pay to the Lender on the first business day of each calendar month an amount equal to one-twelfth (1/12th) of what the Lender estimates is necessary to pay, on an annualized basis,

# UNOFFICIAL COPY

(1) all Taxes, and (2) all premiums for the insurance policies required pursuant to the Loan Agreement (“Premiums”) and to enable the Lender to pay same at least thirty (30) days before the Taxes would become delinquent and the Premiums are due, and, on demand, from time to time shall pay to the Lender additional sums necessary to pay the Premiums and Taxes. No amounts so paid shall be deemed to be trust funds, but may be commingled with the general funds of the Lender, and no interest shall be payable thereon. In the event that the Borrower does not pay such sums for Premiums and Taxes, then the Lender may, but shall not be obligated to, pay such Premiums and Taxes and any money so paid by the Lender shall constitute additional Debt hereunder and shall be payable by Borrower to Lender on demand with interest thereon from the date of disbursement by Lender at Default Rate until repaid to Lender. If an Event of Default occurs, the Lender shall have the right, at its election, to apply any amounts so held under this Section 23 against all or any part of the Debt, or in payment of the Premiums or Taxes for which the amounts were deposited. The Borrower will furnish to the Lender bills for Taxes and Premiums not less than thirty (30) days before Taxes become delinquent and such Premiums become due.

24. Assignment of Leases and Other Agreements Affecting the Mortgaged Property. In order to further secure payment of the Debt and the observance, performance and discharge of the Borrower’s obligations under the Loan Documents, the Borrower hereby assigns to the Lender all of the Borrower’s right, title, interest and estate in, to and under all of the Leases and in and to all of the Rents and Profits (defined as all rents, income, issues and profits arising from any Leases or other agreements affecting the use, enjoyment or occupancy of the Mortgaged Property now or hereafter made affecting the Mortgaged Property or any portion thereof), as more particularly described in that certain Assignment of Leases and Rents dated as of even herewith from Borrower to and for the benefit of Lender. Unless and until an Event of Default occurs, the Borrower shall be entitled to collect the Rents and Profits (except as otherwise provided in this Mortgage) as and when they become due and payable. Neither these assignments nor Lender’s enforcement of the provisions of these assignments (including the receipt of the Rents) will operate to subordinate the lien of this Mortgage to any of the rights of any tenant of all or any part of the Mortgaged Property, or to subject Lender to any liability to any such tenant for the performance of any obligations of Borrower under any such Lease unless and until Lender agrees to such subordination or assumes such liability by an appropriate written instrument.

25. Inspection of Mortgaged Property and Records. The Lender and its representatives and agents shall have the right to inspect the Mortgaged Property and all books, records and documents relating thereto at all reasonable times, after giving reasonable notice to the Borrower, and access thereto, subject to the rights of tenants pursuant to Leases. The Lender shall use reasonable efforts to avoid disturbing business operations on the Mortgaged Property during such inspections. The Borrower or the Lender thereof shall keep and maintain full and correct books and records showing in detail the income and expenses of the Mortgaged Property and permit the Lender or its agents to examine such books and records and all supporting vouchers and data at any time and from time to time on request at its offices at the address hereinafter identified or at such other location as may be mutually agreed upon.

26. [INTENTIONALLY OMITTED].



# UNOFFICIAL COPY

27. Environmental Matters. Concurrently herewith, Borrower and John I. Silverman shall execute and deliver an Environmental Indemnity Agreement in form satisfactory to Lender (the "Environmental Indemnity Agreement"). The performance of the covenants, undertakings and obligations of the indemnitors under the Environmental Indemnity Agreement shall be secured by this Mortgage.

28. Notices. All notices or other written communications hereunder shall be deemed to have been properly given (i) upon delivery, if delivered in person, (ii) one (1) business day after having been deposited for overnight delivery with any reputable overnight courier service, or (iii) three (3) business days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal Service and sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the addresses set forth below in this Section or as such party may from time to time designate by written notice to the other parties. Either party by notice to the other in the manner provided herein may designate additional or different addresses for subsequent notices or communications:

To Lender:	Associated Bank, National Association 312 Walnut Street, Suite 3450 Cincinnati, Ohio 45202 Attn: Commercial Real Estate
With copy to:	Keating Muething & Klekamp PLL One East Fourth Street #1400 Cincinnati, Ohio 45202 Attn: Kalman Steinberg, Esq.
To Borrower:	GMX MIDLAND HOMEWOOD II, LLC 8044 Montgomery Road, Suite 370 Cincinnati, Ohio 45236 Attn: Ryan Kyte
With copy to:	Frost Brown Todd, LLC 3300 Great American Tower 301 East Fourth Street Cincinnati, Ohio 45202 Attn: John C. Krug, Esq.

29. Releases.

(a) Upon payment in full of all sums due under the Note and this Mortgage and the other of the Loan Documents, the Lender shall, upon the request of, and at the cost of, the Borrower, execute a proper release of this Mortgage.

(b) The Lender may, regardless of consideration, cause the release of any part of the Mortgaged Property from the lien of this Mortgage without in any manner

# UNOFFICIAL COPY

affecting or impairing the lien or priority of this Mortgage as to the remainder of the Mortgaged Property not so released.

30. Single Asset Borrower. Borrower was organized solely for the purpose of owning, developing, managing and disposing of the Mortgaged Property and does not own any real property other than the Mortgaged Property and does not operate any business other than the development, construction, ownership, management and operation of the Mortgaged Property. Borrower shall not during the term of the Loan, including any extensions, modifications, renewals or refinancings thereof, acquire any real property or assets other than the Mortgaged Property, operate any business other than the acquisition, development, management and disposition of the Mortgaged Property, or incur any liability or obligation other than those incurred in the ownership and operation of the Mortgaged Property. Borrower will not commingle any of its funds or assets with those of any other entity and has held, and will hold, all of its assets and conduct all of its business in its own name. Borrower has paid and will pay all of its liabilities out of its own funds and assets. Borrower has allocated and will allocate fairly and reasonably any overhead for shared office space and will use separate stationery, invoices and checks in connection with the conduct of its business. Borrower has not entered into and will not enter into, or be a party to, any transaction with any of its equity interest holders or its affiliates, except in the ordinary course of its business and on terms which are intrinsically fair and no less favorable to it than would be obtained in a comparable arm's-length transaction with an unrelated third party. Borrower will not engage in, seek, or consent to any dissolution, winding up or liquidation, without the express consent of Lender. Borrower's articles of organization and operating agreement limit its purpose to the acquisition, development, management, operation and disposition of the Mortgaged Property (the "Primary Purpose"), and to engage in any other business activity related to the Primary Purpose as may be permitted under Ohio law, and such purposes shall not be amended without the prior written consent of Lender, which consent may be withheld by Lender in its sole and absolute discretion.

31. Indemnification by the Borrower. The Borrower shall protect and indemnify the Lender from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements), imposed upon or incurred by or asserted against the Lender or the members, partners, stockholders, directors, officers, agents or employees of the Lender by reason of (a) ownership of the Mortgaged Property or any interest therein, or receipt of any Rents or other sum therefrom, (b) any accident to, injury to or death of persons or loss of or damage to Mortgaged Property occurring on or about the Mortgaged Property or the adjoining sidewalks, curbs, vaults or vault space, if any, streets or ways, (c) any failure on the part of the Borrower or Guarantor of the Note to perform or comply with any of the terms, covenants, conditions and agreements set forth in this Mortgage, the Note, any of the other Loan Documents, or any agreement, reimbursement agreement, guaranty, or any other agreements executed by the Borrower or Guarantor or any other persons directly or indirectly liable for the payment of the Debt, (d) any failure on the part of the Borrower to perform or comply with (i) any other agreement executed by the Borrower or Guarantor, or (ii) any requirement of law, (e) payment of sums for the protection of the lien and security interest of the Lender in and to the Mortgaged Property, (f) performance of any labor or services or the furnishing of any materials or other Mortgaged Property in respect of the Mortgaged Property or any part thereof for construction or maintenance or otherwise, or (g) any action brought against the Lender attacking the validity, priority or enforceability of this

# UNOFFICIAL COPY

Mortgage, the Note, any other Loan Document, or any agreement, reimbursement agreement, guaranty, or any other agreements executed by the Borrower or any other persons directly or indirectly liable for the payment of the Debt. Any amounts payable to the Lender under this paragraph shall bear interest at the Default Rate and shall be secured by this Mortgage. In the event any action, suit or proceeding is brought against the Lender or the members, partners, stockholders, directors, officers, agents or employees of the Lender by reason of any such occurrence, the Borrower, upon the request of the Lender and at Borrower's sole expense, shall resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by Borrower and approved by the Lender. Such obligations under this paragraph shall survive the termination, satisfaction or release of this Mortgage.

32. OFAC Covenant. Borrower shall ensure, and cause each of its subsidiaries to ensure, that (i) no person who owns twenty percent (20.00%) or more of the equity interests in the Borrower, or otherwise controls the Borrower or any of its subsidiaries is or shall be listed on the Specially Designated Nationals and Blocked Person List or other similar lists maintained by the OFAC, the Department of the Treasury or included in any Executive Orders, (ii) the proceeds of the Loan do not violate any of the foreign asset control regulations of OFAC or any enabling statute or Executive Order relating thereto, and (iii) it shall comply, and cause each of its subsidiaries to comply, with all applicable Bank Secrecy Act laws and regulations, as amended.

33. Miscellaneous.

(a) Time is of the Essence. Time is of the essence of this Mortgage.

(b) Captions and Pronouns. The captions and headings of the various Sections of this Mortgage are for convenience only, and are not to be construed as confining or limiting in any way the scope or intent of the provisions hereof. Whenever the context requires or permits, the singular shall include the plural, the plural shall include the singular, and the masculine, feminine and neuter shall be freely interchangeable.

(c) Maximum Indebtedness. Notwithstanding anything contained herein to the contrary, in no event shall the Debt exceed an amount equal to \$4,900,000.00; provided, however, in no event shall the Lender be obligated to advance funds in excess of the face amount of the Note.

(d) The Borrower Not a Joint Venturer or Partner. The Borrower and the Lender acknowledge and agree that in no event shall the Lender be deemed to be a partner or joint venturer with the Borrower. Without limitation of the foregoing, the Lender shall not be deemed to be such a partner or joint venturer on account of its becoming a mortgagee in possession or exercising any rights pursuant to this Mortgage or pursuant to any other instrument or document evidencing or securing any of the Debt, or otherwise.

(e) Replacement of the Note. Upon notice to the Borrower of the loss, theft, destruction or mutilation of the Note, the Borrower will execute and deliver, in lieu thereof, a replacement note, identical in form and substance to the Note and dated as of

# UNOFFICIAL COPY

the date of the Note and upon such execution and delivery all references in any of the Loan Documents to the Note shall be deemed to refer to such replacement note.

(f) Waiver of Consequential Damages. The Borrower covenants and agrees that in no event shall the Lender be liable for consequential damages, whatever the nature of a failure by the Lender to perform its obligation(s), if any, under the Loan Documents, and the Borrower hereby expressly waives all claims that it now or may hereafter have against the Lender for such consequential damages.

(g) After Acquired Mortgaged Property. The lien hereof will automatically attach, without further act, to all after-acquired Mortgaged Property attached to and/or used in connection with or in the operation of the Mortgaged Property or any part thereof.

(h) Severability. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Mortgage except that if such provision relates to the payment of any monetary sum, then the Lender may, at its option declare the Debt immediately due and payable.

(i) Interpretation of Agreement. Should any provision of this Mortgage require interpretation or construction in any judicial, administrative, or other proceeding or circumstance, it is agreed that the parties hereto intend that the court, administrative body, or other entity interpreting or construing the same shall not apply a presumption that the provisions hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the same, it being agreed that the agents of both parties hereto have fully participated in the preparation of all provisions of this Mortgage, including, without limitation, all Exhibits attached to this Mortgage.

(j) Joint and Several Obligations: Counterparts. If this Mortgage is executed by more than one Borrower, (i) the obligations and liabilities of Borrower under this Mortgage shall be joint and several and shall be binding upon and enforceable against each Borrower and their respective successors and assigns, and (ii) this Mortgage may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Mortgage.

(k) Effect of Extensions and Amendments. If the payment of the Debt, or any part thereof, be extended or varied, or if any part of the security or guaranties therefor be released, all persons now or at any time hereafter liable therefor, or interested in the Mortgaged Property shall be held to assent to such extension, variation or release, and their liability, and the lien, and all provisions hereof, shall continue in full force and effect; the right of recourse against all such persons being expressly reserved by the Lender, notwithstanding any such extension, variation or release.

(l) Mortgagee-in-Possession. Nothing herein contained shall be construed as constituting the Lender a mortgagee-in-possession in the absence of the actual taking of possession of the Mortgaged Property by the Lender pursuant to this Mortgage.

# UNOFFICIAL COPY

(m) No Merger. The parties hereto intend that the Mortgage and the lien hereof shall not merge in fee simple title to the Mortgaged Property, and if the Lender acquires any additional or other interest in or to the Mortgaged Property or the ownership thereof, then, unless a contrary intent is manifested by the Lender as evidenced by an express statement to that effect in an appropriate document duly recorded, this Mortgage and the lien hereof shall not merge in the fee simple title and this Mortgage may be foreclosed as if owned by a stranger to the fee simple title.

(n) Complete Agreement. This Mortgage, the Note and the other Loan Documents constitute the complete agreement between the parties with respect to the subject matter hereof and the Loan Documents may not be modified, altered or amended except by an agreement in writing signed by both the Borrower and the Lender.

34. JURISDICTION AND VENUE. BORROWER HEREBY AGREES THAT ALL ACTIONS OR PROCEEDINGS INITIATED BY BORROWER AND ARISING DIRECTLY OR INDIRECTLY OUT OF THIS MORTGAGE SHALL BE LITIGATED IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, OR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS OR, THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO OR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, OR IF LENDER INITIATES SUCH ACTION, ANY COURT IN WHICH LENDER SHALL INITIATE SUCH ACTION AND WHICH HAS JURISDICTION. BORROWER HEREBY EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR PROCEEDING COMMENCED BY LENDER IN ANY OF SUCH COURTS, AND HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS AND COMPLAINT, OR OTHER PROCESS OR PAPERS ISSUED THEREIN, AND AGREES THAT SERVICE OF SUCH SUMMONS AND COMPLAINT OR OTHER PROCESS OR PAPERS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO BORROWER AT THE ADDRESS TO WHICH NOTICES ARE TO BE SENT PURSUANT TO THIS MORTGAGE. BORROWER WAIVES ANY CLAIM THAT COOK COUNTY, ILLINOIS OR THE NORTHERN DISTRICT OF ILLINOIS OR THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO OR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO IS AN INCONVENIENT FORUM OR AN IMPROPER FORUM BASED ON LACK OF VENUE. SHOULD BORROWER, AFTER BEING SO SERVED, FAIL TO APPEAR OR ANSWER TO ANY SUMMONS, COMPLAINT, PROCESS OR PAPERS SO SERVED WITHIN THE NUMBER OF DAYS PRESCRIBED BY LAW AFTER THE MAILING THEREOF, BORROWER SHALL BE DEEMED IN DEFAULT AND AN ORDER AND/OR JUDGMENT MAY BE ENTERED BY LENDER AGAINST BORROWER AS DEMANDED OR PRAYED FOR IN SUCH SUMMONS, COMPLAINT, PROCESS OR PAPERS. THE EXCLUSIVE CHOICE OF FORUM FOR BORROWER SET FORTH IN THIS SECTION SHALL NOT BE DEEMED TO PRECLUDE THE ENFORCEMENT BY LENDER OF ANY JUDGMENT OBTAINED IN ANY OTHER FORUM OR THE TAKING BY LENDER OF ANY ACTION TO ENFORCE THE SAME IN ANY OTHER APPROPRIATE JURISDICTION, AND BORROWER HEREBY WAIVES THE RIGHT, IF ANY, TO COLLATERALLY ATTACK ANY SUCH JUDGMENT OR ACTION.

# UNOFFICIAL COPY

35. Waiver of Jury Trial. BORROWER AND LENDER HEREBY VOLUNTARILY, KNOWINGLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY RIGHT TO HAVE A JURY PARTICIPATE IN RESOLVING ANY DISPUTE (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) BETWEEN OR AMONG BORROWER AND LENDER ARISING OUT OF OR IN ANY WAY RELATED TO THIS MORTGAGE, ANY OTHER LOAN DOCUMENT, OR ANY RELATIONSHIP BETWEEN BORROWER AND LENDER. THIS PROVISION IS A MATERIAL INDUCEMENT TO LENDER TO PROVIDE THE LOAN DESCRIBED HEREIN AND IN THE OTHER LOAN DOCUMENTS.

36. Additional Waivers. BORROWER EXPRESSLY AND UNCONDITIONALLY WAIVES, IN CONNECTION WITH ANY SUIT, ACTION OR PROCEEDING BROUGHT BY LENDER ON THIS MORTGAGE, ANY AND EVERY RIGHT IT MAY HAVE TO (A) INTERPOSE ANY COUNTERCLAIM THEREIN UNLESS UNDER THE APPLICABLE RULES OF COURT SUCH COUNTERCLAIM MUST BE ASSERTED IN SUCH PROCEEDING, OR (B) HAVE THE SAME CONSOLIDATED WITH ANY OTHER OR SEPARATE SUIT, ACTION OR PROCEEDING UNLESS UNDER THE APPLICABLE RULES OF COURT SUCH SUIT, ACTION OR PROCEEDING MUST BE CONSOLIDATED WITH THE PROCEEDING BROUGHT BY LENDER.

37. Compliance with Loan Agreement. Borrower will abide by and comply with and be governed and restricted by all of the terms, covenants, provisions, restrictions and agreements contained in the Loan Agreement, and in each and every supplement thereto or amendment thereof which may at any time or from time to time be executed and delivered by the parties thereto or their successors and assigns.

38. Provisions of Loan Agreement. The proceeds of the Note are to be disbursed by the Lender in accordance with the terms contained in the Loan Agreement, the provisions of which are incorporated herein by reference to the same extent as if fully set forth herein. Borrower covenants that any and all monetary disbursements made in accordance with the Loan Agreement shall constitute adequate consideration to Borrower for the enforceability of this Mortgage and the Note, and that all advances and indebtedness arising and accruing under the Loan Agreement from time to time, whether or not the total amount thereof may exceed the face amount of the Note, shall be secured by this Mortgage; provided, however, that the total Debt shall not in any event exceed two hundred percent of the stated principal amount of the Note.

39. Construction Loan. The Note evidences a debt created by one or more disbursements made by Lender to Borrower to finance the cost of the construction of certain improvements upon the Land 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 Code.

40. Interest Rate. The interest rate on the Loan (the "Loan Rate") is the following: LIBOR plus two and fifty hundredths percent (2.50%), and the Loan Rate may be reduced to LIBOR plus two and twenty-five hundredths percent (2.25%) under certain conditions as specified in the Note. The Default Rate is the Loan Rate plus five percent (5.0%).

**[The remainder of this page is left blank intentionally]**

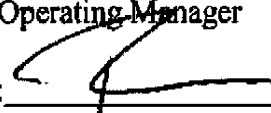
# UNOFFICIAL COPY

**IN WITNESS WHEREOF**, the Borrower has caused this Mortgage to be duly executed and delivered as of the day and year first above written.

**BORROWER:**

**GMX MIDLAND HOMEWOOD II, LLC,**  
an Ohio limited liability company

By: **MAP Homewood II, LLC,**  
an Ohio limited liability company,  
its **Operating Manager**

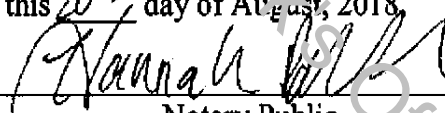
By:   
\_\_\_\_\_  
**Ryan L. Kyte, Manager**

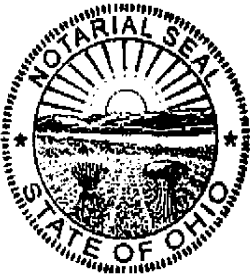
Property of Cook County Clerk's Office

STATE OF OHIO )  
                                  ) SS.  
COUNTY OF HAMILTON )

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Ryan L. Kyte, the Manager of MAP Homewood II, LLC, the Operating Manager of GMX Midland Homewood II, LLC, an Ohio limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said company, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 20<sup>th</sup> day of August, 2018.

  
\_\_\_\_\_  
Notary Public



**HANNAH POWERS**  
Notary Public, State of Ohio  
My Commission Expires 08-15-2021

My Commission Expires:

8-15-2021

# UNOFFICIAL COPY

**EXHIBIT "A"**

**LEGAL DESCRIPTION**

COMMON ADDRESS: \_\_\_\_\_

PIN NOS.: \_\_\_\_\_

Property of Cook County Clerk's Office



# UNOFFICIAL COPY

## LEGAL DESCRIPTION

Order No.: CCHI1801205LD

For APN/Parcel ID(s): 29-29-409-018-0000

Parcel 1:

Lot 1 in Matteson Richton Bank Subdivision, a Resubdivision of Lot 2 in Richmond Subdivision, a Subdivision of part of the East 1/2 of Southeast 1/4 of Section 29, Township 36 North, Range 14, East of the Third Principal Meridian in Cook County, Illinois.

Parcel 2:

Lot 1 (except the east 25 feet) in Matteson Richton Bank Subdivision, a Subdivision in the East 1/2 of the SouthEast 1/4 of Section 29, Township 36 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 3:

Lot 1 in Richmond Subdivision, being a Subdivision in the East Half of the Southeast Quarter of Section 29, Township 26 North, Range 14, East of the Third Principal Meridian, according to the Plat thereof recorded December 2, 1980 as document 25688712, (excepting from said Lot 1 that part dedicated for street by Plat of Dedication recorded November 30, 1994 as document 27355903 );

also excepting that part thereof taken by the Illinois Department of Transportation described as follows:

commencing at the Southeast Corner of Said Lot 1; thence South 89 degrees 12 minutes 07 seconds West along the South Line of said Lot 1 a distance of 57.97 feet, to the Southwest corner of that part of Said Lot 1 dedicated for street per document number 27355903 also being the point of beginning; thence continuing South 89 degrees 12 minutes 07 seconds West Along said South Line of Lot 1 a distance of 44.03 feet; thence North 70 degrees 47 minutes 56 seconds East 63.35 feet, to a line that is 42.00 feet West of and parallel with the East Line of Said Lot 1; thence North 00 degrees 28 minutes 51 seconds West along said parallel line 95.89 feet, to the North Line of Said Lot 1; thence North 89 degrees 31 minutes 09 seconds East along said North line 26.00 feet, to a line 16.00 feet West of the Northeast Corner of Said Lot 1; thence South 00 degrees 28 minutes 51 seconds East along the West Line of said part of Lot 1 dedicated for street per document number 27355903 a distance of 27.61 feet; thence Southerly along the Westerly line of said part of Lot 1 dedicated for street per document number 27355903 being a tangential curve to the right having an arc length of 55.26 feet, a radius of 174.00 feet, a chord length of 55.03 feet and a chord bearing South 08 degrees 37 minutes 03 seconds west; thence Southwesterly along the Westerly line of said part of Lot 1 dedicated for street per document number 27355903 being a tangential compound curve to the right having an arc length of 49.29 feet, a radius of 54.00 feet, a chord length of 47.60 feet and a chord bearing South 43 degrees 51 minutes 49 seconds West, to the point of beginning), all in Cook County, Illinois

Parcel 4:

Non-exclusive easement for the benefit of parcels 1, 2 and 3 as granted in access, parking and sign easement agreement recorded October 11, 2017 as Document Number 1728445074 for vehicular and pedestrian access, ingress and egress over and upon paved entranceways and drive lanes, parking and temporary construction easement over and upon areas located on the land as described and depicted

# UNOFFICIAL COPY

## LEGAL DESCRIPTION

(continued)

on exhibits attached thereto

Parcel 5:

Easement for the benefit of parcels 1 and 3 as created by a Common Driveway Easement recorded as document 85223218 for vehicular and pedestrian ingress and egress over the east 12.5 feet of lot 2 in aforesaid M-R Bank Subdivision.

Property of Cook County Clerk's Office