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## CONSTRUCTION LOAN AGREEMENT

This CONSTRUCTION LOAN AGREEMENT (this "**Agreement**") is made as of the [day] day of [month], [year], by and between [borrower's name], a(n) [entity type and state of formation] ("**Borrower**"), and [lender's name], a(n) [entity type and state of formation] ("**Lender**").

### WITNESSETH:

WHEREAS, Borrower has applied to Lender for a loan to finance certain costs related to the construction and development of the Improvements (as hereinafter defined) on the land in which Borrower has acquired or is acquiring the [fee simple/leasehold], which land is further described on Schedule A attached hereto and made a part hereof (the "**Land**"); and

WHEREAS, Lender has agreed to make the loan on the terms and conditions set forth in this Agreement and in the other documents evidencing and securing the loan.

NOW, THEREFORE, in consideration of the premises, and in further consideration of the mutual covenants and agreements herein set forth and of the sum of Ten Dollars (\$10.00) paid by each party to the other, receipt of which is hereby acknowledged, the parties covenant and agree as follows:

### ARTICLE I. GENERAL INFORMATION; DEFINED TERMS.

**Conditions to Closing.** The conditions precedent to closing the Loan and recording the Mortgage (as hereinafter defined) are set forth in Schedule B attached hereto and made a part hereof.

**Schedules.** The following Schedules are attached to this Agreement and are incorporated herein and made a part hereof:

Schedule A – Legal Description of the Land

Schedule B – Conditions Precedent

Schedule C – Construction Budget

Schedule D – Project Schedule

Schedule E – Form of Draw Request

[Schedule E-1 – Notice of Borrowing]

[Schedule E-2 – Borrowing Certificate]

[Schedule E-3 – Borrower's Requisition Spreadsheet]

[Schedule E-4 – Application and Certificate of Payment]

[Schedule E-5 – Payment Receipts]

Schedule F – Form of Lien Waiver

Schedule G – Additional Conditions for Draw Requests

Schedule H – Leasing Guidelines

Schedule I – Swap Contract Guidelines

Schedule J – Notice Addresses

**Defined Terms.** Unless otherwise defined herein capitalized terms in this Agreement shall have the following definitions (such definitions to be applicable equally to the singular and the plural forms of such terms and to all genders):

"**Acceleration Event**" means either:

- (a) any material loss or damage to the Property (i) that is uninsured and Borrower has not, after ten (10) days' notice, deposited with Lender either (A) an amount sufficient to pay for such loss or damage, or (B) a letter of credit in an amount sufficient to pay for such loss or damage, in each case, as

determined by Lender, or (ii) as to which the Improvements cannot be restored by the then applicable Maturity Date;

- (b) any actual taking of any portion of the Property as to which either (i) the remaining Improvements cannot be restored by the then applicable Maturity Date or (ii) Lender determines that due to such taking, either (A) there will exist a material blockage or substantial impairment of access or utility service to the Improvements or (B) the Property will fail to comply with any Laws in any material respect; or
- (c) the occurrence of any event that causes the servicing of the Loan to not be economically viable for Lender or any servicer of the Loan.

**"Advance"** means each disbursement of any portion of the Loan by Lender to Borrower or Borrower's designee pursuant to this Agreement, including, without limitation, the Initial Advance. The term "Advanced" shall have a correlative meaning.

**"Affiliate"** means, with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified, including, without limitation, (a) any Person who has a familial relationship, by blood, marriage or otherwise with any partner or employee of Borrower, or any affiliate thereof and (b) any Person that receives compensation for administrative, legal or accounting services from Borrower, or any affiliate.

**"Agreement"** is defined in the recitals.

**"Architect"** means [name of Architect approved by Lender].

**"Assignee"** is defined in Q.

**"Assignment of Contracts"** means the Assignment of Contracts, Licenses and Permits, dated as of the date hereof, by Borrower to Lender, as the same may from time to time be extended, amended, restated or otherwise modified.

**"Assignment of Leases and Rents"** means the Assignment of Leases and Rents, dated as of the date hereof, by Borrower to Lender, as the same may from time to time be extended, amended, restated or otherwise modified.

**"Authorized Signer"** means [name(s) identified by Borrower], or any other representative of Borrower duly designated and authorized by Borrower to sign Draw Requests in a writing addressed to Lender.

**"Borrower"** is defined in the recitals.

**"Borrower Formation Documents"** is defined in Q.

**"Borrower Party"** means Borrower, Guarantor and any of their respective permitted successors and assigns.

**"Borrower's Deposit Account"** means an account established with Lender pursuant to the terms of Q.

**"Borrower's Funds"** has the meaning ascribed to such term in Schedule G.

**"Budget"** means the breakdown of hard costs and soft costs attached hereto as Schedule C, as the same may be revised from time to time as such revisions may be approved by Lender pursuant to Q.

**"Business Days"** means any day other than a Saturday, Sunday or day that shall be a legal holiday or day on which banking institutions are required or authorized to close in the State of [name of state]

**"Casualty"** means any act or occurrence of any kind or nature that result in damage, loss or destruction to the Property.

**"Change of Control"** shall mean the occurrence of any of the following, as determined by Lender:

- (a) If any transfer of ownership interests in Borrower shall occur that results in the change of ownership of more than [percentage in words] percent ([percentage in numbers])% of the

direct or indirect beneficial ownership in Borrower without Lender's prior written consent, in its sole and absolute discretion; or

(b) If [name] shall fail to directly or indirectly own more than [percentage in words] percent ([percentage in numbers])% of the beneficial ownership in Borrower; or

(c) If [name] shall fail to directly or indirectly Control the management of Borrower.

**"Claim"** means any liability, suit, action, claim, demand, loss, expense, penalty, fine, judgment or other cost of any kind or nature whatsoever, without limitation, fees, costs and expenses of attorneys, consultants, contractors and experts.

**"Closing Date"** means the date of this Agreement.

**"Code"** means the Internal Revenue Code of 1986, as amended.

**"Completion of Construction"** means, with respect to the construction of the Improvements or any component thereof, the satisfaction in all material respects of all of the conditions of Article V of Schedule G.

**"Completion Guaranty"** means that certain Guaranty Agreement (Construction Obligations), dated as of the date hereof, by Guarantor for the benefit of Lender, as the same may from time to time be extended, amended, restated, supplemented or otherwise modified.

**"Condemnation"** means any taking of title to, use of, or any other interest in the Property under the exercise of the power of condemnation or eminent domain, whether temporarily or permanently, by any Governmental Authority or by any other Person acting under or for the benefit of a Governmental Authority.

**"Condemnation Awards"** means any and all judgments, awards of damages (including, without limitation, severance and consequential damages), payments, proceeds, settlements, amounts paid for a taking in lieu of Condemnation, or other compensation heretofore or hereafter made, including, without limitation, interest thereon, and the right to receive the same, as a result of, or in connection with, any Condemnation or threatened Condemnation.

**"Construction Commencement Date"** means the date construction of the Improvements has commenced, as determined by the Lender's Consultant. The Construction Commencement Date shall occur no later than [number of days in words] ([number of days in numbers]) days after the date hereof, subject to extension for Force Majeure delays.

**"Control"** means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise, "Controlling" or "Controlled" have meanings correlative thereto.

**"Default"** means the occurrence of an event or circumstance described in Article VI (without regard to cure periods) that would constitute an Event of Default under the provisions of this Agreement upon the giving of Notice or lapse of time, or both, or that would constitute an automatic Event of Default without the giving of Notice or lapse of time, as applicable.

**"Developer"** means [name], or any other developer or development manager engaged by Borrower and approved by Lender in its reasonable discretion.

**"Development Agreement"** means that certain [name of agreement], dated as of [date], between Borrower, as owner, and Developer, as development manager, as the same may be amended or otherwise modified from time to time with the prior written approval of Lender, in its sole discretion.

**"Developer Subordination Agreement"** means that certain Subordination Agreement to be executed by Developer in favor of Lender, in form and substance acceptable to Lender, as amended from time to time.

**"Dispute"** means any controversy, claim or dispute between or among the parties to this Agreement, including, without limitation, any such controversy, claim or dispute arising out of or relating to (a) this Agreement, (b) any other Loan Document, (c) any related agreements or instruments, or (d) the



transaction contemplated herein or therein (including, without limitation, any claim based on or arising from an alleged personal injury or business tort).

**"Draw Request"** means a statement prepared by the Borrower or Developer in form and substance similar to Schedule E attached hereto and made a part hereof satisfactory to Lender in its reasonable discretion setting forth the amount of the Loan advance requested in each instance with respect to the Improvements, and including, without limitation, if reasonably requested by Lender, (a) the Hard Costs Statement and Soft Costs Statement, (b) a cost certification executed by the General Contractor or Developer in form approved in writing by Lender in its reasonable discretion and the Lender's Consultant in its reasonable discretion, (c) payment receipts from the Developer, General Contractor and all Subcontractors in a form approved in writing by Lender and Lender's Consultant in its reasonable discretion, (d) proof of payment of all Hard Costs and Soft Costs covered by all previous Draw Requests, and (e) a Lien Waiver in form approved by Lender and Lender's counsel from the Developer, General Contractor and all Subcontractors for all sums advanced up to and including, without limitation, the previous Draw Request (to the extent not previously delivered pursuant to a prior Draw Request or otherwise).

**"Environmental Indemnity Agreement"** means the Environmental Indemnification Agreement, dated as of the date hereof, by and among Borrower, Guarantor and Lender pertaining to the Property, as the same may from time to time be extended, amended, restated or otherwise modified.

**"Environmental Report"** is defined in the Environmental Indemnity Agreement.

**"Equipment"** has the meaning set forth in the Mortgage.

**"ERISA"** means the Employee Retirement Income Security Act of 1974, as amended.

**"Event of Default"** means the continuance of any Default beyond the applicable grace and/or cure periods therefor, if any, or the occurrence of any Default for which no grace and/or cure periods therefor, if any, in each case, as further set forth in Article VI.

**"Expenses"** means all out-of-pocket fees, charges, costs and expenses of any nature whatsoever incurred at any time and from time to time (whether before or after an Event of Default) by Lender in making, funding, administering or modifying the Loan, in negotiating or entering into any "workout" of the Loan, or in exercising or enforcing any rights, powers and remedies provided in the Mortgage or any of the other Loan Documents, including, without limitation, attorneys' fees, court costs, receiver's fees, management fees and costs incurred in the repair, maintenance and operation of, or taking possession of, or selling, the Property.

**"Force Majeure"** means strikes, lock-outs, war, civil disturbance, natural disaster, acts of terrorism or acts of God that cause a delay in Borrower's performance of an Obligation related to the work of construction, provided, however, that (a) Borrower has delivered Notice to Lender within ten (10) days after the occurrence of an event that it believes to constitute Force Majeure, and Lender, after consultation with its Lender's Consultant, agrees in writing that such an event has occurred (in the exercise of good faith judgment), (b) in no event shall Force Majeure extend the time for the performance of an Obligation by more than [ninety (90) days/other time period] in the aggregate, and (c) circumstances that can be remedied or mitigated through the payment of money shall not constitute Force Majeure hereunder to the extent such remedy or mitigation is deemed reasonable by Lender in its sole discretion.

**"GC Agreement"** means that certain [name of Agreement], dated as of [date], between Developer, as developer, and the General Contractor, as general contractor, as the same may be amended or otherwise modified from time to time with the prior written approval of Lender, in its sole discretion.

**"General Contractor"** means [name], its successors and permitted assigns, or any other general contractor engaged by Developer to perform and complete the Project, and approved by Borrower and Lender.

**"Governmental Authority"** means any governmental or quasi-governmental entity, including, without limitation, any court, department, commission, board, bureau, agency, administration, service, district or other instrumentality of any governmental entity.

**"Ground Lessor"** means [description of Ground Lease], between Ground Lessor, as landlord, and Borrower, as tenant, with respect to the [Land/Real Property] the same may be amended or otherwise modified pursuant to the terms thereof and as permitted under this Agreement.

**"Ground Lease"** means [name of ground lessor], a [jurisdiction of organization and form of entity], together with its successors and assigns under the Ground Lease.

**OPTIONAL LENDER SUSTAINABILITY PROVISION:**

**"Green Building Certification"** means [type of green building certification likely to be obtained based on the Plans and Specifications, for example, LEED for New Construction – [platinum/gold/silver/] certification, ENERGY STAR, [one/two/three/four Green Globes]].

**"Guarantor"** means, collectively, [name], a(n) [entity type and state of formation], and [name], a(n) [entity type and state of formation].

**"Hard Costs"** means the costs of all labor, materials, equipment, and fixtures necessary for completion of construction of the Improvements.

**"Hard Costs Loan"** means the portions of the Loan that shall be used to pay for Hard Costs.

**"Hard Costs Statement"** means a statement in form approved by Lender in its reasonable discretion of Hard Costs incurred and to be incurred, trade by trade, to be prepared by the Developer or General Contractor, including, without limitation, the Hard Costs contingency amounts.

**"Hazardous Material"** means asbestos, polychlorinated biphenyls and petroleum products, mold, and any other hazardous or toxic materials, wastes and substances that are defined as a "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste" or "restricted hazardous waste" under any provision of the laws of the City, State and/or the laws of the United States.

**"IEEPA"** is defined in 0.

**"Improvements"** means all on-site and off-site improvements to the Land for a [description of property type to be developed], currently existing and/or to be constructed on the Land, together with all fixtures, tenant improvements and appurtenances now or later to be located on the Land and/or in such improvements in accordance with the Plans and Specifications.

**"Initial Advance"** means the first Advance of the Loan proceeds to be made hereunder.

**"Insurance Proceeds"** means the insurance claims under and the proceeds of any and all policies of insurance covering the Property or any part thereof, including, without limitation, all returned and unearned premiums with respect to any insurance relating to such Property, in each case whether now or hereafter existing or arising.

**"Interest Revenue"** is defined in 0.

**"Land"** is defined in the recitals.

**"Laws"** means all federal, state and local laws, statutes, rules, ordinances, regulations, codes, licenses, authorizations, decisions, injunctions, interpretations, orders or decrees of any court or other Governmental Authority having jurisdiction as may be in effect from time to time.

**"Leases"** means all subleases, license agreements and other occupancy or use agreements (whether oral or written), now or hereafter existing, that cover or relate to the Property or any part thereof, together with all options therefor, amendments thereto and renewals, modifications and guaranties thereof, including, without limitation, any cash or security deposited under the Leases to secure performance by the tenants of their obligations under the Leases, whether such cash or security is to be held until the expiration of the terms of the Leases or applied to one or more of the installments of rent coming due thereunder.

**"Lender"** is defined in the recitals.

**"Lender's Consultant"** means a person or firm appointed or designated by Lender from time to time (with experience in construction projects similar to the Project) to inspect the progress of the development of the Land, the Project, and the conformity of the Project with the Plans and Specifications, the Budget and the Project Schedule, and to perform such other ancillary acts and duties for such other ancillary purposes as Lender may from time to time deem appropriate or as may be required by the terms of this Agreement.

**"Lien"** shall mean any mortgage, deed of trust, lien, pledge, hypothecation, assignment, security interest, or any other encumbrance, charge or transfer of, on or affecting the Property or any portion thereof or any interest therein which is owned by Borrower, or on or affecting Borrower or any interest in Borrower, including, without limitation, any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, the filing of any financing statement, and mechanic's, materialmen's and other similar liens and encumbrances against the Property or any portion thereof or Borrower or any interest in Borrower.

**"Lien Waiver"** means a lien waiver in the form attached hereto as Schedule F and made a part hereof.

**"Loan"** means the loan from Lender to Borrower, the repayment obligations in connection of which are evidenced by the Note.

**"Loan Amount"** means [dollar amount in words and [cents in words]/100 Dollars (\$[amount in numbers]).

**"Loan Documents"** means this Agreement, the Note, the Mortgage, the Assignment of Contracts, the Assignment of Leases, the Environmental Indemnity Agreement, the Completion Guaranty, the Recourse Guaranty, any Swap Contract, the Developer Subordination Agreement (if any and if applicable), any application or reimbursement agreement executed in connection with any and all other documents that Borrower, Guarantor or any other party or parties have executed and delivered, or may hereafter execute and deliver, to evidence, secure or guarantee the Obligations, or any part thereof, as the same may from time to time be extended, amended, restated, supplemented or otherwise modified.

**"Major Lease"** means any Lease to a Major Tenant.

**"Major Subcontract"** means any Subcontract for which the payments thereunder to the applicable Subcontractor shall exceed \$[amount in numbers] in the aggregate.

**"Major Tenant"** means any tenant under a Lease for space in excess of [square footage in numbers] [rentable/leasable/gross] square feet within the Improvements.

**"Material Adverse Effect"** means: (a) any effect upon, the Project, the Property and/or leasing of the Improvements, or the operations, business, properties, liabilities (actual or contingent), condition (financial or otherwise) of Borrower (or Borrower and its Affiliates taken as a whole) that materially and adversely affects the ability of any party to the Loan Documents to perform its obligations under any Loan Document to which it is a party, (b) a material adverse effect upon the legality, validity, binding effect or enforceability against any party to the Loan Documents of any Loan Document to which it is a party, or (c) a material adverse change in, or a material adverse effect upon, the Project, the Property and/or leasing of the Improvements.

**"Maturity Date"** has the meaning set forth in the Note, subject to extension as provided therein.

**"Mortgage"** means the Mortgage, Assignment, Security Agreement and Fixture Filing, dated as of the date hereof, from Borrower, as mortgagor, to Lender, as mortgagee, as the same may from time to time be extended, amended, restated or otherwise modified.

**"OFAC"** is defined in 0.

**"Net Proceeds"** means, with respect to any Condemnation Awards or Insurance Proceeds, the gross proceeds therefrom less all Expenses, including, without limitation, reasonable attorneys' fees, incurred in the collection of such gross proceeds.

**"Note"** means the Note, dated as of the date hereof, by Borrower to Lender, evidencing the amount of the Loan, as the same may hereafter be extended, severed, restated, replaced, supplemented or otherwise modified.

**"Notice"** means a notice, request, consent, demand or other communication given in accordance with the provisions of Q.

**"Obligations"** means all present and future debts, obligations and liabilities of Borrower to Lender arising pursuant to, or on account of, the provisions of this Agreement, the Note or any of the other Loan Documents, including, without limitation, the obligation to: (a) pay all principal, interest, late charges, prepayment premiums (if any) and other amounts due at any time under the Note, (b) pay all Expenses, indemnification payments, fees and other amounts due at any time under the Mortgage or any of the other Loan Documents, together with interest thereon as provided in the Mortgage or such Loan Document, (c) pay and perform all obligations of Borrower (or its Affiliate) under any Swap Contract, and (d) perform, observe and comply with all of the terms, covenants and conditions, expressed or implied, that Borrower is required to perform, observe or comply with pursuant to the terms of the Mortgage or any of the other Loan Documents. Notwithstanding any language contained in the Loan Documents, the Obligations of Borrower to pay and perform under the Environmental Indemnity Agreement are unsecured.

**"Participant"** is defined in Q.

**"Patriot Act"** means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, as the same may be amended from time to time, and corresponding provisions of future laws.

**"Permits"** mean all approvals, consents, waivers, orders, acknowledgments, authorizations, permits and licenses required under applicable Law to be obtained from any Governmental Authority for the construction of the Improvements and/or the use, occupancy and operation following completion of construction, as the context requires.

**"Permitted Encumbrances"** means the exceptions listed on Schedule B of the Title Policy.

**"Person"** means an individual, a corporation, a partnership, a joint venture, a limited liability company, a trust, an unincorporated association, any Governmental Authority or any other entity.

**"Plans and Specifications"** means any and all plans and specifications prepared in connection with the development of the Land and/or the Project and approved in writing by Lender, as the same may from time to time be amended with the prior written approval of Lender in its reasonable discretion [**OPTIONAL BORROWER PROVISION:** in accordance with the terms of this Agreement].

**"Prohibited Transfer"** is defined in Article V(e).

**"Project"** means the development of the Land and/or the construction of the Improvements pursuant to the Plans and Specifications, Budget and Project Schedule.

**"Project Schedule"** means the schedule for commencement and completion of the development of the land and Project attached hereto as Schedule D, as the same may be revised from time to time with the written approval of Lender in its sole discretion.

**"Property"** means the Real Property and the Personalty.

**"Property Assessments"** means any and all taxes and assessments affecting the Real Property.

**"Punch List Items"** shall mean details of construction, decoration and mechanical and electrical adjustment that in the aggregate are minor in character and do not materially interfere with the use or enjoyment of the Improvements.

**"Real Property"** means the Land, as same may be improved, from time to time, pursuant to the Project, including, without limitation, the Improvements.

**"Recourse Guaranty"** means that certain Guaranty of Recourse Obligations, dated as of the date hereof, by Guarantor for the benefit of Lender, as the same may from time to time be extended, amended, restated, supplemented or otherwise modified.

**"Rents"** means all of the rents, royalties, issues, profits, revenues, earnings, income and other benefits of the Property or any part thereof, or arising from the use or enjoyment of the Property or any part thereof, including, without limitation, all such amounts paid under or arising from any of the Leases and all fees, charges, accounts or other payments for the use or occupancy of rooms or other public facilities within the Property or any part thereof.

**"Restricted Party"** means Borrower, and [name(s)].

**"Retainage"** is defined in Article II(d).

**"Sale"** means any conveyance, sale, or assignment, or any pledge, assignment, grant as security or other transfer of the Property, or any part thereof or interest therein.

**"Scheduled Completion Date"** means the date that is the day prior to the date [number of days in numbers] days after the date hereof.

**"Soft Costs Statement"** means a statement in form approved by Lender in its reasonable discretion of Soft Costs incurred and to be incurred by Borrower, including, without limitation, the Soft Costs contingency amounts.

**"Soft Costs"** means certain costs (other than Hard Costs) of completion of the Improvements, including, without limitation, but not limited to, architects', engineers' and Lender's and Borrower's counsel's fees, filing fees, permitting and approval fees and expenses, [OPTIONAL LENDER SUSTAINABILITY PROVISION: Green Building Certification fees], ground rents, interest on and recording taxes and title charges in respect of building loan mortgages, real estate taxes, water and sewer rents, survey costs, loan commitment fees, insurance and bond premiums and other costs related to the design or construction of the Improvements.

**"State"** means the State of [governing law state].

**"Stored Materials"** means building materials or furnishings that have not yet been incorporated into the Improvements.

**"Subcontractor"** means any Person who has performed work and/or supplied any labor and/or materials with respect to the Improvements other than the Developer or the General Contractor.

**"Substantial Completion"** means, with respect to the Project, when (a) all work required by the Plans and Specifications, and the other approved construction documents has been completed, subject to change orders previously approved by Lender (except for Punch List Items, tenant improvements that are not required to be completed by the applicable time under the Leases, and minor items that can be fully completed (lien-free or which have been bonded or insured over and excluding the liens created by the Loan Documents) without material interference with the use of the Improvements, and other items which, because of the season, weather or nature of the items are not practical to do at the time), in accordance with the terms and provisions of this Agreement, the approved Plans and Specifications, any applicable Leases, the other approved construction documents and all Laws, (b) a temporary Certificate of Occupancy for the Improvements has been issued by applicable Governmental Authority, and (c) Lender has received satisfactory evidence (including, without limitation, Lien Waivers) that the General Contractor, Subcontractor, the Developer and each other applicable contractor, and all subcontractors, materialmen, and other parties who have supplied labor, materials, or services for the construction of the Improvements, or who otherwise might be entitled to claim a contractual, statutory or constitutional lien against the Property have been fully paid (other than for such minor items or Punch List Items) [OPTIONAL LENDER SUSTAINABILITY PROVISION: ; and (d) the Green Building Certification has been obtained].

**"Survey"** means a map or plat of survey of the Land that conforms with Lender's survey requirements set forth in the Closing Checklist and with the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys" jointly established and adopted by ALTA/ACSM in 2016.

**"Swap Contract"** means any agreement, whether or not in writing, relating to any Swap Transaction, including, without limitation, unless the context otherwise clearly requires, any form of master agreement (the **"Master Agreement"**) published by the International Swaps and Derivatives Association, Inc., or any other master agreement, entered into prior to the date hereof or any time

after the date hereof, between Swap Counterparty and Borrower (or its Affiliate), together with any related schedule and confirmation, as amended, supplemented, superseded or replaced from time to time.

"**Swap Counterparty**" means Lender or an Affiliate of Lender, in its capacity as counterparty under any Swap Contract.

"**Swap Transaction**" means any transaction that is a rate swap, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap or option, bond option, note or bill option, interest rate option, forward foreign exchange transaction, cap transaction, collar transaction, floor transaction, currency swap transaction, cross-currency rate swap transaction, swap option, currency option, credit swap or default transaction, T-lock, or any other similar transaction (including, without limitation, any option to enter into the foregoing) or any combination of the foregoing, entered into prior to the date hereof or any time after the date hereof, between Swap Counterparty and Borrower (or its Affiliate) so long as a writing, such as a Swap Contract, evidences the parties' intent that such obligations shall be secured by the Mortgage.

"**Taxes**" means all Property Assessments, and any and all taxes and assessments whether general or special, ordinary or extraordinary, or foreseen or unforeseen, that at any time may be assessed, levied, confirmed or imposed by any Governmental Authority or any communities facilities or other private district on Borrower or on any of its properties or assets or any part thereof, including, without limitation, the Property, or in respect of any of its franchises, businesses, income or profits.

"**Title Insurer**" means [name of title company].

"**Title Policy**" means that certain lender's policy of title insurance, issued on the date hereof, by the Title Insurer (File No. [file number]), with Lender named as the insured thereunder, and insuring the first priority lien of the Mortgage against the Land and the Improvements.

"**Trade Contract**" means any contract or subcontract with a Subcontractor for the supply of labor and/or materials in connection with the construction of the Improvements.

"**TWEA**" is defined in Q.

## **ARTICLE II. ADVANCES ON THE LOAN.**

### **Loan Advances, Requisitions and Retainage.**

- (a) Borrower agrees to borrow the Loan from Lender, and Lender agrees to lend the Loan to Borrower, subject to the terms and conditions herein set forth, in incremental Advances that will not exceed, in the aggregate, the Loan Amount. Interest shall accrue and be payable in arrears only on sums advanced hereunder for the period of time outstanding. The Loan is not a revolving loan, and amounts repaid may not be re-borrowed.
- (b) Subject to the provisions of this Agreement, Lender will Advance and Borrower will accept the Advances as follows:
  - (1) The Initial Advance will be made immediately upon the satisfaction of the applicable conditions set forth in Q and this Article II, and all subsequent Advances shall be made no more often than once monthly thereafter, upon the satisfaction of the applicable conditions set forth herein, in amounts that shall be equal to the aggregate of the Hard Costs and Soft Costs incurred by Borrower through the end of the period covered by the Draw Request, less:
    - (i) the applicable Retainage;
    - (ii) the total of the Loan advances theretofore made on account of the items set forth in such Draw Request; and
    - (iii) the total amount of the Borrower's Funds that were used to pay for Hard Costs or Soft Costs included in any such Draw Request, if any; and
  - (2) at the election of Lender, less any combination of the following further amounts:

- (i) all or a portion of the amount by which any actual Hard Costs or Soft Costs are or are reasonably estimated by Lender or Lender's Consultant to be greater than the respective line items for such costs on the Budget (except to the extent of reallocation under Q); and/or
  - (ii) any costs covered by the Draw Request not approved, certified or verified as provided in Q, any Soft Costs covered by a previous Draw Request for which any requested proof of payment or payment receipts have not been received by Lender, and/or any Hard Costs covered by a previous Draw Request for which any requested proof of payment or payment receipts or Lien Waivers have not been received by Lender and the Lender's Consultant.
- (c) Advances shall be made not more frequently than monthly based on Draw Requests signed by an Authorized Signer in the form attached hereto as Schedule E or in another form approved by Lender. **[OPTIONAL LENDER PROVISION** if lender requires a minimum advance amount: In no event shall Lender be obligated to make any Advance (other than the final Advance) in an amount less than \$[amount in numbers] for each such Advance.] Each Draw Request for Hard Costs shall be set forth on AIA Forms G702 and G703 or another form reasonably approved by Lender, and shall be reviewed by the Lender's Consultant, signed by the Developer or General Contractor and, if requested by Lender, approved by the Architect. Draw Requests for Hard Costs shall show the percentage of completion of construction of the Project and shall set forth in trade breakdown form and in such detail as may be reasonably required by Lender the amounts expended and/or costs incurred for work done and materials incorporated in the Improvements. Each Draw Request shall be supported by such information and documentation (such as paid receipts, invoices, statements of accounts, Lien Waivers, etc.) as Lender may reasonably require to assure that amounts requested are to be used to reimburse Borrower for costs previously paid by Borrower or to pay costs incurred by Borrower that are to be paid from proceeds of the Loan, as set forth in the Budget.
- (d) Borrower shall (or shall cause Developer to) hold back from amounts payable to the General Contractor under the GC Agreement, and shall cause the General Contractor to hold back from amounts payable to each Subcontractor under each Trade Contract an amount ("**Retainage**") with respect to the value of its work in place in respect of the Improvements, which shall not, at any time, be less than (i) [10%/ other percentage] of the aggregate Hard Costs theretofore incurred by Borrower with respect to the General Contractor or such Subcontractor, as the case may be, for work in place in completing construction of the first [50%/other percentage] of the work to be performed by the General Contractor or such Subcontractor, as the case may be, with respect to the Improvements, as verified from time to time by Lender's Consultant pursuant to the provisions of this Agreement, and (ii) [5%/other percentage] of the aggregate Hard Costs theretofore incurred by Borrower with respect to the General Contractor or such Subcontractor, as the case maybe, for work in place in completing construction of the last [50%/other percentage] of the work to be performed by the General Contractor or such Subcontractor, as the case may be, as verified from time to time by Lender's Consultant pursuant to the provisions of this Agreement, such [50%/other percentage] to be based upon the total budgeted Hard Costs for the work to be performed by the General Contractor or particular Subcontractor, as the case may be, as of the date of computation.
- (e) Retainage will be withheld by Lender and released to Borrower upon Completion of Construction in accordance with the terms of Schedule G.

**Hard Costs Verification.** All Hard Costs shall be certified by the Developer or General Contractor and must be in accordance with the applicable Hard Costs Statement. Verification of the monthly progress and Hard Costs that have been incurred by Borrower from time to time, and the estimated total Hard Costs, shall be conclusively determined by the Lender's Consultant, except that both Hard Costs and Soft Costs are also subject to approval and verification by Lender from time to time.

**Office for Advances.** All Advances are to be made at Lender's office set forth in Q or at such other place as Lender may designate and shall be deposited in Borrower's checking account maintained with Lender or, if requested by Borrower in writing to Developer or the General Contractor, Draw Requests together with all attachments thereto shall be received by Lender at least five (5) Business Days prior to the date of the requested Advance and Borrower shall schedule a site inspection with Lender's Consultant with respect to each such Advance

on or before the date of the submission to the Lender of such Draw Request. Lender shall make an Advance within five (5) Business Days after having received the required documentation with respect to a Draw Request. Lender shall make Advances not more frequently than once a month.

**Advances after Construction; Monthly Advances.** Amounts of the Hard Costs Loan not Advanced pursuant to Q during the course of construction of the Project (excluding Retainage) may be Advanced by Lender in its sole discretion upon the satisfaction of the conditions set forth herein. Budget line items for Soft Costs not Advanced prior to completion of construction of the Improvements shall be advanced until exhausted, not more frequently than once a month, for Soft Costs as incurred after such completion.

**Evidence of and Security for Loan.** Advances under the Loan shall be evidenced by the Note and secured by the Mortgage.

**Loan Reallocation.** If, at any time, the Borrower shall request that the undisbursed balance of a Budget line item for any category of cost shown on the Budget be reallocated to another category of cost, Lender shall consent to such reallocation (a) if, in Lender's reasonable judgment, the undisbursed balance of the Budget line item for such category of cost is excessive, and the undisbursed balance of the category of cost to which the funds shall be reallocated is insufficient, (b) provided that any reallocation of Budget line items pursuant to this Q will not have the effect of reducing the net sum that Borrower estimates will be available to it from the Loan to pay the Developer for the Improvements, and (c) provided the "Interest" category is not reduced.

**Advances for Costs of Improvements.** Lender shall not be required to make any advances for Stored Materials, except as permitted by Schedule G hereto.

**Additional Terms Regarding Advances.** Advances of the Loan shall also be subject to the terms and conditions set forth in Schedule G.

**Liability of Lender.** Lender shall in no event be responsible or liable to any Person other than Borrower for the disbursement of or failure to disburse the Loan proceeds or any part thereof and neither the General Contractor, Lender's Consultant nor any subcontractor, laborer or material supplier shall have any right or claim against Lender under this Agreement or the other Loan Documents.

**Interest Reserve.** On the date hereof, Loan proceeds in the amount of \$[\_\_\_\_\_] will be withheld by Lender and allocated for the payment of estimated interest due and owing under this Agreement, the Note and the other Loan Documents (the "Interest Reserve") for a period of [number of months in words] ([number of months in numbers]) months. Lender shall have the right to apply amounts in the Interest Reserve towards the payment to Lender of accrued but unpaid interest accrued hereunder on each date that interest is due and payable under the Note until all amounts in the Interest Reserve are depleted. Lender is hereby authorized, without the necessity of notifying Borrower, to charge the Note directly for each such payment of interest by interest journal entries on Lender's books. Upon full distribution of the Interest Reserve or upon an Event of Default, Borrower shall make payments for interest under the Note directly to Lender in accordance with the provisions of the Note. Borrower agrees and acknowledges that the insufficiency of the amount of the Interest Reserve or the election of Lender not to apply amounts in the Interest Reserve upon an Event of Default shall not constitute a limitation on the obligation of Borrower to pay interest due and owing under the Note. Upon the occurrence and continuance of an Event of Default, the application of amounts in the Interest Reserve shall be at Lender's sole discretion and for such purposes as Lender's shall elect in its sole discretion.

### ARTICLE III. REPRESENTATIONS AND WARRANTIES.

Borrower represents and warrants to Lender that:

**Organization, Power and Authority of Borrower; Loan Documents.** Borrower (a) is or has been duly formed, existing and is in good standing under the laws of the state in which it is formed, and is duly qualified to do business and in good standing in the state in which the Land is located (if different from the state of its formation) and in any other state where the nature of Borrower's business or property requires it to be qualified to do business, and (b) has the power, authority and legal right to own its property and carry on the business now being conducted by it and to engage in the transactions contemplated by the Loan Documents. The Loan Documents to which Borrower and/or Guarantor is a party have been duly executed and delivered by Borrower and/or Guarantor, as applicable, and the execution and delivery of, and the carrying out of the transactions contemplated by, such Loan Documents, and the performance and observance of the terms and conditions thereof, have been duly authorized by



all necessary organizational action by and on behalf of Borrower and Guarantor, as applicable. The Loan Documents to which Borrower and Guarantor, as applicable, is a party constitute the valid and legally binding obligations of Borrower and Guarantor, as applicable, and are fully enforceable against Borrower and Guarantor, as applicable, in accordance with their respective terms, except to the extent that such enforceability may be limited by laws generally affecting the enforcement of creditors' rights and general equitable principles.

**Other Documents; Laws.** The execution and performance of the Loan Documents to which Borrower and/or Guarantor is a party and the consummation of the transactions contemplated thereby (a) will not conflict with, result in any breach of, or constitute a default under, the organizational documents of Borrower or Guarantor, or any contract, agreement, document or other instrument to which Borrower or Guarantor is a party or by which Borrower, Guarantor or any of their respective properties may be bound or affected, and such actions do not and will not violate or contravene any Law to which Borrower or Guarantor is subject, (b) are duly authorized and do not require the consent or approval of any other party or Governmental Authority that has not been obtained, and (c) will not or result in the imposition of any lien, charge or encumbrance upon the assets of any such party, except as contemplated by the Loan Documents.

**Principal Place of Business.** Borrower's principal place of business and chief executive offices are located at [city and state], and Borrower at all times has maintained its principal place of business and chief executive office at such location or at other locations within the same state.

**Trade Names.** Borrower conducts its business solely under the name set forth in the preamble to this Agreement and makes use of no trade names in connection therewith, unless such trade names have been previously disclosed to Lender in writing.

**Delivery of Organizational Documents.** A true and complete copy of the formation documents creating Borrower and any and all amendments thereto (collectively, the "**Borrower Formation Documents**") has been furnished to Lender. The Borrower Formation Documents constitute the entire agreement regarding Borrower among the [the form of entities comprising borrower (e.g., for a limited liability company, insert "members")] of Borrower and are binding upon and enforceable against each of the [members] in accordance with its terms. There are no other agreements, oral or written, among any of the [members] regarding Borrower. No breach exists under the Borrower Formation Documents and no condition exists that, with the giving of notice or the passage of time, would constitute a breach under the Borrower Formation Documents.

**ERISA and Prohibited Transactions.** As of the date hereof and throughout the term of the Loan: (a) Borrower is not and will not be (i) an "employee benefit plan," as defined in Section 3(3) of ERISA, (ii) a "governmental plan" within the meaning of Section 3(32) of ERISA, or (iii) a "plan" within the meaning of Section 4975(e) of the Code, (b) the assets of Borrower do not and will not constitute "plan assets" within the meaning of the United States Department of Labor Regulations set forth in Section 2510.3-101 of Title 29 of the Code of Federal Regulations, (c) transactions by or with Borrower are not and will not be subject to state statutes applicable to Borrower regulating investments of fiduciaries with respect to governmental plans, and (d) Borrower will not engage in any transaction that would cause any Obligation or any action taken or to be taken hereunder (or the exercise by Lender of any of its rights under the Mortgage or any of the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA or Section 4975 of the Code. Borrower agrees to deliver to Lender such certifications or other evidence of compliance with the provisions of this Section as Lender may from time to time reasonably request.

**Patriot Act.**

- (a) No Borrower Party is now, or has ever been (i) listed on any (A) the specially designated nationals and blocked persons lists maintained by the Office of Foreign Assets Control ("**OFAC**"), (B) any other list of terrorists, terrorist organizations or narcotics traffickers maintained pursuant to any of the rules and regulations of OFAC that Lender notified Borrower in writing is now included in "Government Lists", or (C) any similar lists maintained by the United States Department of State, the United States Department of Commerce or any other Government Authority or pursuant to any executive order of the President of the United States of America that Lender notified Borrower in writing is now included in "Government Lists", (ii) a Person who has been determined by competent authority to be subject to the prohibitions contained in Presidential Executive Order No. 13224 (September 23, 2001) or any other similar prohibitions contained in the rules and regulations of OFAC (as hereinafter defined) or in any enabling legislation or other Presidential Executive Orders

in respect thereof, (iii) indicted for or convicted of any felony involving a crime or crimes of moral turpitude or for any violation of the criminal laws of the United States of America or of any of the several states, or that would be a criminal violation if committed within the jurisdiction of the United States of America or any of the several states, relating to terrorism or the laundering of monetary instruments, including, without limitation, any offense under (A) the criminal laws against terrorism, (B) the criminal laws against money laundering, (C) the Bank Secrecy Act, as amended, (D) the Money Laundering Control Act of 1986, as amended, or (E) the Patriot Act (or of any conspiracy to commit, or aiding and abetting another to commit, any of the foregoing), or (iv) under investigation by any Governmental Authority for alleged criminal activity.

- (b) Borrower has taken, and shall continue to take until after the Loan is fully repaid, such measures as are required by law to verify that the funds invested in Borrower are derived (i) from transactions that do not violate U.S. law and, to the extent such funds originate outside the United States, do not violate the laws of the jurisdiction in which they originated, and (ii) from permissible sources under U.S. law and to the extent such funds originate outside the United States, under the laws of the jurisdiction in which they originated.
- (c) To the best of Borrower's knowledge, neither Borrower, any other Borrower Party, any holder of a direct interest in Borrower, nor any Person providing funds to Borrower (i) is under investigation by any Governmental Authority for, or has been charged with, or convicted of, money laundering, drug trafficking, terrorist related activities, any crimes that in the United States would be predicate crimes to money laundering, or any violation of any Anti-Money Laundering Laws, (ii) has been assessed civil or criminal penalties under any Anti-Money Laundering Laws, and (iii) has had any of its/his/her funds seized or forfeited in any action under any Anti-Money Laundering Laws.
- (d) Borrower shall make payments on the Loan using funds invested in Borrower, revenues from the Property, insurance proceeds or condemnation awards unless otherwise agreed to by Lender.
- (e) To the best of Borrower's knowledge, as of the Closing Date and at all times during the term of the Loan, all revenues from the Property are and will be derived from lawful business activities of tenants of the Project or the Property, or other permissible sources under U.S. law.
- (f) On the Maturity Date, Borrower will take reasonable steps to verify that funds used to repay the Loan in full (whether in connection with a refinancing, asset sale or otherwise) are from sources permissible under U.S. law and to the extent such funds originate outside the United States, permissible under the laws of the jurisdiction in which they originated.
- (g) Borrower is, and at all times shall be, in compliance with the Office of Foreign Assets Control sanctions and regulations promulgated under the authority granted by the Trading with the Enemy Act ("*TWEA*"), 50 U.S.C. App. Section 1 *et seq.* and the International Emergency Economic Powers Act ("*IEEPA*"), 50 U.S.C. Section 1701 *et seq.*, as the *TWEA* and the *IEEPA* may apply to Borrower's activities.
- (h) Borrower is and at all times shall be in compliance with (i) the Patriot Act and all rules and regulations promulgated under the Patriot Act applicable to Borrower and (ii) other federal or state laws relating to "know your customer" and other anti-money laundering rules and regulations.
- (i) Borrower (i) is not now, nor has ever been, under investigation by any Governmental Authority for, nor has been charged with or convicted for a crime under, 18 U.S.C. Sections 1956 or 1957 or any predicate offense thereunder, or a violation of the Bank Secrecy Act, (ii) has never been assessed a civil penalty under any Anti-Money Laundering Laws or predicate offenses thereunder, (iii) has not had any of its funds seized, frozen or forfeited in any action relating to any Anti-Money Laundering Laws or predicate offenses thereunder, (iv) has taken such steps and implemented such policies as are reasonably necessary to ensure that Borrower is not promoting, facilitating or otherwise furthering, intentionally or unintentionally, the transfer, deposit or withdrawal of criminally derived property, or of money or monetary instruments that are (or which Borrower suspects or has reason to believe are) the proceeds of any illegal activity or that are intended to be used to promote or further any illegal activity, and (v) has taken such steps and implemented such policies as are reasonably necessary to ensure that Borrower is in compliance with all laws and regulations applicable to its business for the prevention of money laundering and with anti-terrorism laws and regulations, with

respect both to the source of funds from its investors and from its operations, and that such steps include the development and implementation of an anti-money laundering compliance program within the meaning of Section 352 of the Patriot Act, to the extent Borrower is required to develop such a program under the rules and regulations promulgated pursuant to Section 352 of the Patriot Act.

#### **Financial Statements.**

- (j) The financial statements heretofore delivered by Borrower and Guarantor to Lender are true and correct in all respects, have been prepared in accordance with sound accounting principles consistently applied, and fairly present the respective financial conditions of the subjects thereof as of the respective dates thereof.
- (k) Neither Borrower nor Guarantor is contemplating either the filing of a petition by it under state or federal bankruptcy or insolvency laws or the liquidation of all or a major portion of its assets or property, and neither Borrower nor Guarantor has knowledge of any Person contemplating the filing of any such petition against it.
- (l) After giving effect to the Loan, the fair saleable value of Borrower's assets exceeds and will, immediately following the making of the Loan, exceed Borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed and contingent liabilities. The fair saleable value of Borrower's assets is and will, immediately following the making of the Loan, be greater than Borrower's probable liabilities, including, without limitation, the maximum amount of its contingent liabilities on its debts as such debts become absolute and matured. Borrower's assets do not and, immediately following the making of the Loan, will not constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. Borrower does not intend to, and does not believe that it will, incur debts and liabilities (including, without limitation, contingent liabilities and other commitments) beyond its ability to pay such debts as they mature (taking into account the timing and amounts of cash to be received by Borrower and the amounts to be payable on or in respect of obligations of Borrower). Except as expressly disclosed to Lender in writing, no petition in bankruptcy has been filed against Borrower or Guarantor in the last seven (7) years, and neither Borrower nor Guarantor in the last seven (7) years has ever made an assignment for the benefit of creditors or taken advantage of any insolvency act for the benefit of debtors.

#### **Taxes.**

- (m) Borrower has filed all federal, state, county and municipal Tax returns or extensions with respect thereto required to have been filed by Borrower and has paid all Taxes that have become due pursuant to such returns or pursuant to any Tax assessments received by Borrower, unless Borrower has contested such Tax in accordance with the terms of the Mortgage.
- (n) To the best knowledge of Borrower, there are no unpaid or outstanding real estate or other taxes or assessments on or against the Land and/or Improvements, or any part thereof, except general real estate taxes not due or payable (and except for any outstanding real estate taxes being paid and/or escrowed with the Title Insurer on the date hereof). The Land and/or the Improvements is comprised of one or more parcels, constituting a separate tax lot and not constituting a portion of any other tax lot. To the best knowledge of Borrower, there are no pending or, to Borrower's best knowledge, proposed, special or other assessments for public improvements or otherwise affecting the Land and/or Improvements, nor are there any contemplated improvements to the Land and/or Improvements (including, without limitation, the Project) that may result in such special or other assessments.

#### **Legal Actions.**

- (o) There are no Claims or investigations by or before any court or Governmental Authority, pending, or to the best of Borrower's knowledge and belief, threatened against or affecting Borrower or Guarantor, Borrower's or Guarantor's business or Borrower's interest in the Property that are reasonably likely to have a Materially Adverse Effect on Borrower, Guarantor or Borrower's interest in the Property. Borrower or Guarantor is not in default with respect to any order, writ, injunction,

decree or demand of any court or any Governmental Authority affecting Borrower, Guarantor or Borrower's interest in the Property.

- (p) There has not been and shall never be committed by Borrower any act or omission affording the federal government or any state or local government the right of forfeiture as against the Property or any part thereof or any monies paid in performance of Borrower's obligations under any of the Loan Documents. Borrower hereby covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right of forfeiture.
- (q) No condemnation has been commenced or, to Borrower's knowledge, is contemplated with respect to all or any portion of the Land or for the relocation of roadways providing access to the Land.

**Nature of Loan.** Borrower is a business or commercial organization. The Loan is being obtained solely for business or investment purposes, and will not be used for personal, family, household or agricultural purposes.

**Usury.** In no event shall the amount of interest (including, without limitation, any fees, commissions and any other amounts that would constitute interest under Laws governing the maximum interest permitted to be charged) due or payable hereunder or under the Note exceed the maximum rate of interest allowed by Laws and the interest rate calculated hereunder shall be calculated accordingly so that such maximum lawful rate is not exceeded. In the event any such payment of interest in excess of the maximum lawful rate is made by Borrower or received by Lender, such excess sum shall be credited as a payment of principal, unless Borrower shall notify Lender, in writing, that it elects to have such excess sum returned forthwith [**OPTIONAL BORROWER PROVISION:** and the same shall not constitute a default or misrepresentation by Borrower]. It is the express intent hereof that Borrower not pay, and Lender not receive, directly or indirectly in any manner whatsoever, interest in excess of that which may legally be paid by Borrower under Laws.

**Title to Property.** Borrower (a) owns [good and marketable fee simple/leasehold] title to the Land, (b) owns (or will own upon completion of the Project, and each phase thereof) the [fee simple] interest to the Improvements (or such phase thereof), (c) owns all of the beneficial and equitable interest in and to the Real Property, (d) is lawfully seized and possessed of the Real Property and Personalty, and (e) has good title to the Personalty. Borrower has the right and authority to convey the Real Property under the Mortgage and does convey the Real Property with general warranty pursuant to the Mortgage. The Real Property and Personalty are subject to no Liens other than the Permitted Encumbrances.

**Independence of the Real Property.** No buildings or other improvements on property not covered by the Mortgage rely on the Real Property or any interest therein to fulfill any requirement of any Governmental Authority for the existence of such property, building or improvements, and none of the Real Property relies, or will rely, on any property not covered by the Mortgage or any interest therein to fulfill any requirement of any Governmental Authority [**OPTIONAL BORROWER PROVISION:** , except any easement agreements the Real Property relies on]. The Real Property has been properly subdivided from all other property in accordance with the requirements of each applicable Governmental Authority. The current and anticipated use of the Real Property and proposed Improvements comply with all Laws, including, without limitation, all applicable zoning ordinances, regulations and restrictive covenants affecting the Land. All use and other requirements of any Governmental Authority having jurisdiction over the Real Property have been satisfied. No violation of any Law exists or will upon completion of the Improvements exist with respect to the Real Property. Borrower represents and warrants that the Property: (i) contains no facilities that are subject to reporting (by either Borrower or any tenant or lessee thereof or other person or entity in possession or occupancy of any portion thereof) under Section 312 of the federal Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. §11022), (ii) is not the site of any underground storage tanks for which notification is required under 42 U.S.C. §6991a and other applicable law, and (iii) is not listed on the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) (42 U.S.C. §9616). Any part of the Property may be released by Lender from the lien created by the Mortgage. Any such partial release is at the sole option of Lender, Lender is not obligated to grant partial releases. Any such partial release will not affect the lien created by the Mortgage as to the remainder of the Property.

**Plans and Specifications.** The Plans and Specifications are complete and adequate for the Project [**OPTIONAL LENDER SUSTAINABILITY PROVISION:** , including, without limitation, obtaining the Green Building Certification]. The Plans and Specifications have been approved by all Governmental Authority having or claiming jurisdiction over the Property and by the beneficiary of each restrictive covenant affecting the Real Property, if any, whose approval is required. The Plans and Specifications have also been approved by the Architect,

the Developer, the General Contractor, and any tenant whose approval is required. To the best of Borrower's knowledge, the Improvements, if constructed substantially in accordance with the Plans and Specifications, will fully comply with all applicable Laws, including, without limitation, those Laws relating to access and facilities for disabled persons [**OPTIONAL LENDER SUSTAINABILITY PROVISION:** and will obtain the Green Building Certification]. All construction, if any, already performed on the Improvements has been performed on the Land in accordance with the Plans and Specifications approved by the persons named above and with any restrictive covenants applicable thereto and there are no structural defects in such existing portions of the Improvements or violations of any requirement of any Governmental Authority with respect thereto, the planned use of the Improvements complies with applicable zoning ordinances, regulations and restrictive covenants affecting the Land as well as all environmental, ecological, landmark, and other applicable laws and regulations, and all requirements for such use have been satisfied.

**Building Permits; Other Permits.**

- (r) All Permits necessary or required in connection with the Project have been validly issued or will be issued in a timely manner by a date sufficient to ensure commencement of construction and Completion of Construction in accordance with the Project Schedule. All required fees have been paid and bonds and/or other security have been posted in connection with all Permits that have been issued, and adequate amounts are included in the Budget to pay all fees and the cost of all bonds and other security in connection with Permits to be issued in the future. Borrower will promptly obtain all Permits required from Governmental Authority and within ten (10) days of receipt of such Permits send copies thereof to Lender. Following the issuance thereof, all permits will remain in full force and effect.
- (s) Borrower has all requisite Permits and all other licenses, permits, franchises, qualifications, or other governmental authorizations to own and lease the Land and/or Improvements, and to construct the Project and carry on its business, and to best knowledge of Borrower, Developer has all requisite licenses, Permits, franchises, qualifications, or other governmental authorizations to manage the construction of the Project (excluding any licenses any tenants must maintain to operate within the Project or the Property) and carry on its business.

**Utilities.** All utility services necessary for the Project and the operation thereof for their intended purposes are available at the boundaries of the Land (or will be available upon the completion of the Project, including, without limitation, telephone service, cable television, water supply, storm and sanitary sewer facilities, and electric facilities, including, without limitation, cabling for telephonic and data communication.

**Access; Roads.** All roads and other accesses necessary for the Project and full utilization thereof for their intended purposes have either been completed or the necessary rights of way therefor have either been acquired by the appropriate Governmental Authority, or have been dedicated to public use and accepted by such Governmental Authority and all necessary steps have been taken by Borrower or such Governmental Authority to assure the complete construction and installation thereof by a date sufficient to ensure the Completion of Construction in accordance with the Project Schedule.

**Other Liens.** Except for contracts for labor, materials and services furnished or to be furnished in connection with the Project or the Property who have executed and furnished to Lender Lien Waivers or signed payment receipts in form approved by Lender for all payments due under said arrangements as of the end of the period covered by the last Draw Request, Borrower has made no contract or arrangement of any kind the performance of which by the other party thereto would give rise to a lien on the Property.

**Defaults.** There is no Default or Event of Default under any of the Loan Documents, and there is no default or event of default under any material contract, agreement or other document related to the construction or operation of the Improvements.

**Affirmation of Representations and Warranties.** Each Draw Request and each receipt of the funds requested thereby shall constitute an affirmation that (a) the representations and warranties of Borrower contained in this Article III are true and correct in all material respects as of the date of the Draw Request and, unless Lender is notified to the contrary prior to the disbursement of the Advance requested, will be so on the date of the disbursement, (b) the work completed to the date of the Draw Request is of quality and in all other respects consistent in all material respects with the Plans and Specifications, and (c) if applicable, construction of the Improvements is proceeding in all material respects in accordance with the Project Schedule.

**Governmental Authority.** There are no actions, suits or proceedings pending or to the knowledge of Borrower threatened against or affecting it or the Guarantor, Borrower's interest in the Property, the validity or enforceability of the Mortgage or the priority of the lien thereof at law, in equity or before or by any Governmental Authority that are reasonably likely to have a Material Adverse Effect on Borrower, Guarantor or Borrower's interest in the Property. To Borrower's knowledge, it is not in default with respect to any order, writ, injunction, decree or demand of any court or Governmental Authority [**OPTIONAL BORROWER PROVISION:** that is reasonably likely to have a Material Adverse Effect on Borrower, Guarantor or Borrower's interest in the Property].

**Prior Work.** Borrower has advised the Title Insurer in writing prior to the issuance of the Title Policy whether any survey, soils-testing, site-development, excavation or other work related to construction of the Improvements was begun or done before the Mortgage was recorded.

**Hazardous Materials; Related Claims.** To the best of Borrower's knowledge, except for those conditions listed in the Environmental Report, for which a reliance letter has been issued to Lender, the Property and the Improvements thereon, if any, and the contiguous areas, are not currently and have not been subject to Hazardous Materials or their effects, and there are no claims, litigation, administrative or other proceedings, whether actual or threatened, or judgments or orders, relating to any hazardous or toxic substances or wastes, discharges, emissions or other forms of pollution relating in any way to the Land or the Improvements, if any, thereon.

**No Material Adverse Change.** No material adverse change has occurred in the financial conditions reflected in the financial statements of Borrower or Guarantor since the respective dates of such statements, and no material additional liabilities have been incurred by Borrower since the dates of such statements other than the borrowings contemplated herein or as approved in writing by Lender.

**Margin Stock.** No part of proceeds of the Loan will be used for purchasing or acquiring any "margin stock" within the meaning of Regulations T, U or X of the Board of Governors of the Federal Reserve System.

**Flood Zone.** No portion of the Improvements is (or will be) located in an area identified by the Secretary of Housing and Urban Development or any successor thereto as an area having special flood hazards pursuant to the National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973 or the National Flood Insurance Act of 1994, as amended, or any successor law, or, if located within any such area, Borrower has obtained and will maintain the insurance prescribed in 0.

**Ground Lease; Lease.**

- (t) With respect to the Ground Lease, (i) the Ground Lease is valid and in and full force and effect, (ii) the Ground Lease (including, without limitation, amendments and other modifications thereto, and/or waivers thereunder) are in writing, and there are no oral agreements with respect thereto, (iii) the copies of the Ground Lease delivered to Lender is true and complete, (iv) neither the tenant nor, to best Knowledge of Borrower, the landlord, is in default under the Ground Lease, (v) to Borrower's Knowledge, there is no notice of any termination or default with respect to the Ground Lease, (vi) Borrower has not currently assigned or pledged the Ground Lease, the rents or any interests therein except to Lender, and (vii) Borrower has obtained all required consents to enter into the Mortgage and to grant Lender the security in the collateral described therein.
- (u) As of the date hereof, there are no leases with respect to the Land and/or the Improvements, and there are no agreements with any Persons for the use or occupancy of the Land and/or the Improvements except as set forth in the Title Policy.

**Leases; Ground Leases.**

- (v) With respect to the Leases and other than as set forth in Schedule J: (i) the Leases as set forth in Schedule J are valid and in and full force and effect, (ii) the Leases (including, without limitation, amendments and modifications thereto, and/or waivers thereunder) are in writing, and there are no oral agreements with respect thereto, (iii) the copies of the Leases delivered to Lender are true and complete, (iv) neither the landlord nor, to best knowledge of Borrower, any tenant, is in default under any of the Leases, (v) Borrower has no knowledge of any notice of termination or default with respect to any Lease, (vi) Borrower has not currently assigned or pledged any of the Leases, the rents or any interests therein except to Lender, (vii) no tenant or any other party has an option to purchase all or any portion of the Property, (viii) no tenant has the right to terminate its Lease prior to expiration of the stated term of such Lease, (ix) no Tenant has prepaid more than one month's rent in

advance (except for bona fide security deposits), and (x) all existing Leases are subordinate to the Fee Mortgage, the Parking Mortgage, and/or the Miramar Mortgage, as applicable, pursuant to their terms.

- (w) With respect to the Parking Lease: (i) the Parking Lease is valid and in full force and effect, (ii) the Parking Lease (including, without limitation, amendments and modifications thereto, and/or waivers thereunder) are in writing, and there are no oral agreements with respect thereto, (iii) the copies of the Parking Lease delivered to Lender is true and complete, (iv) neither the tenant nor, to best knowledge of Borrower, the landlord, is in default under the Parking Lease, (v) Borrower has no knowledge of any notice of termination or default with respect to the Parking Lease, (vi) Borrower has not currently assigned or pledged the Parking Lease, the rents or any interests therein except to Lender, and (vii) Borrower has obtained all required consents to enter into the Parking Mortgage, and to grant Lender the security in the collateral described therein.

**Third Party Agreements.** A true, correct and complete copy of each of the Development Agreement and the GC Agreement, and each material agreement entered into by Borrower, together with all amendments thereto, have been delivered to Lender. Such agreements and all amendments thereto are in full force and effect as of the date hereof.

**Physical Condition.** Except as specifically set forth in the engineering report, if any, to Borrower's knowledge, (a) the Property, including, without limitation, all buildings, improvements, parking facilities, sidewalks, storm drainage systems, roofs, plumbing systems, HVAC systems, fire protection systems, electrical systems, equipment, elevators, exterior sidings and doors, landscaping, irrigation systems and all structural components, is in good condition, order and repair in all material respects, and (b) there exists no structural or other material defects or damages in the Land and/or the Improvements, whether latent or otherwise. Borrower has not received written notice from any insurance company or bonding company of any defects or inadequacies in the Land and/or the Improvements, or any part thereof, that would adversely affect the insurability of the same or cause the imposition of extraordinary premiums or charges thereon or of any termination or threatened termination of any policy of insurance or bond.

**Full and Accurate Disclosure.** No statement of fact made by or on behalf of Borrower or Guarantor in this Agreement, in any of the other Loan Documents or the Environmental Indemnity Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not misleading. There is no fact presently known to Borrower which has not been disclosed to Lender and that adversely affects, nor as far as Borrower can foresee, might adversely affect, the Project, the Property, or the business, operations or condition (financial or otherwise) of Borrower or Guarantor. To Borrower's knowledge, all information supplied by Borrower regarding any other collateral is accurate and complete in all material respects. All evidence of Borrower's and each Guarantor's identity provided to Lender is genuine, and all related information is accurate.

#### **ARTICLE IV. AFFIRMATIVE COVENANTS AND AGREEMENTS.**

**Obligations.** Borrower agrees to promptly pay and perform all of the Obligations [**OPTIONAL BORROWER PROVISION:** (subject to applicable notice and cure periods)], time being of the essence in each case.

**Compliance with Laws.** Borrower will [**OPTIONAL BORROWER PROVISION:** materially] comply with and not violate, and cause to be complied with and not violated, all present and future Laws applicable to the Property and its use and operation.

**Maintenance and Repair of the Property.** Borrower, at Borrower's sole expense, will (a) keep and maintain the Improvements and the Personalty in good condition, working order and repair, and (b) make all necessary or appropriate repairs and additions to Improvements and Personalty, so that each part of the Improvements and all of the Personalty shall at all times be in good condition and fit and proper for the respective purposes for which they were originally intended, erected, or installed [**OPTIONAL LENDER SUSTAINABILITY PROVISION:** , including, without limitation, in a manner that supports the sustainability features of the Improvements and Personalty and maximizes energy efficiency].

**Additions to Security.** All right, title and interest of Borrower in and to all Improvements and Personalty hereafter constructed or placed on the Property and in and to any Equipment hereafter acquired shall, without any further mortgage, deed of trust, conveyance, assignment or other act by Borrower, become subject to the lien of the Mortgage as fully and completely, and with the same effect, as though now owned by Borrower and specifically described in the granting clauses hereof. Borrower agrees, however, to execute and deliver to Lender such further documents as may be required by the terms of this Agreement and the other Loan Documents.

**Subrogation.** To the extent permitted by Law, Lender shall be subrogated, notwithstanding its release of record, to any lien now or hereafter existing on the Property to the extent that such lien is paid or discharged by Lender whether or not from the proceeds of the Loan. This 0 shall not be deemed or construed, however, to obligate Lender to pay or discharge any Lien.

**Maintain Lien.** Borrower shall maintain the lien of the Mortgage as a first priority on Borrower's interest in the Property, subject only to the Permitted Encumbrances, until all of the Obligations have been satisfied in full. Borrower agrees that it shall indemnify and hold Lender harmless against any loss or liability, cost or expense, including, without limitation, any judgments, [OPTIONAL BORROWER PROVISION: reasonable] attorneys' fees and costs, costs of appeal bonds and printing costs, arising out of or relating to any proceeding instituted by any claimant alleging priority over the lien of this Mortgage with respect to the Property.

**Commencement and Completion of Construction.** Borrower shall cause the Project to be commenced and prosecuted in a good and workmanlike manner on or before the Construction Commencement Date, subject to extension for Force Majeure delays (it being understood that the commencement of site work constitutes commencement of the Project) and shall cause the Substantial Completion of the Project in accordance with the Project Schedule and substantially in accordance with the Plans and Specifications on or before the Scheduled Completion Date. [OPTIONAL LENDER SUSTAINABILITY PROVISION: In addition, Borrower shall cause the Project to be prosecuted in a manner that supports and/or strengthens the likelihood that the Improvements will obtain the Green Building Certification, including, without limitation, with respect to the disposal of materials from the Project.]

#### **Approval of Construction.**

- (a) No work associated with the Project shall be commenced or continued by Borrower unless and until the Plans and Specifications (and any changes thereto as required by Article V hereto) have been approved by Lender, by all Governmental Authorities having or claiming jurisdiction over the Land and Improvements, by the beneficiary of any applicable restrictive covenant whose approval is required, and by any other party whose approval is required under applicable agreements, and unless and until all building, construction and other Permits necessary or required in connection with the Project have been validly issued and all fees, bonds and any other security required in connection therewith have been paid or posted. Borrower shall obtain Lender's prior written consent (in Lender's reasonable discretion) to any Major Subcontract.
- (b) Borrower covenants and agrees with Lender that it will require covenants from the Developer, and use good faith and diligent efforts to require covenants from Subcontractors who have contracts directly with Borrower to the same effect as the covenant made by Borrower in the immediately preceding paragraph, and it will cause Developer to use good faith and diligent efforts to (i) require covenants from the General Contractor and Subcontractors who have contracts with Developer to the same effect as the covenant made by Borrower in the immediately preceding paragraph, and (ii) provide in the GC Agreement that the General Contractor will deliver to Lender or the Lender's Consultant copies of all change orders and any other contract, purchase order or subcontract covering labor, materials, equipment or furnishings to or for the Improvements, and the names of all persons with whom the Borrower, the Developer or the General Contractor has contracted or intends to contract for the construction of the Improvements or for the furnishing of labor or materials therefor.
- (c) Borrower shall comply with the terms of the Development Agreement.

**Deposits to Balance Loan.** If at any time Lender shall reasonably determine that (a) the proceeds of the Loan remaining to be advanced for any line item within the Budget, together with any anticipated Borrower's Funds that Lender determines is or will be available for such item, are not or will not be sufficient to pay, in a timely manner, the amount of such line item remaining to be paid, and (b) the deficiency cannot be remedied by a reallocation of budgeted amounts pursuant to 0, then Borrower shall deposit with Lender, within ten (10) days from



the effective date of a Notice from Lender requesting such deposit, funds in an amount equal to the deficiency **[OPTIONAL BORROWER PROVISION:** or post a letter of credit in the amount of such deficiency, which letter of credit shall be in the amount of such deficiency, and shall be otherwise in form and substance acceptable to Lender]. Such funds shall be held by Lender in the Borrower's Deposit Account, which shall be an interest-bearing account, with all accrued interest to become part of such funds. Borrower agrees that it shall include all interest and earnings on any such deposit as its income (and, if Borrower is a partnership or other pass-through entity, the income of its partners, members or beneficiaries, as the case may be), and shall be the owner of all funds on deposit in the Borrower's Deposit Account for federal and applicable state and local tax purposes. Lender shall have the exclusive right to manage and control all funds in the Borrower's Deposit Account, but Lender shall have no fiduciary duty with respect to such funds. Advances of the deposited funds will be made from time to time for the payment of deficient line item amounts, prior to the advance of proceeds of the Loan for such amounts. Advances of the deposited funds will be subject to the terms of this Agreement regarding advances of the Loan. Any reasonable account fees and charges may be deducted from the balance, if any, in the Borrower's Deposit Account. Borrower grants to Lender a security interest in the Borrower's Deposit Account and all such deposited funds hereafter deposited to such deposit account, and any proceeds thereof, as security for the Obligations. Such security interest shall be governed by the Uniform Commercial Code of the State, and Lender shall have available to it all of the rights and remedies available to a secured party thereunder following an Event of Default. The Borrower's Deposit Account may be established and held in such name or names as Lender shall deem appropriate, including, without limitation, in the name of Lender. Borrower hereby constitutes and appoints Lender and any officer or agent of Lender its true and lawful attorneys-in-fact with full power of substitution to open the Borrower's Deposit Account and to do any and every act that Borrower might do on its own behalf to fulfill the terms of this 0. To the extent permitted by applicable Laws, Borrower hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof. It is understood and agreed that this power of attorney, which shall be deemed to be a power coupled with an interest, cannot be revoked unless and until the Loan and all other charges under the Loan Documents have been repaid in full and the Mortgage released or satisfied of record.

**Compliance with Laws; Encroachments.** The Improvements shall be constructed, maintained and operated in accordance with all applicable (whether present or future) Laws. The Improvements shall be constructed entirely on the Land and shall not encroach upon any easement or right-of-way, or upon the land of others (unless Borrower shall have a continuing easement for the same until the Maturity Date, as the same may be extended). The Project shall be constructed and developed wholly within all applicable building restriction lines and set-backs, however established, and shall be in strict compliance with all applicable use or other restrictions and the provisions of any prior agreements, declarations, covenants, restrictions, easements and all applicable zoning and subdivision ordinances and regulations. Borrower covenants and agrees with Lender that it will at its expense promptly comply with all laws, ordinances, orders, rules, statutes and regulations of Governmental Authority or it will timely and at its own expense contest the validity of any such laws, ordinances, orders, rules, statutes and regulations by appropriate legal proceedings and post a sufficient bond or other security reasonably satisfactory to Lender in connection with such contest in order to avoid the filing of a lien against the Property or any part thereof, and upon request provide Lender with copies of all filings and correspondence related thereto, and promptly furnish Lender with reports of any official searches made by Governmental Authority and any claims of violations thereof, and, promptly obtain all Permits required from Governmental Authority and within ten (10) days of receipt of such Permits send copies thereof to the Lender. Notwithstanding the foregoing if any delay in compliance with any Laws shall, in the reasonable judgment of Lender place all or any part of the Property in imminent danger of being forfeited or lost, or if penalties, fines, and/or interest shall accrue as a result thereof, Borrower, shall upon notice from Lender, immediately comply with such Laws.

**Inspections; Cooperation.** Borrower shall permit representatives of Lender and the Lender's Consultant to enter upon the Land, to inspect the Improvements and any and all materials to be used in connection with the development of the Land and the Project, to examine all detailed plans and shop drawings and similar materials as well as, upon reasonable prior notice (which shall be not less than two (2) Business Days, except in the case of an emergency), during business hours all records and books of account maintained by or on behalf of Borrower relating thereto and to discuss the affairs, finances and accounts pertaining to the Loan and the Improvements with representatives of Borrower. Borrower shall at all times reasonably cooperate and cause the Developer and each and every one of its contractors, subcontractors and material suppliers to reasonably cooperate with the representatives of Lender and the Lender's Consultant in connection with or in aid of the performance of Lender's functions under this Agreement. Except in the event of an emergency or for review of books and records, Lender shall give

Borrower at least twenty-four (24) hours' notice by telephone in each instance before entering upon the Land and/or exercising any other rights granted in this Q.

**Contracts, Vouchers and Receipts.** Borrower shall furnish to Lender, promptly on demand, any contracts, subcontracts, bills of sale, statements, receipted vouchers or other agreements relating to the development of the Land or the Project, including, without limitation, any such items pursuant to which Borrower has any claim of title to any materials, fixtures or other articles delivered or to be delivered to the Land or incorporated or to be incorporated into the Improvements. Borrower shall furnish to Lender, promptly on demand, a verified written statement, in such form and detail as Lender may require, setting forth the names and addresses of all contractors, subcontractors and suppliers furnishing labor or materials in the development of the Land or the Project and showing all amounts paid for labor and materials and all items of labor and materials furnished or to be furnished for which payment has not been made and the amounts to be paid therefor. Lender acknowledges that to the extent Borrower is not in privity with such foregoing parties, Borrower shall use its diligent and good faith efforts to obtain such information.

**Payment and Performance of Contractual Obligations.** Borrower shall perform in a timely manner all of its obligations under the Development Agreement and any and all other contracts and agreements to which it is a party and are related to the acquisition, insuring, maintenance and construction or operation of the Improvements, and shall cause Developer to perform in a timely manner all of its obligations under the GC Agreement, and Borrower will pay when due all bills for services or labor performed and materials supplied in connection with the development of the Land and the construction of the Improvements in accordance with the Development Agreement. Within thirty (30) days after notice to Borrower of the filing of any mechanic's lien or other lien or encumbrance against the Property, Borrower will promptly discharge the same by payment or filing a bond or otherwise as permitted by Law. So long as Lender's security has been protected by the filing of a bond or otherwise in a manner satisfactory to Lender in its reasonable discretion, Borrower shall have the right to contest in good faith any claim, lien or encumbrance, provided that Borrower does so diligently and without prejudice to Lender or delay in completing construction of the Improvements. Borrower shall provide payment and performance bonds for each of the Major Subcontracts.

**Correction of Construction Defects.** Promptly following any demand by Lender, Borrower shall correct or cause the correction of any structural defects in the Improvements, any work that fails to comply with the requirements of Q and any material departures or deviations from the Plans and Specifications not approved in writing by Lender.

**Insurance.** Borrower shall maintain or shall cause an entity acceptable to Lender, in its sole discretion, to maintain the following insurance at its sole cost and expense:

- (d) Insurance against Casualty to the Property under a policy or policies covering such risks as are presently included in "special form" (also known as "all risk") coverage, including, without limitation, such risks as are ordinarily insured against by similar businesses, but in any event including, without limitation, fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, damage from aircraft, smoke, vandalism, malicious mischief and acts of terrorism. Such insurance shall name Lender as mortgagee and loss payee. Unless otherwise agreed in writing by Lender, such insurance shall be for the full insurable value of the Property, with a deductible amount, if any, satisfactory to Lender. No policy of insurance shall be written such that the proceeds thereof will produce less than the minimum coverage required by this Section by reason of co-insurance provisions or otherwise. The term "full insurable value" means one hundred percent (100%) of the actual replacement cost of the Property (excluding foundation and excavation costs and costs of underground flues, pipes, drains and other uninsurable items). **[OPTIONAL LENDER SUSTAINABILITY PROVISION: , including, without limitation, all sustainability features of the Property necessary to obtain the same Green Building Certification [awarded/expected to be awarded] to the Improvements prior to the Casualty].**
- (e) Comprehensive (also known as commercial) general liability insurance on an "occurrence" basis against claims for "personal injury" liability and liability for death, bodily injury and damage to property, products and completed operations, in limits satisfactory to Lender with respect to any one occurrence and the aggregate of all occurrences during any given annual policy period. Such insurance shall name Lender as an additional insured.

- (f) Workers' compensation insurance for all employees of Borrower in such amount as is required by Law and including, without limitation, employer's liability insurance, if required by Lender.
- (g) During any period of construction upon the Property, Borrower shall maintain, or cause others to maintain, builder's risk insurance (non-reporting form) of the type customarily carried in the case of similar construction for one hundred percent (100%) of the full replacement cost of work in place and materials stored at or upon the Property.
- (h) If at any time any portion of any structure on the Property is insurable against Casualty by flood and is located in a Special Flood Hazard Area under the Flood Disaster Protection Act of 1973, as amended, a flood insurance policy in form and amount acceptable to Lender but in no event less than the amount sufficient to meet the requirements of applicable Law as such requirements may from time to time be in effect.
- (i) Loss of rental value insurance or business interruption insurance in an amount reasonably acceptable to Lender.
- (j) Such other and further insurance as may be required from time to time by Lender in order to comply with regular requirements and practices of Lender in similar transactions (with similar projects) including, if reasonably required by Lender, wind insurance and earthquake insurance, so long as any such insurance is generally available at commercially reasonable premiums as reasonably determined by Lender from time to time.
- (k) Borrower shall cause the Developer to cause the General Contractor to provide and maintain comprehensive (commercial) general liability insurance and workers' compensation insurance for all employees of the General Contractor meeting, respectively, the requirements of Article IV(e) and Article IV(f), above.

Each policy of insurance (i) shall be issued by one or more insurance companies each of which must have an A.M. Best Company financial and performance rating of A-IX or better and are qualified or authorized by the Laws of the State to assume the risks covered by such policy, (ii) with respect to the insurance described under the preceding Article IV(d), (g), (h) and (i), shall have attached thereto standard non-contributing, non-reporting mortgagee clauses in favor of and entitling Lender without contribution to collect any and all proceeds payable under such insurance, either as sole payee or as joint payee with Borrower, (iii) shall provide that such policy shall not be canceled or modified without at least thirty (30) days prior written notice to Lender, and (iv) shall provide that any loss otherwise payable thereunder shall be payable notwithstanding any act or negligence of Borrower which might, absent such agreement, result in a forfeiture of all or a part of such insurance payment. Borrower shall promptly pay all premiums when due on such insurance and, not less than thirty (30) days prior to the expiration dates of each such policy, Borrower will deliver to Lender acceptable evidence of insurance, such as a renewal policy or policies marked "premium paid" or other evidence satisfactory to Lender reflecting that all required insurance is current and in force. Borrower will immediately give Notice to Lender of any cancellation of, or change in, any insurance policy. Lender shall not, because of accepting, rejecting, approving or obtaining insurance, incur any liability for (A) the existence, nonexistence, form or legal sufficiency thereof, (B) the solvency of any insurer, or (C) the payment of losses. Borrower may satisfy any insurance requirement hereunder by providing one or more "blanket" insurance policies, subject to Lender's approval in each instance as to limits, coverages, forms, deductibles, inception and expiration dates, and cancellation provisions.

**Adjustment of Condemnation and Insurance Claims.** Borrower shall give prompt Notice to Lender of any Casualty or any Condemnation or threatened Condemnation. Lender is authorized, at its sole and absolute option, to commence, appear in and prosecute, in its own or Borrower's name, any action or proceeding relating to any Condemnation (actual or threatened) or Casualty, and to make proof of loss for and to settle or compromise any Claim in connection therewith, and any settlement made by Lender shall be in good faith, as Lender would treat its own assets. In such case, Lender shall have the right to receive all Condemnation Awards and Insurance Proceeds, and may deduct therefrom any or all of its Expenses. However, so long as no Event of Default has occurred, and Borrower is diligently pursuing its rights and remedies with respect to a Claim, Borrower will obtain Lender's written consent (which consent shall not be unreasonably withheld or delayed) before making proof of loss for or settling or compromising each Claim if Lender is not exercising any of its rights pursuant to this Section. Borrower

agrees to diligently assert its rights and remedies with respect to each Claim and to promptly pursue the settlement and compromise of each Claim subject to Lender's approval, which approval shall not be unreasonably withheld or delayed. If, prior to the receipt by Lender of any Condemnation Award or Insurance Proceeds, the Property shall have been sold pursuant to the provisions of the Mortgage, Lender shall have the right to receive such funds (a) to the extent of any deficiency found to be due upon such sale with interest thereon (whether or not a deficiency judgment on the Mortgage shall have been sought or recovered or denied), and (b) to the extent necessary to reimburse Lender for its Expenses. If any Condemnation Awards or Insurance Proceeds are paid to Borrower, Borrower shall receive the same in trust for Lender. Within ten (10) days after Borrower's receipt of any Condemnation Awards or Insurance Proceeds, Borrower shall deliver such awards or proceeds to Lender in the form in which they were received, together with any endorsements or documents that may be necessary to effectively negotiate or transfer the same to Lender. Borrower agrees to execute and deliver from time to time, upon the request of Lender, such further instruments or documents as may be requested by Lender to confirm the grant and assignment to Lender of any Condemnation Awards or Insurance Proceeds.

#### **Utilization of Net Proceeds.**

- (l) Net Proceeds must be utilized either for payment of the Obligations or for the restoration of the Property. Net Proceeds may be utilized for the restoration of the Property only if no Event of Default shall exist and only if in the reasonable judgment of Lender (i) there has been no material adverse change in the financial viability of the construction or operation of the Improvements (other than the reduction in the value of the Improvements in an amount equal to said Net Proceeds as a consequence of the Condemnation or Casualty), (ii) the Net Proceeds, together with other funds deposited with Lender for that purpose, are sufficient to pay the cost of the restoration pursuant to a budget and plans and specifications approved by Lender (not to be unreasonably withheld), and (iii) the restoration can be completed prior to the final maturity of the Loan and prior to the date required by any Lease. Otherwise, Net Proceeds shall be utilized for payment of the Obligations.
- (m) If Net Proceeds are to be utilized for the restoration of the Property, the Net Proceeds, together with any other funds deposited with Lender for that purpose, must be deposited in an interest-bearing account with Lender, which account will be assigned to Lender as additional security for the Loan. The account will be opened, managed and controlled in a manner consistent with, and subject to, the provisions of Q governing a Borrower's Deposit Account, including, without limitation, those provisions permitting Lender to require Borrower to deposit funds in the event of a deficiency in the funds available to complete restoration as herein contemplated. Disbursements of funds from the account will be made in a manner consistent with, and subject to, the requirements for the closing and funding of the Loan and the terms of this Agreement regarding the disbursement of Loan proceeds.

#### **Management.**

- (n) Borrower at all times shall provide for the competent and responsible management and operation of the Property. Any property manager and any management contract or contracts affecting the Property must be approved in writing by Lender prior to the execution of the same and must be subordinate to the Mortgage. If Lender approves of a property manager or management contract, Borrower shall not surrender, terminate, cancel, modify in any material respect, renew, amend, or extend such management agreement, or enter into any other agreement relating to the management or operation of the Project and the Property with such property manager or any other Person, or consent to the assignment by such property manager of its interest under such management agreement, in each case without the express written consent of Lender. Lender's approval of a property manager shall be based upon Lender's evaluation, in its sole discretion of the proposed substitute manager's and operator's financial condition, credit history and credit worthiness, experience in operating and managing properties similar to the Project and the Property, reputation for honesty and integrity and prior experience with Lender. All such property managers shall hold and maintain all necessary licenses, certifications and Permits required by law.
- (o) If Borrower enters into a property management agreement with a property manager, in each case approved by Lender, Borrower shall cause such property manager to manage the Property in accordance with such management agreement, and shall (i) diligently perform and observe all of the terms, covenants and conditions of such management agreement on the part of Borrower to be

performed and observed, (ii) promptly notify Lender of any notice received by Borrower of any default by Borrower in the performance or observance of any of the material terms, covenants or conditions of such management agreement on the part of Borrower to be performed and observed, and (iii) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, report and estimate received by it under such management agreement.

- (p) Notwithstanding Lender's approval of a property manager, Lender shall have the right to require Borrower to replace any such approved property manager with a Person that is not an Affiliate of, but is chosen by, Borrower and approved by Lender, upon the occurrence of any one or more of the following events: (i) at any time following the occurrence and continuance of an Event of Default, and/or (ii) if such property manager shall be in default under the applicable management agreement beyond any applicable notice and cure period or if at any time such property manager has engaged in gross negligence, fraud or willful misconduct or if at any time such property manager is insolvent or a debtor in a bankruptcy proceeding.

**Books and Records; Financial Statements; Tax Returns.** Borrower will keep and maintain full and accurate books and records administered in accordance with sound accounting principles, consistently applied, showing in detail the earnings and expenses of the Property and the operation thereof. [**OPTIONAL LENDER SUSTAINABILITY PROVISION:** Borrower will also keep and maintain full and accurate information necessary to obtain and maintain the Green Building Certification and to track energy usage within the Improvements.] Borrower will keep and maintain its books and records, including, without limitation, recorded data of any kind and regardless of the medium of recording, at the address of Borrower set forth in 0 or at Developer's offices located at [address of Developer], or such other address as provided to Lender in writing from time to time. Borrower shall (or shall cause Developer to) permit Lender, or any Person authorized by Lender, to inspect and examine such books and records (regardless of where maintained) and all supporting vouchers and data and to make copies and extracts therefrom at all reasonable times, upon not less than two (2) Business Days' notice (except in the case of an emergency), and as often as may be reasonably requested by Lender. Borrower will furnish or cause to be furnished to Lender annual unaudited financial statements, including, without limitation, balance sheets and income statements, for Borrower, each Guarantor and the Property, within ninety (90) days after each fiscal year end for the respective reporting party. In addition, Borrower will furnish or cause to be furnished to Lender, with reasonable promptness, such interim unaudited financial statements of Borrower, each Guarantor and the Property, together with such additional information, reports or statements in connection therewith, as Lender may from time to time reasonably request. All financial statements must be in form and detail reasonably acceptable to Lender and must be certified as to accuracy by Borrower or the respective Guarantor, as the case may be. All financial statements must be in form and detail reasonably acceptable to Lender must be certified as to accuracy by Borrower or the respective Guarantor, as the case may be. All annual financial statements of Borrower and of Guarantor must be compiled (but do not have to be audited) by an independent certified public accountant reasonably satisfactory to Lender. Borrower shall provide, upon Lender's request, convenient facilities for the audit and verification of any such statement. All certifications and signatures on behalf of corporations, partnerships, limited liability companies and other entities shall be by a representative of the reporting party reasonably satisfactory to Lender. All financial statements for individuals shall be on Lender's then-current personal financial statement form or in another form reasonably satisfactory to Lender.

**Estoppel Certificates.**

- (q) Borrower at all times shall provide for the competent and responsible management and operation of the Property. Any property manager and any management contract or contracts affecting the Property must be approved in writing by Lender prior to the execution of the same and must be subordinate to the Mortgage. If Lender approves of a property manager or management contract, Borrower shall not surrender, terminate, cancel, modify in any material respect, renew, amend, or extend such management agreement, or enter into any other agreement relating to the management or operation of the Project and the Property with such property manager or any other Person, or consent to the assignment by such property manager of its interest under such management agreement, in each case without the express written consent of Lender. Lender's approval of a property manager shall be based upon Lender's evaluation, in its sole discretion of the proposed substitute manager's and operator's financial condition, credit history and credit worthiness, experience in operating and managing properties similar to the Project and the Property, reputation for honesty and integrity and prior experience with Lender. All such property managers shall hold and maintain all necessary

licenses, certifications and Permits required by law. Within ten (10) Business Days after any request by Lender or a proposed assignee or purchaser of the Loan or any interest therein, Borrower shall certify in writing to Lender, or to such proposed assignee or purchaser, the then unpaid balance of the Loan, whether Borrower claims any right of defense or setoff to the payment or performance of any of the Obligations, if Borrower claims any such right of defense or setoff, Borrower shall give a detailed written description of such claimed right, whether there are any defaults by Borrower, Guarantor or Lender under the Loan Documents, and as to such other matters as may be requested by Lender or such proposed assignee or purchaser, as the case may be. **[OPTIONAL BORROWER PROVISION:** Within ten (10) Business Days after any request by Borrower, Lender shall certify in writing to Borrower that (i) the unpaid principal amount of the Note, (ii) the interest rate of the Note, (iii) the date installments of interest and/or principal were last paid on the Note, and (iv) that this Agreement and the other Loan Documents have not been modified or if modified, giving particulars of such modification, provided that Borrower shall not have the right to request such certificate from Lender more frequently than two (2) times in any calendar year.]

- (r) Borrower shall deliver to Lender, within thirty (30) days after request, an estoppel certificate from each Tenant in form acceptable to Lender in its sole discretion; provided however that such certificate may be in the form required under such Lease.
- (s) Borrower shall deliver to Lender, within thirty (30) days after request, an estoppel certificate from the Ground Lessor under the Ground Lease in form acceptable to Lender in its sole discretion; provided, however, that such certificate may be in the form required under the Ground Lease.

#### **Taxes.**

- (t) Borrower shall pay and discharge all Taxes prior to the date on which penalties are attached thereto unless and to the extent only that such Taxes are contested in accordance with the terms of the Mortgage. Borrower shall, at its sole cost and expense, do, execute, acknowledge and deliver all and every such acts, information reports, returns and withholding of monies as shall be necessary or appropriate to comply fully, or to cause full compliance, with all applicable information reporting and back-up withholding requirements of the Code (including, without limitation, all regulations promulgated thereunder) in respect of the Property, and all transactions related to the Property and shall at all times provide Lender with satisfactory evidence of such compliance and notify Lender of the information reported in connection with such compliance. Without limitation of the foregoing, but subject to Article IV(v), Borrower (a) will promptly pay in full and discharge all of the Property Assessments, and (b) will furnish to Lender, upon demand, the receipted bills for the Property Assessments prior to the day on which the same shall become delinquent. The Property Assessments shall be considered delinquent as of the first day any interest or penalty commences to accrue thereon. Borrower will promptly pay all clerk's fees, other recordation fees, stamp, documentary, recordation, transfer and intangible taxes and all other fees and taxes that may from time to time be required to be paid with respect to the Loan, the Note, this Agreement, or any of the other Loan Documents.
- (u) Borrower shall pay all taxes, charges, filing, registration and recording fees, excises and levies payable with respect to the Note or the liens created or secured by the Loan Documents, other than income, franchise and doing business taxes imposed on Lender. If there shall be enacted any law (a) deducting the Loan from the value of the Property for the purpose of taxation, (b) affecting any Lien on the Property, or (c) changing existing laws of taxation of mortgages, deeds of trust, security deeds, or debts secured by real property, or changing the manner of collecting any such taxes, Borrower shall promptly pay to Lender, on demand, all taxes, costs and charges for which Lender is or may be liable as a result thereof; provided, however, if such payment would be prohibited by law or would render the Loan usurious, then instead of collecting such payment, Lender may declare all amounts owing under the Loan Documents to be immediately due and payable.
- (v) Borrower shall not be required to pay any of the Property Assessments, or to comply with any Laws, so long as Borrower shall in good faith, and at its cost and expense, contest the amount or validity thereof, or take other appropriate action with respect thereto, in good faith and in an appropriate manner or by appropriate proceedings; provided, however, that (a) such proceedings operate to prevent the collection of, or other realization upon, such Property Assessments or enforcement of the

Laws so contested, (b) there will be no sale, forfeiture or loss of the Property during the contest, (c) Lender is not subjected to any Claim as a result of such contest, and (d) Borrower provides assurances satisfactory to Lender (including, without limitation, the establishment of an appropriate reserve account with Lender) of its ability to pay such Property Assessments or comply with such Law in the event Borrower is unsuccessful in its contest. Each such contest shall be promptly prosecuted to final conclusion or settlement, and Borrower shall indemnify and save Lender harmless against all Claims in connection therewith. Promptly after the settlement or conclusion of such contest or action, Borrower shall comply with such Law and/or pay and discharge the amounts which shall be levied, assessed or imposed or determined to be payable, together with all penalties, fines, interests, costs and expenses in connection therewith.

**Lender's Rights to Pay and Perform.** If, after any required Notice, Borrower fails to promptly pay or perform any of the Obligations within any applicable grace or cure periods, Lender, without Notice to or demand upon Borrower, and without waiving or releasing any Obligation or Default, may (but shall be under no obligation to) at any time thereafter make such payment or perform such act for the account and at the reasonable expense of Borrower. Lender may enter upon the Property for that purpose and take all action thereon as Lender considers necessary or appropriate. At the option of Lender, upon the occurrence of an Event of Default, Lender may apply any undisbursed Loan proceeds to the satisfaction of the conditions of the Loan Documents, irrespective of the allocation of such Loan proceeds in the Budget. Without limiting the generality of the foregoing, Lender may pay directly from the proceeds of the Loan all interest bills rendered by Lender in connection with the Loan, and during the continuance of an Event of Default may make advances directly to the Developer, General Contractor, the title insurance company, any subcontractor or material supplier, or to any of them jointly. The execution hereof by Borrower shall, and hereby does, constitute an irrevocable authorization so to Advance the proceeds of the Loan. No further direction or authorization from Borrower shall be necessary to warrant such direct Advances. Each Advance shall be secured by the Mortgage and shall satisfy the obligations of Lender hereunder to the extent of the amount of such Advance.

**Reimbursement; Interest.** If Lender shall incur any Expenses or pay any Claims by reason of the Loan or the rights and remedies provided under the Loan Documents (regardless of whether or not any of the Loan Documents expressly provide for an indemnification by Borrower against such Claims), Lender's payment of such Expenses and Claims shall (and, so long as there exists no Event of Default, Lender shall use its good faith efforts to provide subsequent notice to Borrower of such payment) constitute advances to Borrower that shall be paid by Borrower to Lender on demand, together with interest thereon from the date incurred until paid in full at the rate of interest then applicable to the Loan under the terms of the Note. Each advance shall be secured by the Mortgage and the other Loan Documents as fully as if made to Borrower, regardless of the disposition thereof by the party or parties to whom such advance is made. Notwithstanding the foregoing, however, in any action or proceeding to foreclose the Mortgage or to recover or collect the Obligations, the provisions of Law governing the recovery of costs, disbursements and allowances shall prevail unaffected by this 0.

**Notification by Borrower.** Borrower will promptly give Notice to Lender, upon having actual knowledge thereof, of the occurrence of any Default or Event of Default hereunder or under any of the other Loan Documents. Borrower will also promptly give Notice to Lender of any claim of a default by Borrower, or any claim by Borrower of a default by any other party under the Development Agreement, the GC Agreement or any Lease or a default by the Architect.

**Indemnification by Borrower.** Borrower agrees to indemnify Lender and to hold Lender harmless from and against, and to defend Lender by counsel approved by Lender against, any and all Claims directly or indirectly arising out of or resulting from any transaction, act, omission, event or circumstance in any way connected with the Property or the Loan, including, without limitation, any Claim arising out of or resulting from (a) construction of any Improvements, including, without limitation, any defective workmanship or materials, (b) any failure by Borrower to comply with the requirements of any Laws or to comply with any agreement that applies or pertains to the Property, including, without limitation, any agreement between Borrower and a broker or "finder" in connection with the Loan or other financing of the Property, (c) any failure by Borrower to observe and perform any of the obligations imposed upon the landlord under the Leases, (d) any other Default or Event of Default hereunder or under any of the other Loan Documents, (e) any assertion or allegation that Lender is liable for any act or omission of Borrower or any other Person in connection with the ownership, development, financing, leasing, operation or sale of the Property, and (f) the Claims of any broker or finder engaged by Borrower arising by reason of the execution hereof or the making of the Loan; provided, however, that Borrower shall not be obligated to indemnify

Lender to the extent any Claim arises from the gross negligence or willful misconduct of Lender. So long as no Event of Default shall have, Lender shall not settle any Claim that Borrower is obligated to indemnify without Borrower's consent, not to be unreasonably withheld, provided Borrower deposits with Lender either (i) an amount sufficient to pay for any such Claims, or (ii) a letter of credit in an amount sufficient to pay for any such Claims, in each case, as determined by Lender. The agreements and indemnifications contained in this Section shall apply to Claims arising both before and after the repayment of the Loan and shall survive the repayment of the Loan, any foreclosure or deed, assignment or conveyance in lieu thereof and any other action by Lender to enforce the rights and remedies of Lender hereunder or under the other Loan Documents. Borrower shall employ suitable means to protect from theft or vandalism all portions of the Improvements and all tools and building materials (indemnify, without limitation, all Stored Materials) stored on the Land.

**Fees and Expenses.** Borrower shall pay all fees, charges, costs and Expenses required to satisfy the conditions of the Loan Documents. Without limitation of the foregoing, (a) Borrower will pay, when due, and if paid by Lender will reimburse Lender on demand for, all fees and expenses of the Lender's Consultant, the title insurer, environmental engineers, appraisers, surveyors and Lender's counsel in connection with the closing, administration, modification or any "workout" of the Loan, or the enforcement of Lender's rights and remedies under any of the Loan Documents, and (b) Borrower shall pay all filing, registration or recording fees, and all expenses incident to the execution, delivery, acknowledgment and recording or filing, as applicable, of the Mortgage, any mortgage supplemental thereto, any security instrument with respect to Borrower's interest in the Personalty, and any instrument of further assurance, and any Expenses (including, without limitation, reasonable attorney's fees and disbursements) and all federal, state, county, and municipal stamp, mortgage or recording taxes and other taxes, duties, impositions, imposes, fees, costs, expenses, assessments and charges arising out of or in connection with the execution and delivery of the Note, the Mortgage or any mortgage supplemental thereto, any security instrument with respect to the Personalty or any instrument of further assurance.

**Appraisals.** Lender may obtain from time to time an appraisal of all or any part of the Property, prepared in accordance with written instructions from Lender, from a third-party appraiser satisfactory to, and engaged directly by, Lender. The cost of one such appraisal obtained by Lender in each calendar year and the cost of each such appraisal obtained by Lender following the occurrence of an Event of Default shall be borne by Borrower and shall be paid by Borrower on demand. Borrower shall provide access to the Property [OPTIONAL BORROWER PROVISION: upon reasonable advanced notice] to any such appraiser as reasonably necessary to complete the appraisal.]

**Leasing and Tenant Matters.** Borrower shall comply with the terms and conditions of Schedule H in connection with the leasing of space within the Improvements.

**Principal Depository.** Borrower shall maintain an account at [name of bank] as its principal depository bank, including, without limitation, for the maintenance of business, cash management, operating and administrative deposit accounts.

**Swap Contracts.** Borrower shall enter into a Swap Contract with Swap Counterparty, and Borrower shall comply with all of the terms and conditions of Schedule I with respect to all Swap Contracts.

**Organizational Documents.** Borrower shall comply with all of the provisions of its operating agreement, and shall not modify same in any material respect without Lender's prior written consent, such consent not to be unreasonably withheld or conditioned; provided, however, that Borrower shall not change any voting provisions contained in its operating agreement without Lender's prior written consent, in its sole and absolute discretion.

**Patriot Act.** Borrower shall comply in all respects with the Patriot Act.

**Notices of Certain Events.** Borrower shall promptly notify Lender of (a) any Default or Event of Default, together with a detailed statement of the steps being taken to cure such Default or Event of Default, (b) any notice of default received by Borrower under other obligations relating to the Property or otherwise material to Borrower's business, including, without limitation, any notices of violations of any laws, regulations, codes or ordinances (c) any threatened or pending legal, judicial or regulatory proceedings, including, without limitation, any dispute between Borrower and any Governmental Authority, materially adversely affecting Borrower, any Borrower Party, the Project or the Property, (d) a copy of each notice of default or termination given or made to any Operator by Borrower or received by Borrower from any Operator, and (e) a copy of each notice of default or termination under any license or permit necessary for the operation of the Property in the manner required by this Agreement, and in the case of clauses (b), (d) or (e), promptly provide Lender with copies of such notices referred to therein.



**Use and Proceeds; Revenues.** Borrower shall use the proceeds of the Loan for proper business purposes. No portion of the proceeds of the Loan shall be used by Borrower in any manner that might cause the borrowing or the application of such proceeds to violate Regulation D, Regulation T or Regulation X or any other regulation of the Board of Governors of the Federal Reserve System or to violate the Securities Act of 1933 or the Securities Exchange Act of 1934. Except as otherwise specifically provided in the Loan Documents, revenue and other proceeds from the Property received by Borrower shall be applied to the Indebtedness then due and payable, Expenses or other budgeted capital improvements, repairs or replacements for the Property before distribution by Borrower to any member thereof.

**Representations and Warranties.** Borrower shall cause all representations and warranties to remain true and correct at all times while any portion of the Loan remains outstanding, other than with respect to changes in facts or circumstances that would not otherwise constitute a Default or Event of Default under the Loan Documents or Environmental Indemnity Agreement.

**Alterations after Substantial Completion.** After Substantial Completion of the Project, Lender's prior approval shall be required (but not to be unreasonably withheld) in connection with any alterations to the Property (except tenant improvements under any Lease approved by Lender or under any Lease for which approval was not required by Lender under this Agreement) (a) that materially affect the structural components of the Property, utilities, HVAC or the exterior of the Improvements, (b) that are reasonably likely to cause a Material Adverse Effect or (c) the cost of which (including, without limitation, any related alteration, improvement or replacement) is reasonably anticipated to exceed the [amount in words] and 00/100 Dollars (\$[amount in numbers]), which approval may be granted or withheld in Lender's sole discretion [**OPTIONAL BORROWER PROVISION:** ; provided that Lender's prior approval shall not be required in connection with any tenant improvements pursuant to Leases which have been approved (or deemed approved) by Lender or for which no approval was required in accordance with the provisions of this Agreement] [**OPTIONAL LENDER SUSTAINABILITY PROVISION:** or, (d) that may decrease the likelihood of the Improvements obtaining or retaining the Green Building Certification]. If the total unpaid amounts incurred and to be incurred with respect to such alterations to the Project shall at any time exceed [amount in words] and 00/100 Dollars (\$[amount in numbers]), Borrower shall promptly deliver to Lender as security for the payment of such amounts and as additional security for Borrower's obligations under the Loan Documents any of the following: (i) cash, (ii) letters of credit, (iii) U.S. Obligations, (iv) other securities acceptable to Lender, or (v) a completion bond. Such security shall be in an amount equal to the excess of the total unpaid amounts incurred and to be incurred with respect to such alterations to the Project (other than such amounts to be paid or reimbursed by tenants under the Leases) over [amount in words] and 00/100 Dollars (\$[amount in numbers]).

#### **Management.**

- (w) Borrower shall preserve and keep in full force and effect its existence as, and at all times operate as, a Single Purpose Entity, and shall preserve and keep in full force and effect its entity status, franchises, rights and privileges under the laws of the state of its formation, and all qualifications, licenses and Permits applicable to the ownership, use and operation of the Property. Neither Borrower, Guarantor nor any managing member or non-member manager of Borrower shall wind up, liquidate, dissolve, reorganize, merge, or consolidate with or into any Person, or permit any subsidiary or Affiliate of Borrower to do so. Without limiting the foregoing, Borrower shall not reincorporate or reorganize itself under the laws of any jurisdiction other than the jurisdiction in which it is incorporated or organized as of the Closing Date. Borrower and each managing member or non-member manager of Borrower shall conduct business only in its own name and shall not change its name, identity, state of formation, or organizational structure, or the location of its chief executive office or principal place of business unless Borrower (a) shall have obtained the prior written consent of Lender to such change, and (b) shall have taken all actions necessary or requested by Lender to file or amend any financing statement or continuation statement to assure perfection and continuation of perfection of security interests under the Loan Documents. Borrower and each managing member or non-member manager of Borrower shall maintain its separateness as an entity, including, without limitation, maintaining separate books, records, and accounts and observing corporate and partnership formalities independent of any other entity, shall pay its obligations with its own funds and shall not commingle funds or assets with those of any other entity. If Borrower does not have an organizational identification number and later obtains one, Borrower shall promptly notify Lender of its organizational identification number.

**Business and Operations.** Borrower will continue to engage only in the businesses currently conducted by it on the date hereof, as and to the extent the same are necessary for the ownership and leasing of the Project or the Property. Borrower shall at all times cause the Project to be maintained in accordance with the Property's intended use as a [applicable use of improvements].

**Further Assurances.** Borrower shall promptly (a) cure any defects in the execution and delivery of the Loan Documents and the Environmental Indemnity Agreement, (b) provide, and cause Guarantor to provide, Lender such additional information and documentation on Borrower's and Guarantor's legal or beneficial ownership, policies, procedures, and sources of funds as Lender deems necessary or prudent to enable Lender to comply with Anti-Money Laundering Laws as now in existence or hereafter amended, and (c) execute and deliver, or cause to be executed and delivered, all such other documents, agreements and instruments as Lender may reasonably request to further evidence and more fully describe the collateral for the Loan, to correct any omissions in the Loan Documents or the Environmental Indemnity Agreement to perfect, protect or preserve any liens created under any of the Loan Documents and the Environmental Indemnity Agreement, or to make any recordings, file any notices, or obtain any consents, as may be necessary or appropriate in connection therewith. Borrower grants Lender an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Lender under the Loan Documents and the Environmental Indemnity Agreement, at law and in equity, including, without limitation, such rights and remedies available to Lender pursuant to this 0. From time to time upon the written request of Lender, Borrower shall deliver to Lender a schedule of the name, legal domicile address and jurisdiction of organization, if applicable, for Guarantor and each holder of a legal interest in Borrower.

If Borrower fails to maintain any insurance and pay the premiums for insurance, pay all Taxes, or to repair and maintain any of the Property as required in this Article IV, or if Borrower fails to keep or perform any of Borrower's other covenants herein, Lender may obtain such insurance, cause such repairs and maintenance to be made, pay such taxes, penalties, assessments, charges, or claims, or cause such other covenants to be performed [**OPTIONAL BORROWER PROVISION:** after notice and failure to cure within [three (3)/other time period] Business Days thereafter]. Borrower will pay to Lender on demand all amounts [**OPTIONAL BORROWER PROVISION:** reasonably] paid by Lender for the foregoing and the amount of all expenses incurred by Lender in connection therewith, together with interest thereon from the date when incurred. Such amounts and interest are secured by the Mortgage, which creates a lien in the Property prior to any right, title, interest, lien, or claim in or upon the Property subordinate to the lien of the Mortgage. Any such payments by Lender will not be deemed a waiver of any default or Event of Default. Lender is not obligated to exercise Lender's rights under this provision and is not liable to Borrower for any failure to do so.

## **ARTICLE V. NEGATIVE COVENANTS.**

**Encumbrances.** Borrower will not permit any of the Property to become subject to any Lien other than the Permitted Encumbrances. Within thirty (30) days after [**OPTIONAL BORROWER PROVISION:** Borrower's receipt of written notice of] the filing of any mechanic's lien or other Lien (other than a Permitted Encumbrance) against the Property, Borrower will promptly discharge the same by payment or filing a bond or otherwise as permitted by Law. So long as Lender's security has been protected by the filing of a bond or otherwise in a manner satisfactory to Lender in its sole and absolute discretion, Borrower shall have the right to contest in good faith any Claim or Lien, provided that Borrower does so diligently and without prejudice to Lender or delay in completing construction of the Improvements. Borrower shall give Lender Notice of any default under any Lien and Notice of any foreclosure or threat of foreclosure with respect to any of the Property.

### **Leasing; Ground Leases; Material Agreements.**

- (a) Borrower shall not enter into any Lease, or amend, modify or terminate any Lease, other than in accordance with the terms and conditions of Schedule H, in each case without Lender's prior written approval, which approval may be granted or withheld in the sole discretion of Lender.
- (b) Borrower shall not amend, modify or terminate the Ground Lease without Lender's prior written approval, which approval may be granted or withheld in the sole discretion of Lender.
- (c) Borrower shall not amend, modify or terminate any material agreements to which Borrower is party (or assumed by Borrower) or which affect the Property, including, without limitation, the Development Agreement and the GC Agreement.

**Removal, Demolition or Alteration of Equipment and Improvements.** Except to the extent permitted by the following sentence or elsewhere in this Agreement, no Improvements or Equipment shall be removed, demolished or materially altered without the prior written consent of Lender. Borrower may remove and dispose of, free from the Lien of this Mortgage, such Equipment as from time to time become worn out or obsolete, provided that, either (a) at the time of, or prior to, such removal, any such Equipment are replaced with other Equipment that are free from Liens other than Permitted Encumbrances and have a value [OPTIONAL LENDER SUSTAINABILITY PROVISION: and energy efficiency] at least equal to that of the replaced Equipment (and by such removal and replacement Borrower shall be deemed to have subjected such Equipment to the Lien of this Mortgage), or (b) so long as a prepayment may be made without the imposition of any premium pursuant to the Note, such Equipment are sold at fair market value for cash and the net cash proceeds received from such disposition are paid over promptly to Lender to be applied to the prepayment of the principal of the Loan.

**Additional Improvements.** Borrower will not construct any Improvements other than those presently on the Land and those described in this Agreement without the prior written consent of Lender. Borrower will complete and pay for, within a reasonable time, any Improvements that Borrower is permitted to construct on the Land. Borrower will construct and erect any permitted Improvements (a) strictly in accordance with all applicable Laws and any private restrictive covenants, (b) entirely on lots or parcels of the Land, (c) so as not to encroach upon any easement or right of way or upon the land of others, and (d) wholly within any building restriction and setback lines applicable to the Land.

**Restrictive Covenants, Zoning, etc.** Without the prior written consent of Lender, Borrower will not initiate, join in, or consent to any change in, any restrictive covenant, easement, zoning ordinance, or other public or private restrictions limiting or defining the uses that may be made of the Property. Borrower (a) will promptly [OPTIONAL BORROWER PROVISION: materially] perform and observe, and cause to be performed and observed, all of the [OPTIONAL BORROWER PROVISION: material] terms and conditions of all agreements affecting the Property, and (b) will do or cause to be done all things necessary to preserve intact and unimpaired any and all easements, appurtenances and other interests and rights in favor of, or constituting any portion of, the Property.

**Conditional Sales.** Borrower shall not incorporate in the Improvements any property acquired under a conditional sales contract or lease or as to which the vendor retains title or a security interest, without the prior written consent of Lender.

**Changes to Plans and Specifications.** Borrower shall not make or permit any changes in the Plans and Specifications, including, without limitation, any such changes that alter, diminish or add to the work to be performed or change the design of the Improvements, without the prior written consent of Lender (in its reasonable discretion) and under such reasonable conditions as Lender may establish. Lender shall respond to Borrower's request for changes within five (5) Business Days of Lender's receipt of all materials necessary to render its decision. [OPTIONAL BORROWER PROVISION: Lender's prior written consent shall not be required, however, as to any change order that (a) individually does not cause the fixed or guaranteed maximum price of the GC Agreement to be increased or decreased by more than [percentage in words] percent ([percentage in numbers]%) and, when added to all previous change orders, does not cause such price to be increased or decreased by more than [percentage in words] percent ([percentage in numbers]%) in the aggregate, (b) does not result in a material change to the design of the Improvements [OPTIONAL LENDER SUSTAINABILITY PROVISION: or decrease the likelihood of the Improvements obtaining the Green Building Certification], and (c) has been approved in writing by the Architect and any Governmental Authority, tenant or other party whose approval is required.]

**Insurance Policies and Bonds.** Borrower shall not do or permit to be done anything that would adversely affect the coverage or indemnities provided for pursuant to the provisions of any insurance policy, performance bond, labor and material payment bond or any other bond given in connection with the development of the Land or the construction of the Improvements.

**Transfers or Encumbrance of the Project or the Property.** Borrower will not Transfer, or contract to Transfer, all or any part of the Project or the Property or any legal or beneficial interest therein (except for certain Transfers of the Equipment expressly permitted in this Mortgage). Any Transfer that results in a Change in Control of Borrower (whether in one or more transactions during the term of the Loan) shall be deemed to be a prohibited Transfer of the Project or the Property, subject to the following.

- (d) It shall be an Event of Default if Borrower, without the prior written consent of Lender, shall (i) cause or permit a Sale of the Project or the Property, or any part thereof, to occur (provided, however, Borrower shall have the right to enter into negotiations and/or agreements (and consummate the transactions thereunder) for the Sale of the Project or the Property, or any part thereof, if, in connection with such Sale, the Loan is assumed, repaid or prepaid in full in accordance with the terms of this Agreement), (ii) cause or permit a Prohibited Transfer to occur, other than (x) pursuant to Leases approved by Lender of space in the Improvements to tenants in accordance with the provisions of this Agreement, or Leases of space in the Improvements to tenants not requiring Lender's approval in accordance with the provisions of this Agreement, or (y) as otherwise permitted by this Agreement, (iii) cause or permit a Pledge of the Project or the Property, or any part thereof, except as otherwise permitted by this Agreement, or (iv) or cause or permit a Change of Control to occur with respect to Borrower.
- (e) A "**Prohibited Transfer**" shall mean (i) an installment sale agreement wherein Borrower agrees to sell Project or the Property, or any part thereof, or any interest therein, for a price to be paid in installments, (ii) a Lease by Borrower leasing all or a substantial part of the Project or the Property, for other than actual occupancy by a tenant thereunder without the prior written consent of Lender or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any rents (other than to Lender); (iii) if a Restricted Party is a corporation, any merger, consolidation or Sale of such corporation's stock or the creation or issuance of new stock in one or a series of transactions; (iv) if a Restricted Party is a limited or general partnership or joint venture, any merger or consolidation or the change, removal, resignation or addition of a general partner or the Sale of the partnership interest of any general or limited partner or any profits or proceeds relating to such partnership interests or the creation or issuance of new partnership interests; (v) if a Restricted Party is a limited liability company, any merger or consolidation or the change, removal, resignation or addition of a managing member or non-member manager (or if no managing member or non-member manager, any member) or the Sale by a member of such Restricted Party of its membership interest in such Restricted Party or any profits or proceeds relating to such membership interest; (vi) if a Restricted Party is a trust or nominee trust, any merger, consolidation or the Sale of the legal or beneficial interest in a Restricted Party or the creation or issuance of new legal or beneficial interests; (vii) the transfer by Guarantor of any of its interest in Borrower, or (viii) the removal or the resignation of the Property Manager other than in accordance with the provisions of this Agreement.

## ARTICLE VI. SINGLE PURPOSE REPRESENTATIONS, WARRANTIES, AND COVENANTS.

### Representations Regarding Single Purpose Nature of Borrower.

- (a) The sole purpose conducted or promoted by Borrower is to engage in the following activities:
- (b) to acquire, own, hold, lease, operate, manage, maintain, develop and improve the Land, Improvements, the Project and/or the Property, and to contract for the operation, maintenance, management and development of the Land, Improvements, the Project and/or the Property;
- (c) to enter into and perform its obligations under the Loan Documents and the Environmental Indemnity Agreement;
- (d) to sell, transfer, service, convey, dispose of, pledge, assign, borrow money against, finance, refinance or otherwise deal with the Land, Improvements, the Project and/or the Property to the extent permitted under the Loan Documents; and
- (e) to engage in any lawful act or activity and to exercise any powers permitted to [the relevant type of entity for Borrower] organized under the laws of the State of [Borrower's state of formation] that are related or incidental to and necessary, convenient or advisable for the accomplishment of the above mentioned purposes.

**Single Purpose Covenants.** Until the Obligations have been indefeasibly paid to Lender in cash and all obligations of the Lender under this Agreement and the other Loan Documents have terminated, Borrower shall observe and comply with the following covenants:

- (f) Borrower shall limit the nature, purpose and conduct of its business to engage solely in the following activities set forth in 0.
- (g) Borrower shall conduct its affairs in accordance with the following provisions:
  - (1) It shall establish and maintain an office through which its business shall be conducted and shall allocate fairly and reasonably any overhead for shared office space, and any common employee salaries.
  - (2) It shall maintain records and books of account separate from those of any other Person.
  - (3) When applicable, its board of managers shall hold appropriate meetings (or act by written consent) to authorize all appropriate company action.
  - (4) It shall observe all [the form of organization of Borrower] formalities necessary to maintain its separate existence.
  - (5) It shall not commingle its assets or funds, including, without limitation, bank accounts, with those of any other Person.
  - (6) It shall maintain its assets in such a manner that it is not costly or difficult to segregate, identify or ascertain such assets from those of other Persons.
  - (7) It shall hold all of its assets and conduct all of its business in its own name, and not that of any other Person.
  - (8) It shall not pledge its assets for the benefit of any other Person, other than Lender pursuant to the Loan Documents.
  - (9) It shall hold itself out to its creditors and the public as a legal entity separate and distinct from any other Person.
  - (10) It shall maintain financial statements separate from any other Person, and not have its assets listed on any financial statement of any other Person **[OPTIONAL BORROWER PROVISION: ; provided, however, Borrower's assets may be included in a consolidated financial statement of its Affiliate so long as appropriate notation is made on such consolidated financial statement to indicate the separateness of Borrower from such Affiliate, and to indicate that Borrower's assets and credit are not available to satisfy the debts and other obligations of such Affiliate or any other Person].**
  - (11) It shall prepare and file its own tax returns separate from those of any other Person, and pay any taxes required to be paid by applicable Law.
  - (12) It shall pay any liabilities out of its own funds (including, without limitation, from proceeds of the Loan), including, without limitation, salaries of any employees, and not from the funds of any other Person.
  - (13) It shall maintain an arm's length relationship with any Person and shall conduct any business with any other Person pursuant to written agreements.
  - (14) It shall not guarantee or become obligated for the debts of any other Person (other than pursuant to the Loan Documents), or hold out its credit as being available to satisfy the obligations of others.
  - (15) It shall not permit any Affiliate to guarantee or pay its obligations (except pursuant to the Loan Documents, and except for contributions of capital by any [member] (or any direct or indirect holder of the beneficial interests in such [member]) to pay for the obligations of Borrower).
  - (16) It shall have no obligation to, and will not, indemnify its partners, officers, directors or members, as the case may be, unless such obligation is fully subordinated to the Loan, and will not constitute a claim against it in the event that cash flow in excess of the amount required to pay the Loan is insufficient to pay such obligation.
  - (17) It shall use stationery, invoices and checks separate from any other Person.

- (18) It shall not pledge its assets for the benefit of any other entity, including, without limitation, any other Person.
- (19) It shall not make loans or advances to any other Person.
- (20) It shall hold itself out as an entity separate from any other Person.
- (21) It shall correct any known misunderstanding as to its separate identity.
- (22) It shall maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of contemplated business operations  
[**OPTIONAL BORROWER PROVISION:** ; provided, however, the foregoing shall not require any [member] or holder or a direct or indirect beneficial interest in such [member] to make any additional capital contribution to Borrower].
- (23) It shall not enter into any transactions with Affiliates except on an arm's-length basis on terms that are intrinsically fair and no less favorable than would be available for unaffiliated third parties, and pursuant to written, enforceable agreements.
- (24) It shall cause its [manager, officers,] employees, agents and other representatives to act (in such capacities) at all times with respect to Borrower consistently and in furtherance of foregoing and the best interests of Borrower.

**Limitations on Debt; Actions.** Notwithstanding anything to the contrary in the Loan Documents or in any other document governing the formation, management or operation of Borrower, Borrower shall not:

- (h) guarantee any obligation of any Person, including, without limitation, any Affiliate, or become obligated for the debts of any other Person or hold out its credit as being available to pay the obligations of any other Person other than pursuant to the Loan Documents and the Environmental Indemnity Agreement;
- (i) engage, directly or indirectly, in any business other than as required or permitted to be performed under this Article VI;
- (j) incur, create or assume any Debt other than (x) the Loan, (y) unsecured trade payables incurred in the ordinary course of its business that are related to the ownership and operation of the Project and/or the Property, and that, in the case of clause (y) shall ( A) not exceed two percent (2%) of the outstanding balance of the Loan, ( B) not be evidenced by a note, ( C) be paid within sixty (60) days, and ( D) otherwise expressly be permitted under the Loan Documents and (z) Debt held by members of Borrower or Affiliates of members of Borrower that is expressly subordinate to the Loan, is not to be satisfied in whole or in part prior to the satisfaction in full of the Loan, and is not secured by any portion of the Project and/or the Property;
- (k) make or permit to remain outstanding any loan or advance to, or own or acquire any stock or securities of, any Person, except that Borrower may invest in investment-grade securities;
- (l) to the fullest extent permitted by law, engage in any dissolution, liquidation, consolidation, merger, sale or other transfer of any of its assets outside the ordinary course of Borrower's business;
- (m) buy or hold evidence of indebtedness issued by any other Person (other than cash or investment-grade securities);
- (n) form, acquire or hold any subsidiary (whether corporate, partnership, limited liability company or other) or own any equity interest in any other entity;
- (o) own any asset or property other than the Property, and incidental personal property necessary for the development, ownership or operation of the Project and/or the Property; or
- (p) take any material action without the approval of Guarantor and all other required parties under Borrower's organizational documents.

## **ARTICLE VII. EVENTS OF DEFAULT.**

The occurrence or happening, from time to time, of any one or more of the following shall constitute an Event of Default under this Agreement:

**Payment Default.** Borrower fails to pay any Obligation under this Agreement when due, whether on the scheduled due date or upon acceleration, maturity or otherwise, and such failure continues for two (2) Business Days other than the payment of any amount due on the Maturity Date, for which there shall be no grace period.

**Default under Other Loan Documents.** An Event of Default (as defined therein) occurs under the Note or the Mortgage, or Borrower or Guarantor fails to promptly pay, perform, observe or comply with any term, obligation or agreement contained in any of the other Loan Documents (within any applicable grace or cure period), including, without limitation, under the Completion Guaranty and/or the Recourse Guaranty.

**Accuracy of Information; Representations and Warranties.** Any information contained in any financial statement, schedule, report or any other document delivered by Borrower, Guarantor or any other Person to Lender in connection with the Loan proves at any time not to be in all material respects true and accurate, or Borrower, Guarantor or any other Person shall have failed to state any material fact or any material fact necessary to make such information not misleading in any material respect, or any representation or warranty contained in this Agreement or in any other Loan Document or other document, certificate or opinion delivered to Lender in connection with the Loan, proves at any time to be incorrect or misleading in any material respect either on the date when made or on the date when reaffirmed pursuant to the terms of this Agreement.

**Deposits.** Borrower fails to deposit funds with Lender, in the amount requested by Lender, pursuant to the provisions of Q or Q, within ten (10) days from the effective date of a Notice from Lender requesting such deposit, or Borrower fails to deliver to Lender any Condemnation Awards or Insurance Proceeds within ten (10) days after Borrower's receipt thereof.

**Insurance Obligations.** Borrower fails to promptly perform or comply with any of the covenants contained in the Loan Documents with respect to maintaining insurance, including, without limitation, the covenants contained in Q, for more than ten (10) days after Borrower's receipt of Notice thereof from Lender.

**Other Obligations.** Borrower fails to promptly perform or comply with any of the Obligations set forth in this Agreement (other than those otherwise expressly described in this Article VI), and such failure continues uncured for a period of thirty (30) days after Notice from Lender to Borrower, unless (a) such failure, by its nature, is not capable of being cured within such period, and (b) within such period, Borrower commences to cure such failure and thereafter diligently prosecutes the cure thereof, and (c) Borrower causes such failure to be cured no later than ninety (90) days after the date of such Notice from Lender.

**Progress of Construction.** If the Project (or any part thereof) is abandoned or is discontinued [OPTIONAL BORROWER PROVISION: after the Construction Commencement Date] for a period of more than twenty (20) consecutive days, subject to extension due to Force Majeure.

**Lapse of Permits or Approvals.** Any permit, license, certificate or approval that Borrower is required to obtain with respect to the construction, operation, development, leasing or maintenance of the Improvements or the Property lapses or ceases to be in full force and effect, unless cured within ten (10) days after Borrower has received notice thereof.

**Completion of Construction.** Completion of Construction does not occur, subject to extension for Force Majeure delays, in accordance with the Project Schedule, or Lender reasonably determines that Completion of Construction will not occur by the Scheduled Completion Date and such failure does not arise from a Force Majeure event.

**Mechanic's Lien.** A lien for the performance of work or the supply of materials filed against the Property, or any stop notice served on Borrower, the General Contractor or Lender, remains unsatisfied or unbonded for a period of thirty (30) days after the date Borrower receives notice thereof.

**Survey Matters.** Any Survey required by Lender during the period of construction shows any matter that in Lender's reasonable judgment would, in any material respect, interfere with the Project or the operation or use of the Property or would create an exception to the title insurance policy insuring the Mortgage that is not acceptable to Lender, and such matter is not removed or insured over by the Title Insurer within a period of thirty (30) days after Notice thereof by Lender to Borrower.

**Developer Default.** The Developer defaults under the Development Agreement in a manner that Lender reasonably deems to be material, and, unless otherwise agreed in writing by Lender, Borrower fails promptly to exercise its rights and remedies under the Development Agreement with respect to such default, or Borrower materially defaults under the Development Agreement.

**Performance Enjoined or Prohibited.** Borrower is legally enjoined or prohibited from performing any of its material obligations under any of the Loan Documents for a period of more than fifteen (15) consecutive days.

**Bankruptcy.** Borrower or Guarantor files a bankruptcy petition or makes a general assignment for the benefit of creditors, or a bankruptcy petition is filed against Borrower or Guarantor and such involuntary bankruptcy petition continues undismissed for a period of sixty (60) days after the filing thereof.

**Appointment of Receiver, Trustee, Liquidator.** Borrower or Guarantor applies for or consents in writing to the appointment of a receiver, trustee or liquidator of Borrower, Guarantor, the Property, or all or substantially all of the other assets of Borrower or Guarantor, or an order, judgment or decree is entered by any court of competent jurisdiction on the application of a creditor appointing a receiver, trustee or liquidator of Borrower, Guarantor, the Property, or all or substantially all of the other assets of Borrower or Guarantor.

**Judgment.** A final nonappealable judgment for the payment of money involving more than \$[amount in dollars] is entered against Borrower or Guarantor, and Borrower or such Guarantor fails to discharge the same, or causes it to be discharged or bonded off to Lender's reasonable satisfaction, within thirty (30) days from the date of the entry of such judgment.

**Dissolution; Change in Business Status.** Unless the written consent of Lender is previously obtained, all or substantially all of the business assets of Borrower or Guarantor are sold, Borrower or Guarantor is dissolved, or there occurs any change in the form of business entity through which Borrower or Guarantor presently conducts its business or any merger or consolidation involving Borrower or Guarantor.

**Default under Other Indebtedness.** Borrower or Guarantor fails to pay any indebtedness (other than the Loan) owed by Borrower or such Guarantor to Lender when and as due and payable (whether by acceleration or otherwise).

**Death; Disability.** If Guarantor dies or becomes incapacitated.

**Change in Controlling Interest.** The occurrence of any Change of Control without the prior written consent of Lender (which consent may be conditioned, among other matters, on the issuance of a satisfactory endorsement to the title insurance policy insuring Lender's interest under the Mortgage) (provided such endorsement is available under Laws).

**Material Adverse Effect.** In the reasonable opinion of Lender, the prospect of payment or performance of all or any part of the Obligations has been impaired because of a Material Adverse Effect on the financial condition, results of operations, business or properties of Borrower, Guarantor or any other Person liable for the payment or performance of any of the Obligations.

**Failure to Satisfy Conditions for Advance.** If Borrower fails [OPTIONAL BORROWER PROVISION: in any material respect] to satisfy any conditions herein or in any other Loan Documents to an Advance of the Loan within thirty (30) days of submitting a Draw Request with respect thereto.

## ARTICLE VIII. REMEDIES ON DEFAULT.

**Remedies on Default.** Upon the happening of any Event of Default or the occurrence of an Acceleration Event, Lender shall have the right, in addition to any other rights or remedies available to Lender under the Mortgage or any of the other Loan Documents or under applicable Law [OPTIONAL LENDER PROVISION: or in equity], to exercise any one or more of the following rights and remedies:

- (a) Lender may terminate its obligation to advance any further principal of the Loan pursuant to this Agreement by Notice to Borrower.
- (b) Lender may accelerate all the Obligations under the Loan Documents, whether or not matured and regardless of the adequacy of any other collateral securing the Loan, whereupon such Obligations shall become immediately due and payable, without notice of default, acceleration or intention to



accelerate, presentment or demand for payment, protest or notice of nonpayment or dishonor, or notices or demands of any kind or character (all of which are hereby waived by Borrower).

- (c) Lender may apply to any court of competent jurisdiction for, and obtain appointment of, a receiver for the Property.
- (d) Lender may set off the amounts due Lender under the Loan Documents against any and all accounts, credits, money, securities or other property of Borrower now or hereafter on deposit with, held by or in the possession of Lender to the credit or for the account of Borrower, without notice to or the consent of Borrower.
- (e) Lender may enter into possession of the Property and perform any and all work and labor necessary to complete the development of the Land and the Project (whether or not in accordance with the Plans and Specifications) and to employ watchmen to protect the Property and the Improvements. All sums expended by Lender for such purposes shall be deemed to have been advanced to Borrower under the Note and shall be secured by the Mortgage. For this purpose, Borrower hereby constitutes and appoints Lender its true and lawful attorney-in-fact with full power of substitution, which power is coupled with an interest, to complete the work in the name of Borrower, and hereby empowers said attorney or attorneys, in the name of Borrower or Lender:
  - (1) to use any funds of Borrower including, without limitation, any balance which may be held by Lender and any funds which may remain unadvanced hereunder for the purpose of completing the development of the Land and the Project, and the construction of the Improvements, whether or not in the manner called for in the Plans and Specifications;
  - (2) to make such additions and changes and corrections to the Plans and Specifications as shall be necessary or desirable in the judgment of Lender to complete the development of the Land and the Project and the construction of the Improvements;
  - (3) to employ such contractors, subcontractors, agents, architects and inspectors as shall be necessary or desirable for said purpose;
  - (4) to pay, settle or compromise all existing bills and claims which are or may be liens against the Property, or may be necessary or desirable for the completion of the work or the clearance of title to the Property;
  - (5) to execute all applications and certificates which may be required in the name of Borrower;
  - (6) to enter into, enforce, modify or cancel Leases and to fix or modify Rents on such terms as Lender may consider proper;
  - (7) to file for record, at Borrower's cost and expense and in Borrower's name, any notices of completion, notices of cessation of labor, or any other notices that Lender in its sole and absolute discretion may consider necessary or desirable to protect its security; and
  - (8) to do any and every act with respect to the development of the Land and the construction of the Improvements which Borrower may do in its own behalf.
- (f) It is understood and agreed that this power of attorney shall be deemed to be a power coupled with an interest which cannot be revoked prior to payment in full of the indebtedness and other costs evidenced by the Note and the satisfaction or release of the Mortgage of record. Said attorney-in-fact shall also have the power to prosecute and defend all actions or proceedings in connection with the development of the Land and the construction of the Improvements and to take such actions and to require such performance as Lender may deem necessary.

**No Release or Waiver; Remedies Cumulative and Concurrent.** Borrower shall not be relieved of any Obligation by reason of the failure of Lender to comply with any request of Borrower or of any other Person to take action to foreclose on the Property under the Mortgage or otherwise to enforce any provision of the Loan Documents, or by reason of the release, regardless of consideration, of all or any part of the Property. No delay or omission of Lender to exercise any right, power or remedy accruing upon the happening of an Event of Default shall impair any such right, power or remedy or shall be construed to be a waiver of any such Event of Default or any acquiescence therein. No delay or omission on the part of Lender to exercise any option for acceleration of the

maturity of the Obligations, or for foreclosure of the Mortgage following any Event of Default as aforesaid, or any other option granted to Lender hereunder in any one or more instances, or the acceptance by Lender of any partial payment on account of the Obligations shall, except as otherwise provided in a writing signed by Lender, constitute a waiver of any such Event of Default and each such option shall remain continuously in full force and effect. No remedy herein conferred upon or reserved to Lender is intended to be exclusive of any other remedies provided for in the Loan Documents, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder, or under the Loan Documents, or now or hereafter existing under applicable Laws or in equity or by statute. Every right, power and remedy given by the Loan Documents to Lender shall be concurrent and may be pursued separately, successively or together against Borrower or the Property or any part thereof, and every right, power and remedy given by the Loan Documents may be exercised from time to time as often as may be deemed expedient by Lender.

## **ARTICLE IX. MISCELLANEOUS.**

**Further Assurances; Authorization to File Documents.** At any time, and from time to time, upon request by Lender, Borrower will, at Borrower's expense, (a) correct any defect, error or omission that may be discovered in the form or content of any of the Loan Documents, and (b) make, execute, deliver and record, or cause to be made, executed, delivered and recorded, any and all further instruments, certificates and other documents as may, in the reasonable opinion of Lender, be necessary or desirable in order to complete, perfect or continue and preserve the lien of the Mortgage. Upon any failure by Borrower to do so, Lender may make, execute and record any and all such instruments, certificates and other documents for and in the name of Borrower, all at the sole reasonable expense of Borrower, and Borrower hereby appoints Lender the agent and attorney-in-fact of Borrower to do so, this appointment being coupled with an interest and being irrevocable. Without limitation of the foregoing, Borrower irrevocably authorizes Lender at any time and from time to time to file any initial financing statements, amendments thereto and continuation statements reasonably deemed necessary or desirable by Lender to establish or maintain the validity, perfection and priority of the security interests granted in the Mortgage, and Borrower ratifies any such filings made by Lender prior to the date hereof. In addition, at any time, and from time to time, upon request by Lender, Borrower will, at Borrower's expense, provide any and all further instruments, certificates and other documents as may, in the reasonable opinion of Lender, be necessary or desirable in order to verify the Borrower's identity and background in a manner satisfactory to Lender.

**No Warranty by Lender.** By accepting or approving anything required to be observed, performed or fulfilled by Borrower or to be given to Lender pursuant to this Agreement, including, without limitation, any certificate, Survey, receipt, appraisal or insurance policy, Lender shall not be deemed to have warranted or represented the sufficiency, legality, effectiveness or legal effect of the same, or of any term, provision or condition thereof and any such acceptance or approval thereof shall not be or constitute any warranty or representation with respect thereto by Lender.

**Standard of Conduct of Lender.** Nothing contained in this Agreement or any other Loan Document (except to the extent any Loan Document expressly requires Lender to act reasonably or use reasonable discretion) shall limit the right of Lender to exercise its business judgment or to act, in the context of the granting or withholding of any advance or consent under this Agreement or any other Loan Document, in a subjective manner, whether or not objectively reasonable under the circumstances, so long as Lender's exercise of its business judgment or action is made or undertaken in good faith. Borrower and Lender intend by the foregoing to set forth and affirm their entire understanding with respect to the standard pursuant to which Lender's duties and obligations are to be judged and the parameters within which Lender's discretion may be exercised hereunder and under the other Loan Documents. As used herein, "good faith" means honesty in fact in the conduct and transaction concerned.

**No Partnership.** Nothing contained in this Agreement shall be construed in a manner to create any relationship between Borrower and Lender other than the relationship of borrower and lender and Borrower and Lender shall not be considered partners or co-venturers for any purpose on account of this Agreement.

**Severability.** In the event any one or more of the provisions of this Agreement or any of the other Loan Documents shall for any reason be held to be invalid, illegal or unenforceable, in whole or in part or in any other respect, or in the event any one or more of the provisions of any of the Loan Documents operates or would prospectively operate to invalidate this Agreement or any of the other Loan Documents, then and in either of those events, at the option of Lender, such provision or provisions only shall be deemed null and void and shall not affect

the validity of the remaining Obligations, and the remaining provisions of the Loan Documents shall remain operative and in full force and effect and shall in no way be affected, prejudiced or disturbed thereby.

**Notices.** All Notices required or which any party desires to give hereunder or under any other Loan Document shall be in writing and, unless otherwise specifically provided in such other Loan Document, shall be deemed sufficiently given or furnished if delivered by personal delivery, by nationally recognized overnight courier service or by certified United States mail, postage prepaid, return receipt requested, addressed to the party to whom directed at the applicable address set forth on Schedule J (unless changed by similar notice in writing given by the particular party whose address is to be changed) or by facsimile or electronic mail. Any Notice shall be deemed to have been given either at the time of personal delivery or, in the case of courier or mail, as of the date of first attempted delivery at the address and in the manner provided herein, or, in the case of facsimile or electronic mail, upon receipt; provided that service of a Notice required by any applicable statute shall be considered complete when the requirements of that statute are met. Notwithstanding the foregoing, no notice of change of address shall be effective except upon actual receipt. This Q shall not be construed in any way to affect or impair any waiver of notice or demand provided in this Agreement or in any other Loan Document or to require giving of notice or demand to or upon any Person in any situation or for any reason.

**Permitted Successors and Assigns; Disclosure of Information.**

- (a) Each and every one of the covenants, terms, provisions and conditions of this Agreement and the Loan Documents shall apply to, bind and inure to the benefit of Borrower, its successors and those assigns of Borrower consented to in writing by Lender, and shall apply to, bind and inure to the benefit of Lender and the endorsees, transferees, successors and assigns of Lender, and all Persons claiming under or through any of them.
- (b) Borrower agrees not to transfer, assign, pledge or hypothecate any right or interest in any payment or advance due pursuant to this Agreement (except to Lender as provided herein), or any of the other benefits of this Agreement, without the prior written consent of Lender, which consent may be withheld by Lender in its sole and absolute discretion. Any such transfer, assignment, pledge or hypothecation made or attempted by Borrower without the prior written consent of Lender shall be void and of no effect. No consent by Lender to an assignment shall be deemed to be a waiver of the requirement of prior written consent by Lender with respect to each and every further assignment and as a condition precedent to the effectiveness of such assignment.

**Modification; Waiver.** None of the terms or provisions of this Agreement may be changed, waived, modified, discharged or terminated except by instrument in writing executed by the party or parties against whom enforcement of the change, waiver, modification, discharge or termination is asserted. None of the terms or provisions of this Agreement shall be deemed to have been abrogated or waived by reason of any failure or failures to enforce the same.

**Third Parties; Benefit.** All conditions to the obligation of Lender to make advances hereunder are imposed solely and exclusively for the benefit of Lender and its assigns and no other Persons shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will refuse to make advances in the absence of strict compliance with any or all thereof and no other Person shall, under any circumstances, be deemed to be the beneficiary of such conditions, any or all of which may be freely waived in whole or in part by Lender at any time in the sole and absolute exercise of its discretion. The terms and provisions of this Agreement are for the benefit of the parties hereto and, except as herein specifically provided, no other Person shall have any right or cause of action on account thereof.

**Rules of Construction.** The words "hereof," "herein," "hereunder," "hereto," and other words of similar import refer to this Agreement in its entirety. The terms "agree" and "agreements" mean and include "covenant" and "covenants." The words "include" and "including" shall be interpreted as if followed by the words "without limitation." The captions and headings contained in this Agreement are included herein for convenience of reference only and shall not be considered a part hereof and are not in any way intended to define, limit or enlarge the terms hereof. All references (a) made in the neuter, masculine or feminine gender shall be deemed to have been made in all such genders, (b) made in the singular or plural number shall be deemed to have been made, respectively, in the plural or singular number as well, (c) to the Loan Documents are to the same as extended, amended, restated, supplemented or otherwise modified from time to time unless expressly indicated otherwise, (d) to the Land, the Improvements or the Property shall mean all or any portion of each of the foregoing, respectively, and (e) to

Articles, Sections and Schedules are to the respective Articles, Sections and Schedules contained in this Agreement unless expressly indicated otherwise.

**Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be considered an original for all purposes; provided, however, that all such counterparts shall together constitute one and the same instrument.

**Signs; Publicity.** At Lender's request, but at the expense of Borrower, Borrower shall place a sign at a location on the Property reasonably satisfactory to Lender and Borrower, which sign shall recite, among other things, that Lender is financing the development of the Land and the construction of the Improvements. Borrower expressly authorizes Lender to prepare and subject to Borrower's review and reasonable approval, not to be unreasonably withheld, conditioned or delayed, to furnish to the news media for publication from time to time news releases with respect to the Property, specifically to include releases detailing Lender's involvement with the financing of the Property.

**Governing Law.** This Agreement shall be governed by and construed, interpreted and enforced in accordance with the laws of the State.

**Time of Essence.** Time shall be of the essence for the performance of each and every obligation of Borrower under this Agreement of which time is an element, subject to applicable notice and cure periods contained herein.

**Electronic Transmission of Data.** Lender and Borrower agree that certain data related to the Loan (including, without limitation, confidential information, documents, applications and reports) may be transmitted electronically, including, without limitation, transmission over the Internet. This data may be transmitted to, received from or circulated among agents and representatives of Borrower and/or Lender and their Affiliates and other Persons involved with the subject matter of this Agreement. Borrower acknowledges and agrees that (a) there are risks associated with the use of electronic transmission and that Lender does not control the method of transmittal or service providers, (b) Lender has no obligation or responsibility whatsoever and assumes no duty or obligation for the security, receipt or third party interception of any such transmission, and (c) Borrower will release, hold harmless and indemnify Lender from any claim, damage or loss, including, without limitation, that arising in whole or part from Lender's strict liability or sole, comparative or contributory negligence, that is related to the electronic transmission of data related to the Loan.

**Forum.** Borrower hereby irrevocably submits generally and unconditionally for itself and in respect of its property to the jurisdiction of any state court or any United States federal court sitting in the State specified in the governing law section of this Agreement and to the jurisdiction of any state court or any United States federal court sitting in the state in which any of the Property is located, over any Dispute. Borrower hereby irrevocably waives, to the fullest extent permitted by Law, any objection that Borrower may now or hereafter have to the laying of venue in any such court and any claim that any such court is an inconvenient forum. Borrower hereby agrees and consents that, in addition to any methods of service of process provided for under applicable law, all service of process in any such suit, action or proceeding in any state court or any United States federal court sitting in the state specified in the governing law section of this Agreement may be made by certified or registered mail, return receipt requested, directed to Borrower at its address for notice set forth in this Agreement, or at a subsequent address of which Lender received actual notice from Borrower in accordance with the notice section of this Agreement, and service so made shall be complete five (5) days after the same shall have been so mailed. Nothing herein shall affect the right of Lender to serve process in any manner permitted by Law or limit the right of Lender to bring proceedings against Borrower in any other court or jurisdiction.

**Waiver of Jury Trial. BORROWER AND LENDER WAIVE TRIAL BY JURY IN RESPECT OF ANY DISPUTE AND ANY ACTION ON SUCH DISPUTE. THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY BORROWER AND LENDER, AND BORROWER AND LENDER HEREBY AGREE THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY PERSON OR ENTITY TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE PARTIES ENTERING INTO THE LOAN DOCUMENTS. BORROWER AND LENDER ARE EACH HEREBY AUTHORIZED TO FILE A COPY OF THIS SECTION IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER OF JURY TRIAL. BORROWER FURTHER REPRESENTS AND WARRANTS THAT IT HAS BEEN REPRESENTED IN THE SIGNING OF THIS**

**AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, OR HAS HAD THE OPPORTUNITY TO BE REPRESENTED BY INDEPENDENT LEGAL COUNSEL SELECTED OF ITS OWN FREE WILL, AND THAT IT HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL.**

**Additional Waivers.** BORROWER FURTHER HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES, IN CONNECTION WITH ANY SUIT, ACTION OR PROCEEDING BROUGHT BY OR ON BEHALF OF LENDER WITH RESPECT TO THIS AGREEMENT, THE NOTE OR OTHERWISE IN RESPECT OF THE LOAN, ANY AND EVERY RIGHT BORROWER MAY HAVE TO (A) INJUNCTIVE RELIEF, (B) INTERPOSE ANY COUNTERCLAIM THEREIN, OTHER THAN A COMPULSORY COUNTERCLAIM, AND (C) HAVE THE SAME CONSOLIDATED WITH ANY OTHER OR SEPARATE SUIT, ACTION OR PROCEEDING (EXCEPT TO THE EXTENT COMPULSORY). NOTHING CONTAINED IN THE IMMEDIATELY PRECEDING SENTENCE SHALL PREVENT OR PROHIBIT BORROWER FROM INSTITUTING OR MAINTAINING A SEPARATE ACTION AGAINST LENDER WITH RESPECT TO ANY ASSERTED CLAIM.

**Limitation on Liability.** Borrower waives any right to assert or make any claim against Lender (or to sue Lender upon any claim for) any special, indirect, incidental, punitive or consequential damages in respect of any breach or wrongful conduct (whether the claim is based on contract, tort or duty imposed by law) in connection with, arising out of or in any way related to this Agreement, the other Loan Documents or the transactions contemplated hereby and/or thereby, or any act, omission or event in connection therewith. Any obligation or liability whatsoever of Lender that may arise at any time under this Agreement, any other Loan Document, or the Environmental Indemnity Agreement shall be satisfied, if at all, out of Lender's assets only. No such obligation or liability shall be personally binding upon, nor shall resort for the enforcement thereof be had to, the property of any of Lender's members, partners, shareholders, directors, officers, employees or agents, regardless of whether such obligation or liability is in the nature of contract, tort or otherwise.

**Entire Agreement.** The Loan Documents constitute the entire understanding and agreement between Borrower and Lender with respect to the transactions arising in connection with the Loan, and supersede all prior written or oral understandings and agreements between Borrower and Lender with respect to the matters addressed in the Loan Documents. In particular, and without limitation, the terms of any commitment by Lender to make the Loan are merged into the Loan Documents. Except as incorporated in writing into the Loan Documents, there are no representations, understandings, stipulations, agreements or promises, oral or written, with respect to the matters addressed in the Loan Documents.

**Lost Note.** Upon receipt of an affidavit of an officer of Lender as to the loss, theft, destruction or mutilation of the Note or any other security document which is not of public record, and, in the case of any such loss, theft, destruction or mutilation, upon cancellation of the Note or other security document, Borrower will issue, in lieu thereof, a replacement note or other security document in the same principal amount thereof and otherwise of like tenor. Such replacement note shall contain therein a statement that it is a replacement note and evidences the same indebtedness as the lost, stolen, destroyed or mutilated Note and no additional or further indebtedness.

**Method of Payment.** All payments due hereunder and/or under the Note shall be made by Borrower to Lender at [address of Lender where payments should be made], or such other place as Lender may from time to time specify in writing in lawful currency of the United States of America in immediately available funds, without counterclaim or setoff and free and clear of, and without any deduction or withholding for, any taxes or other payments.

**Pledge to the Federal Reserve.** Lender may at any time pledge or assign all or any portion of its rights under the Loan Documents which evidence and/or secure the Loan to any of the twelve (12) Federal Reserve Banks organized under Section 4 of the Federal Reserve Act, 12 U.S.C. Section 341. No such pledge or assignment or enforcement thereof shall release Lender from its obligations under any of the Loan Documents which evidence and/or secure the Loan.

**Right of Setoff.** Borrower hereby grants to Lender, a continuing lien, security interest and right of setoff as security for all liabilities and obligations to Lender whether now existing or hereafter arising, upon and against all deposits, credits, collateral and property, now or hereafter in the possession, custody, safekeeping or control of Lender or any entity under the control of Lender, and its successors and/or assigns or in transit to any of them. At any time, without demand or notice (any such notice being expressly waived by Borrower), Lender may setoff the

same or any part thereof and apply the same to any liability or obligation of Borrower and Guarantor even though unmatured and regardless of the adequacy of any other collateral security for the Loan. **ANY AND ALL RIGHTS TO REQUIRE LENDER TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES THE LOAN, PRIOR TO EXERCISING ITS RIGHT OF SETOFF WITH RESPECT TO SUCH DEPOSITS, CREDITS OR OTHER PROPERTY OF THE BORROWER OR GUARANTOR, ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.**

**Usury.** All agreements between Borrower and Lender are hereby expressly limited so that in no contingency or event whatsoever, whether by reason of acceleration of maturity of the indebtedness to be advanced hereby or otherwise, shall the amount paid or agreed to be paid to Lender for the use or the forbearance of the indebtedness evidenced hereby exceed the maximum permissible under applicable law. As used herein, the term "applicable law" shall mean the law in effect as of the date hereof; provided, however, that in the event there is a change in the law which results in a higher permissible rate of interest, then the Note shall be governed by such new law as of its effective date. In this regard, it is expressly agreed that it is the intent of Borrower and Lender in the execution, delivery and acceptance of the Note to contract in strict compliance with the laws of the State from time to time in effect. If, under or from any circumstances whatsoever, fulfillment of any provision hereof or of any of the loan documents evidencing and/or securing the Loan at the time of performance of such provision shall be due, shall involve transcending the limit of such validity prescribed by applicable law, then the obligation to be fulfilled shall automatically be reduced to the limits of such validity, and if under or from circumstances whatsoever Lender should ever receive as interest an amount which would exceed the highest lawful rate, such amount which would be excessive interest shall be applied to the reduction of the principal balance of the Note and not to the payment of interest. This provision shall control every other provision of all agreements between Borrower and Lender.

**Application of Payments.** All payments received by Lender hereunder shall be applied first to the payment of all fees, expenses and other amounts due to Lender under the Loan Documents (excluding principal and interest), then to accrued interest, and the balance on account of outstanding principal; provided, however, that after an Event of Default hereunder, payments will be applied to the obligations of Borrower to Lender as Lender determines in its sole discretion.

**Payment Date Adjustment for Non-Business Days.** If any payment under the Note becomes due on a day which is not a Business Day (as defined below), the due date of the Note or payment shall be extended to the next succeeding Business Day, and such extension of time shall be included in computing interest and fees in connection with such payment.

**Payment of Fees and Expenses.** Borrower shall pay on demand all Expenses of Lender in connection with the preparation, administration, default, collection, waiver or amendment of loan terms, or in connection with Lender's exercise, preservation or enforcement of any of its rights, remedies or options hereunder (excluding any costs related to any sale, assignment or participation of the Loan or any interest therein), including, without limitation, reasonable fees of outside legal counsel, and any fees or expenses associated with travel or other costs relating to any appraisals or examinations permitted hereunder to be conducted in connection with the loan or any collateral therefor, and the amount of all such expenses shall, until paid, bear interest at the rate applicable to principal hereunder (including, without limitation, any default rate during the continuance of an Event of Default) and be an obligation secured by any collateral.

**Collateral Pledge (Transfer to Nominee).** With respect to any investment security, certificate of deposit or deposit account referred to herein and made by Borrower in connection with the Loan, the Borrower agrees that Lender may transfer any proceeds of such account into its name or that of its nominee and may receive the income and any distributions thereon and hold the same as collateral for the Obligations or apply the same to any Obligation whether or not a Default or an Event of Default has occurred.

**Capital Adequacy.** In the event the Lender shall have determined that any requirement of any law of the United States of America, any regulation, order, interpretation, ruling, official directive or guideline (whether or not having the force of law) of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation or any other board or governmental or administrative agency of the United States of America which shall impose, increase, modify or make applicable to the Note or this Agreement or cause the Note or this Agreement to be included in any reserve, special deposit, calculation used in the computation of regulatory capital standards, assessment or other requirement which imposes on the Lender any cost that is attributable to the maintenance thereof, then, and in each such event, the Borrower shall promptly pay the Lender,

upon its demand, such amount as will compensate the Lender for any such cost, which determination may be based upon the Lender's reasonable allocation of the aggregate of such costs resulting from such events. In the event any such cost is a continuing cost, a fee payable to the Lender may be imposed upon the Borrower periodically for so long as any such cost is deemed applicable by the Lender, in an amount determined by the Lender to be necessary to compensate the Lender for any such cost, which determination may be based upon the Lender's reasonable allocation of the aggregate of such costs resulting from such events. The determination by the Lender of the existence and amount of any such costs shall, in the absence of manifest error, be conclusive. This section shall be available to Lender regardless of any possible contention of invalidity or inapplicability of the law, regulation or condition which shall have been imposed.

**Right to Sell Loan to Participant.** Lender shall have the unrestricted right at any time and from time to time, and without the consent of or prior (but upon prompt subsequent) notice to Borrower or Guarantor, to grant to one or more banks or other financial institutions (each, a "**Participant**") participating interests in Lender's obligation to lend hereunder and/or any or all of the Loan. In the event of any such grant by Lender of a participating interest to a Participant, whether or not upon notice to Borrower, Lender shall remain responsible for the performance of its obligations hereunder and Borrower shall continue to deal solely and directly with Lender in connection with Lender's rights and obligations hereunder. Lender may furnish any information concerning Borrower in its possession from time to time to prospective Participants.

**Loan Assignment.** Lender shall have the unrestricted right at any time or from time to time, and without Borrower's or anyone else's consent, to assign all or any portion of its rights and obligations hereunder to one or more banks or other financial institutions (each, an "**Assignee**"), and Borrower and each Guarantor agrees that it shall execute or cause to be executed, such documents, including, without limitation, amendments to this Agreement and to any other documents, instruments and agreements executed in connection herewith as Lender shall reasonably deem necessary to effect the foregoing (but none of which shall increase Borrower's Obligations or diminish Lender's obligations hereunder or Borrower's rights hereunder). In addition, at the request of Lender and any such Assignee, Borrower shall, at no out-of-pocket cost, issue one or more new promissory notes, as applicable, to any such Assignee, and if Lender has retained any of its rights and obligations hereunder following such assignment, to Lender, which new promissory notes shall be issued in replacement of, but not in discharge of, the liability evidenced by the promissory note held by Lender prior to such assignment and shall reflect the amount of the respective commitments and loans held by such Assignee and Lender after giving effect to such assignment. Upon the execution and delivery of appropriate assignment documentation, amendments and any other documentation reasonably required by Lender in connection with such assignment, and the payment by Assignee of the purchase price agreed to by Lender and such Assignee, such Assignee shall be a party to this Agreement and shall have all of the rights and obligations of Lender hereunder (and under any and all other guaranties, documents, instruments and agreements executed in connection herewith) to the extent that such rights and obligations have been assigned by Lender pursuant to the assignment documentation between Lender and such Assignee, and Lender shall be released from its obligations hereunder and thereunder to a corresponding extent. Borrower may furnish any information concerning Borrower in its possession from time to time to prospective Assignees, provided that Lender shall require any such prospective Assignees to agree in writing to maintain the confidentiality of such information.

**Dissemination of Information.** Lender may disseminate any information it now has or hereafter obtains pertaining to the Loan, including, without limitation, any security for the Loan, any credit or other information on the Property (including, without limitation, environmental reports and assessments), Borrower, any of Borrower's principals or Guarantor, to any actual or prospective assignee or participant, to Lender's Affiliates to any regulatory body having jurisdiction over Lender, to any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to Borrower and the Loan, or to any other party as necessary or appropriate in Lender's reasonable judgment, provided it shall request such party to reasonably keep such information confidential.

**Jurisdiction; Venue. LENDER AND BORROWER AGREE THAT ANY SUIT FOR THE ENFORCEMENT OF THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS MAY BE BROUGHT IN THE COURTS OF THE STATE OF [state] OR ANY FEDERAL COURT SITTING THEREIN AND CONSENTS TO THE NONEXCLUSIVE JURISDICTION OF SUCH COURT AND SERVICE OF PROCESS IN ANY SUCH SUIT BEING MADE UPON LENDER OR BORROWER BY MAIL AT THE ADDRESS SET FORTH IN THIS AGREEMENT. LENDER AND BORROWER HEREBY WAIVE ANY OBJECTION THAT THEY MAY NOW OR HEREAFTER HAVE TO THE VENUE OF ANY SUCH SUIT OR ANY SUCH COURT OR THAT SUCH SUIT IS BROUGHT IN AN INCONVENIENT FORUM.**

**Integration.** This Agreement is intended by the parties as the final, complete and exclusive statement of the transactions evidenced by this Agreement. All prior or contemporaneous promises, agreements and understandings, whether oral or written, are deemed to be superseded by this Agreement, and no party is relying on any promise, agreement or understanding not set forth in this Agreement. This Agreement may not be amended or modified except by a written instrument describing such amendment or modification executed by Borrower and Lender.

**Use of Proceeds.** No portion of the proceeds of the Loan shall be used, in whole or in part, for the purpose of purchasing or carrying any "margin stock" as such term is defined in Regulation U of the Board of Governors of the Federal Reserve System.

**Demand Deposit Account.** Borrower shall cause the Developer to deposit all sums received from proceeds of the Loan into a separate demand deposit account at Lender and to only make withdrawals from such account to pay for the "cost of improvement".

**Cross-Default/Cross Collateralization.** This Loan shall be cross-defaulted and cross-collateralized with all other loans that Borrower shall have from Lender (or any subsidiary or affiliated entity of Lender) during the term of this Loan, whether existing as of the date of this Agreement subsequently made. A default under any of the above described loans shall constitute a Default under this Loan. A Default under this Loan shall constitute a Default under the above described other loans. To the extent not prohibited by applicable law, if Lender, at its option, avails itself of this cross-collateralization/cross-default provision, Lender shall have the option to pursue its remedies in any combinations and against any or all of Lender's security for the aforesaid loans, whether successively, concurrently or otherwise.

## ARTICLE X. LIMITATIONS ON RECOURSE.

### Limitations on Recourse.

- (a) Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the Obligations by any action or proceeding wherein a money judgment shall be sought against Borrower, except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Mortgage and the other Loan Documents, or in the Project and/or the Property, or any other collateral given to the Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Project and/or the Property, and in any other collateral given to Lender to secure the Obligations, and Lender, as applicable, by accepting the Note, this Agreement, the Mortgage and the other Loan Documents, shall not sue for, seek or demand any deficiency judgment against Borrower in any such action or proceeding under or by reason of or under or in connection with the Note, this Agreement, the Mortgage or the other Loan Documents.
- (b) The provisions of this Q shall not, however, (i) constitute a waiver, release or impairment of any Obligation evidenced or secured by any of the Loan Documents; (ii) impair the right of any Lender to name Borrower as a party defendant in any action or suit for foreclosure and sale under the Mortgage; (iii) affect the validity or enforceability of any guaranty made in connection with the Loan or any of the rights and remedies of Lender thereunder; (iv) impair the right of Lender to obtain the appointment of a receiver; (v) constitute a prohibition against Lender to commence any appropriate action or proceeding in order for Lender to exercise its remedies against the Project and/or the Property, or (vi) constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any loss, damage, cost, expense, liability, claim or other obligation (including, without limitation, attorneys' fees and costs reasonably incurred), causes of action, suits, claims, demands and judgments of any nature or description whatsoever, that may be imposed upon, incurred by or awarded against Lender or any affiliate thereof as a result of, arising out of or in connection with (and Borrower shall be personally liable and shall indemnify Lender for) the following:
  - (1) Borrower's conviction of a criminal act by a court of competent jurisdiction;



- (2) Borrower's failure to permit on-site inspections of the Project and/or the Property, or to provide the financial reports and other financial information, each as required by, and in accordance with the terms and provisions of, this Agreement and the other Loan Documents;
  - (3) the misappropriation by Borrower or any Borrower Party of any funds derived from the Project and/or the Property, including, without limitation, security deposits, Rents, Insurance Proceeds and Condemnation Awards in contravention of the provisions of the Loan Documents;
  - (4) any [**OPTIONAL BORROWER PROVISION: intentional**] misrepresentation by Borrower or any Borrower Party made in or in connection with the Loan Documents or the Loan;
  - (5) Borrower's collection of Rents (other than security deposits) more than one month in advance or entering into or modifying or canceling Leases, or receipt of monies by Borrower or any Borrower Party in connection with the modification or cancellation of any Leases, in violation of this Agreement or any of the other Loan Documents;
  - (6) Borrower's [**OPTIONAL BORROWER PROVISION: wrongful**] interference with Lender's exercise of rights under the Mortgage;
  - (7) Borrower's failure to turn over to all security deposits upon Lender's demand following an Event of Default;
  - (8) Borrower's failure to maintain insurance as required by this Agreement or to pay (or cause to be paid) any Taxes or assessments [**OPTIONAL LENDER PROVISION: or required insurance deductible**] affecting the Project and/or the Property;
  - (9) damage or destruction to the Project and/or the Property caused by the [**OPTIONAL BORROWER PROVISION: intentional**] acts or omissions of Borrower, its agents, employees, or contractors;
  - (10) Borrower's failure to perform its obligations under the Environmental Indemnity Agreement;
  - (11) Borrower's failure to pay for any loss, liability or expense (including, without limitation, attorneys' fees) incurred by Lender arising out of any claim or allegation made by Borrower, its successors or assigns, or any creditor of Borrower, that this Agreement or the transactions contemplated by the Loan Documents and the Environmental Indemnity Agreement establish a joint venture, partnership or other similar arrangement between Borrower, and Lender;
  - (12) any brokerage commission or finder's fees awarded in connection with the transactions contemplated by the Loan Documents arising out of a claim for such commission or fees as a result of a contract or agreement entered into by Borrower, or an Affiliate thereof;
  - (13) uninsured damage to the Project and/or the Property resulting from acts of terrorism;
  - (14) the physical waste of the Project and/or the Property caused by Borrower or an Affiliate thereof; or
  - (15) the removal or disposal of any personal property from the Project and/or the Property in which Lender has a security interest in violation of the terms and conditions of the Loan Documents.
- (c) Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, all of the Obligations shall be fully recourse to Borrower and Borrower shall be personally liable therefor in the event of: (i) any Sale of the Project, the Property or Borrower in breach of any of the covenants in this Agreement or the other Loan Documents, (ii) Borrower's failure to comply with the covenants in Article VI; (iii) the determination of fraud by Borrower or Guarantor in connection with the Loan by a court of competent jurisdiction, (iv) the filing by Borrower or Guarantor or the filing against Borrower or Guarantor by Borrower, Guarantor or any Affiliate of Borrower of any proceeding for relief under any federal or state bankruptcy, insolvency or receivership laws or any assignment for the benefit of creditors made by Borrower or Guarantor or the consenting to, acquiescing in or joining in any such proceeding by Borrower or Borrower Party, or (v) the occurrence of an Event of Default under Q.

- (d) Borrower also shall be personally liable to Lender for any and all reasonable attorneys' fees and expenses and court costs incurred by Lender in enforcing this Q or otherwise incurred by Lender in connection with any of the foregoing matters, regardless whether such matters are legal or equitable in nature or arise under tort or contract law. The limitation on the personal liability of Borrower in this Q shall not modify, diminish or discharge the personal liability of Guarantor. Nothing herein shall be deemed to be a waiver of any right that Lender may have under Sections 506(a), 506(b), 1111(b) or any other provision of the United States Bankruptcy Code, as such sections may be amended, or corresponding or superseding sections of the Bankruptcy Amendments and Federal Judgeship Act of 1984, to file a claim for the full amount due to Lender under the Loan Documents or to require that all collateral shall continue to secure the amounts due under the Loan Documents.

*[Remainder of page intentionally left blank]*

IN WITNESS WHEREOF, Borrower and Lender have caused this Agreement to be executed as of the date first above written.

**BORROWER:**

[name of Borrower]

By: \_\_\_\_\_

Name: [name of signatory]

Title: [title of signatory]

**LENDER:**

[name of Lender]

By: \_\_\_\_\_

Name: [name of signatory]

Title: [title of signatory]