

UNOFFICIAL COPY

This instrument prepared by
and after recording should be
returned to:

Kutak Rock
Suite 2100
225 Peachtree Street, NE
Atlanta, GA 30303
Attention: David A. Nix, Esq.

99443665

4896/0100 04 001 Page 1 of 9
1999-05-07 11:07:40
Cook County Recorder 37.00



99443665

SECOND ASSIGNMENT OF RENTS AND LEASES

DI 7802397 [Signature]

THIS SECOND ASSIGNMENT OF RENTS AND LEASES (this "Assignment") is executed as of April 29, 1999, by **CAPREIT WATERFORD PLACE LIMITED PARTNERSHIP**, an Illinois limited partnership ("Assignor"), whose address for notice hereunder is c/o CAPREIT, Inc., 11200 Rockville Pike, Suite 100, Rockville, Maryland 20852, Attention: Richard Kadish, for the benefit of **MERRILL LYNCH CAPITAL SERVICES, INC.**, a Delaware corporation ("Assignee"), whose address for notice is Merrill Lynch World Headquarters, World Financial Center North Tower, 22nd Floor, 250 Vesey Street, New York, NY 10281-1322, Attention: Swap Group, World Financial Center. *9*

AGREEMENT:

For valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Assignor and the Assignee agree as follows:

1. **Absolute Assignment.** The Assignor unconditionally and absolutely assigns to the Assignee all of the Assignor's right, title and interest in and to:

(a) all leases, subleases, occupancy agreements, licenses, usufructs, rental contracts and other agreements now or hereafter existing relating to the use or occupancy of the project located on the real property described in Exhibit A hereto (the "Property"), together with all guarantees, modifications, extensions and renewals thereof (collectively, the "Leases"); and

(b) all rents, issues, profits, income and proceeds due or to become due from tenants of the Property, including rentals and all other payments of any kind under the Leases, together with all deposits (including security deposits) of tenants thereunder (collectively, the "Rents"). This Assignment is an absolute assignment to the Assignee and not an assignment as security for the performance of the obligations under the Master Financing and Guaranty Agreement (as hereinafter defined).

2. **Representations and Warranties.** Assignor represents and warrants that:
(a) Assignor has title to and full right to assign the Leases and the Rents hereunder, and no other assignment of any interest in any of the Leases has been made, except as otherwise provided for hereunder; (b) all leases are in full force and effect; (c) there is no existing default by Assignor or any tenant under the provisions of any of the Leases; and (d) no event has occurred which due to the

passage of time, the giving or failure to give notice, or both, would constitute a default under any of the Leases.

3. **Covenants.** Assignor agrees that it will faithfully observe, discharge and perform all of the obligations and agreements imposed upon Assignor under the Leases. Except in the ordinary course of business, consistent with good management practices, Assignor shall not do any of the following without the prior written consent of Assignee: (a) consent to any modification, alteration, cancellation, extension or assignment of any of the Leases; (b) reduce, waive or defer payment of the Rent under any of the Leases; (c) collect or accept payment of any of the Rents arising or accruing under any Lease more than one month in advance of the time when the same shall become due under the terms of such Lease except for security deposits not in excess of an amount equal to two months rent and the usual prepayment of rent for that month, except with respect to ten percent (10%) of the units on the Property if such prepaid rent is used to pay operating costs of the Property or is retained in the operating account of Assignor or (d) waive or release any tenant from any obligation or condition under any of the Leases.

4. **Rights of the Assignee.** After any Default has occurred and is continuing and Assignee has elected to revoke the license granted pursuant to Section 8 below, the Assignee shall have the right, power and authority to:

(a) notify any person that the Leases have been assigned to the Assignee and that all Rents are to be paid directly to the Assignee, whether or not the Assignee has commenced or completed foreclosure or taken possession of the Property;

(b) settle, compromise, release, extend the time of payment of, and make allowances, adjustments and discounts of any Rents or other obligations under the Leases;

(c) enforce payment of Rents and other rights under the Leases, prosecute any action or proceeding, and defend against any claim with respect to Rents and Leases;

(d) enter upon, take possession of and operate the Property;

(e) lease all or any part of the Property; and/or

(f) perform any and all obligations of the Assignor under the Leases and exercise any and all rights of the Assignor therein contained to the full extent of the Assignor's rights and obligations thereunder, with or without the bringing of any action for the appointment of a receiver. At the Assignee's request, the Assignor shall deliver a copy of this Assignment to each tenant under a Lease and to each manager and managing agent or operator of the Property. The Assignor irrevocably directs any tenant, manager, managing agent, or operator of the Property, without any requirement for notice to or consent by the Assignor, to comply with all demands of the Assignee under this Assignment and to turn over to the Assignee on demand all Rents which it receives.

5. **No Obligation.** Notwithstanding the Assignee's rights hereunder, the Assignee shall not be obligated to perform, and the Assignee does not undertake to perform, any obligation, duty or liability with respect to the Leases, Rents or Property on account of this Assignment. The

Assignee shall have no responsibility on account of this Assignment for the control, care, maintenance or repair of the Property, for any waste committed on the Property, for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property.

6. **Right to Apply Rents.** So long as a Default has occurred and is continuing, the Assignee shall have the right, but not the obligation, to use and apply any Rents received hereunder in such order and such manner as the Assignee may determine for:

(a) **Enforcement or Defense.** The payment of costs and expenses of enforcing or defending the terms of this Assignment or the rights of the Assignee hereunder, and collecting any Rents;

(b) **Payment of Obligations.** Interest, principal or other amounts payable pursuant to

(i) the Master Financing and Guaranty Agreement, dated April 29, 1999, between Assignee, affiliates of Assignor and the Assignor (the "Master Financing Agreement");

and (ii) the Second Mortgage and Security Agreement, dated as of even date herewith, executed by the Assignor for the benefit of the Assignee and relating to the Property (the "Second Mortgage") (collectively, the "Obligations"), and any and all modifications, amendments or extensions thereof or replacements or substitutions therefor; and

(c) **Operating Expenses.** Payment of costs and expenses of the operation and maintenance of the Property, including

(i) rentals and other charges payable by the Assignor under any ground lease or other agreement affecting the Property;

(ii) electricity, telephone, water and other utility costs, taxes, assessments, water charges and sewer rents and other utility and governmental charges levied, assessed or imposed against the Property;

(iii) insurance premiums;

(iv) costs and expenses with respect to any litigation affecting the Property, the Leases or the Rents;

(v) wages and salaries of employees, commissions of agents and attorneys' fees and expenses; and

(vi) all other carrying costs, fees, charges, reserves, and expenses whatsoever relating to the Property.

After the payment of all such costs and expenses and after the Assignee has established such reserves as it, in its sole discretion, deems necessary for the proper management of the Property, the Assignee shall apply all remaining Rents received by it to the reduction of the Obligations.

7. **No Waiver.** The exercise or nonexercise by the Assignee of the rights granted in this Assignment or the collection and application of Rents by the Assignee or its agent shall not be a waiver of any default by the Assignor under this Assignment or the Master Financing Agreement. No action or failure to act by the Assignee with respect to any obligations of the Assignor under the Master Financing Agreement, or any security or guaranty given for the payment or performance thereof, shall in any manner affect, impair or prejudice any of the Assignee's rights and privileges under this Assignment, or discharge, release or modify any of the Assignor's duties or obligations hereunder. Under no circumstance, shall the receipt by Assignee of any Rents pursuant to this Assignment after institution of foreclosure or sale proceedings under the Second Mortgage cure any Default or affect any such proceeding or sale pursuant to said Second Mortgage.

8. **Revocable License.** Notwithstanding that this Assignment is an absolute assignment of the Rents and Leases and not merely the collateral assignment of, or the grant of a lien or security interest in the Rents and Leases, the Assignee grants to the Assignor a revocable license to collect and receive the Rents and to retain, use and enjoy such Rents. Such license may be revoked by the Assignee if an Event of Default has occurred and is continuing. The Assignor shall apply any Rents which it receives to the payment of any amounts due under the Master Financing Agreement, taxes, assessments, water charges, sewer rents and other governmental charges levied, assessed or imposed against the Property, insurance premiums, operation and maintenance charges relating to the Property, and other obligations of lessor under the Leases before using such proceeds for any other purpose.

9. **Term.** This Assignment shall continue in full force and effect until

(a) all amounts due under the Master Financing Agreement are paid in full, and

(b) all other obligations of the Assignor under the Master Financing Agreement are fully satisfied, and upon the full payment and performance of such obligations, this Assignment shall automatically become null and void.

10. **Appointment.** The Assignor irrevocably appoints the Assignee its true and lawful attorney in fact, which appointment is coupled with an interest, to be exercisable only when a Default has occurred and is continuing, to execute any or all of the rights or powers described herein with the same force and effect as if executed by the Assignor, and the Assignor ratifies and confirms any and all acts done or omitted to be done by the Assignee, its agents, servants, employees or attorneys in, to or about the Property. If the Rents are collected by Assignee, then Assignor irrevocably designates Assignee as Assignor's attorney-in-fact to endorse instruments received in payment thereof in the name of Assignor and to negotiate the same and collect the proceeds.

11. **Liability of the Assignee.** The Assignee shall not in any way be liable to the Assignor for any action or inaction of the Assignee, its employees or agents under this Assignment.

12. **Indemnification.** Subject to Section 22 hereof, the Assignor shall indemnify, defend and hold harmless the Assignee from and against all liability, loss, damage, cost or expense which it may incur under this Assignment or under any of the Leases, including any claim against the

Assignee by reason of any alleged obligation, undertaking, action, or inaction on its part to perform or discharge any terms, covenants or conditions of the Leases or with respect to Rents, and including attorneys' and paralegals' costs, fees and expenses, including those arising from the joint, concurrent, or comparative negligence of the Assignee; however, the Assignor shall not be liable under such indemnification to the extent such liability, loss, damage, cost or expense results from the Assignee's gross negligence or willful misconduct. Any amount covered by this indemnity shall be payable on demand, and shall bear interest from the date of demand until the same is paid by the Assignor to the Assignee at a rate equal to the Default Rate (as defined in the Master Financing Agreement).

13. **Modification.** This Assignment may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of such change is sought.

14. **Successors and Assigns.** This Assignment shall inure to the benefit of the Assignee and its successors and assigns and shall be binding on the Assignor and its successors and assigns.

15. **Governing Law.** This Assignment shall be governed and construed in accordance with the laws of the State of Illinois.

16. **Conflict.** If any conflict or inconsistency exists between the absolute assignment of the Rents and the Leases in this Assignment and the assignment of the Rents and Leases as security in the Second Mortgage, the terms of this Assignment shall control.

17. **Undefined Terms.** Any capitalized terms not defined herein shall have the meanings ascribed to such terms in the Second Mortgage.

18. **Phrases.** When used in this Assignment, and except as otherwise provided herein, the phrase a "Default has occurred and is continuing" or an "Event of Default has occurred and is continuing" shall mean that an Event of Default or Default has occurred and has not been waived by the.

19. **No Mortgagee in Possession.** Neither the enforcement of any of the remedies under this Assignment, nor any other remedies afforded to Assignee under the Master Financing Agreement, at law or in equity, shall cause Assignee to be deemed or construed to be a mortgagee in possession of the Property, to obligate Assignee to lease the Property or attempt to do so, or to take any action, incur any expense, or perform or discharge any obligation, duty or liability whatsoever under any of the Leases or otherwise.

20. **Prior Lien Documents.** This Assignment is subject, subordinate and inferior to the (a) First Mortgage, as amended, dated May 1, 1991, and (b) the Assignment of Leases, Rents, Income, Profits and Cash Collateral, as amended, dated May 1, 1991, both executed by RG Bond Partners I Limited Partnership ("RGI") for the benefit of the Village of Arlington Heights (the "Issuer"), as security for the loan ("Prior Loan") evidenced by the Promissory Note, dated May 1, 1991, in the stated principal amount of \$14,120,000, executed by RGI and payable to the order of the Issuer (the "Note"), together with all documents evidencing, governing, securing, guarantying,

indemnifying or otherwise pertaining to the loan evidenced by the Note and all modifications, restatements, extensions, renewals and replacements thereof (the aforesaid instruments being individually and collectively called the "Prior Lien Documents"). No amendments or modifications may be made to the Prior Lien Documents without the prior written consent of Assignee. An Event of Default under the Prior Lien Documents shall constitute an event of default hereunder. Assignor shall pay when due the indebtedness owing under the Prior Lien Documents and timely perform all other obligations of Assignor thereunder. Assignee may, but shall not be obligated to, pay any such indebtedness or perform any such obligations for the account of Assignor, and any sum so expended shall be secured hereby. Assignor shall pay to Assignee all amounts so expended by Assignee with interest on such amounts from the date expended at the Default Rate (as defined in the Prior Lien Documents), but not in excess of the highest rate permitted by applicable law.

21. **WAIVER OF TRIAL BY JURY.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, ASSIGNOR AND ASSIGNEE HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS ASSIGNMENT OR THE MASTER FINANCING AGREEMENT, OR IN RESPECT OF ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN) OR ACTION OF ANY SUCH PARTY, OR ARISING OUT OF ANY EXERCISE BY ANY SUCH PARTY OF ITS RESPECTIVE RIGHTS UNDER THIS ASSIGNMENT OR THE MASTER FINANCING AGREEMENT OR IN ANY WAY RELATING TO THE OBLIGATIONS OR THE PROJECT (INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO ANY ACTION TO RESCIND OR CANCEL THIS ASSIGNMENT, AND WITH RESPECT TO ANY CLAIM OR DEFENSE ASSERTING THAT THIS ASSIGNMENT WAS FRAUDULENTLY INDUCED OR IS OTHERWISE VOID OR VOIDABLE). THIS WAIVER OF JURY TRIAL IS A MATERIAL INDUCEMENT FOR ASSIGNOR AND ASSIGNEE TO ENTER THE MASTER FINANCING AGREEMENT.

22. **Limitation on Liability.** Assignor's liability hereunder is subject to the limitation on liability provisions of Section 3.12 of the Second Mortgage.

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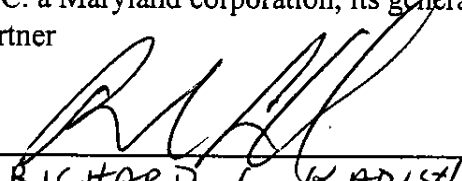
[Signature page to Second Assignment of Rents and Leases]

IN WITNESS WHEREOF, the Assignor has caused this Second Assignment of Rents and Leases to be executed on its behalf by its duly authorized representatives as of the date first above written.

ASSIGNOR:

CAPREIT WATERFORD PLACE
LIMITED PARTNERSHIP, an Illinois
limited partnership

By CAPREIT OF WATERFORD PLACE,
INC. a Maryland corporation, its general
partner

By 
Name RICHARD L. KADISH
Title PRESIDENT

Property of Cook County Clerk's Office

[Signatures continued on following page]

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[Signature Page to Second Assignment of Rents and Leases]

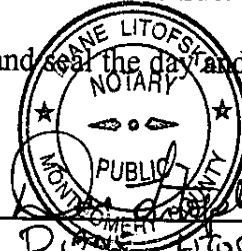
STATE OF MARYLAND)
)SS:
COUNTY OF MONTGOMERY)

I, DIANE LITOFSKY, do hereby certify that on the 29 day of April, 1999, RICHARD L. KAASH, personally appeared before me and being first duly sworn by me severally acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

[NOTARY SEAL]

Notary [Signature]
Print Name DIANE LITOFSKY
Notary Public, State of MARYLAND
My commission expires 5/1/03



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EXHIBIT A

LEGAL DESCRIPTION

LOT 2 IN WESTRIDGE UNIT NO. 1, BEING A SUBDIVISION OF PART OF THE SOUTH EAST ¼ OF SECTION 6, TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED JULY 2, 1985 AS DOCUMENT NUMBER 85084774 AND AS AMENDED BY CERTIFICATE OF CORRECTION RECORDED AS DOCUMENT NUMBER 86454650, IN COOK COUNTY, ILLINOIS.

313 Haggfield

Orlenton Heights

02 06 400 043 000