

31311

Recording Requested By,  
And After Recording, Return To:

WELLS FARGO BANK,  
NATIONAL ASSOCIATION  
MAC R4057-01R  
7711 Plantation Road  
Roanoke, Virginia 24019  
Attn: Loan Documentation

01113377 B: 2515 P: 0854

Page 1 of 27

Rhonda Francis Summit County Recorder

06/28/2019 11:40:32 AM Fee \$40.00

By Park City Title  
Electronically Recorded

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

**THIS INSTRUMENT COVERS GOODS THAT ARE OR WILL BECOME  
FIXTURES ON THE DESCRIBED REAL PROPERTY AND SHOULD BE  
FILED FOR RECORD IN THE REAL PROPERTY RECORDS WHERE  
DEEDS OF TRUST ON REAL ESTATE ARE RECORDED. THIS  
INSTRUMENT SHOULD ALSO BE INDEXED AS A UNIFORM  
COMMERCIAL CODE FINANCING STATEMENT COVERING GOODS  
THAT ARE OR WILL BECOME FIXTURES ON THE DESCRIBED  
REAL PROPERTY, THE MAILING ADDRESSES OF THE SECURED  
PARTY AND THE DEBTOR ARE WITHIN.**

**COLLATERAL IS OR INCLUDES FIXTURES**

**THIS INSTRUMENT SECURES FUTURE ADVANCES.**

**THIS CONSTRUCTION DEED OF TRUST SECURES A NOTE WHICH  
PROVIDES FOR A VARIABLE INTEREST RATE**

**This instrument is acknowledged and agreed to be a "construction  
mortgage" under the Uniform Commercial Code, as amended or recodified  
from time to time, in the state wherein the Subject Property is located**

THIS CONSTRUCTION DEED OF TRUST, ASSIGNMENT AND SECURITY  
AGREEMENT (this "Deed of Trust") is executed as of June 28, 2019 by SMP 1791 LLC, a  
Delaware limited liability company ("Trustor"), to WELLS FARGO TRUST COMPANY,  
NATIONAL ASSOCIATION ("Trustee"), for the benefit of WELLS FARGO BANK,  
NATIONAL ASSOCIATION ("Beneficiary").

**ARTICLE I. GRANT IN TRUST**

1.1 **Grant.** For the purposes and upon the terms and conditions In this Deed of Trust,  
Trustor irrevocably grants, conveys and assigns to Trustee, in trust for the benefit of Beneficiary,

with power of sale and right of entry and possession, all of Trustor's right, title and interest in and to: (a) all real property located in **Summit County, Utah**, and described on **Exhibit A** attached hereto; (b) all easements, rights-of-way and rights used in connection with or as a means of access to any portion of said real property; (c) all tenements, hereditaments and appurtenances thereof and thereto; (d) all right, title and interest of Trustor, now owned or hereafter acquired, in and to any land lying within the right-of-way of any street, open or proposed, adjoining said real property, and any and all sidewalks, alleys and strips and gores of land adjacent to or used in connection with said real property; (e) all buildings, improvements, fixtures, equipment, and landscaping now or hereafter erected or located on said real property; (f) all development rights, governmental or quasi-governmental licenses, permits or approvals, zoning rights and other similar rights or interests which relate to the development, use or operation of, or that benefit or are appurtenant to, said real property; (g) all mineral rights, oil and gas rights, air rights, water or water rights, including without limitation, all wells, canals, ditches and reservoirs of any nature and all rights thereto, appurtenant to or associated with said real property, whether decreed or undecreed, tributary or non-tributary, surface or underground, appropriated or unappropriated, and all shares of stock in any water, canal, ditch or reservoir company, and all well permits, water service contracts, drainage rights and other evidences of any such rights; and (h) all interest or estate which Trustor now has or may hereafter acquire in said real property and all additions and accretions thereto, and all awards or payments made for the taking of all or any portion of said real property by eminent domain or any proceeding or purchase in lieu thereof, or any damage to any portion of said real property (collectively, the "Subject Property"). The listing of specific rights or property shall not be interpreted as a limitation of general terms.

TO HAVE AND TO HOLD the above granted and described Subject Property, with all privileges and appurtenances thereto belonging, to Trustee, its successors and assigns in fee simple forever, for the benefit of Beneficiary and the successors and assigns of Beneficiary forever, upon the trusts, terms and conditions, and for the uses, hereinafter set forth.

1.2 **Address.** The address of the Subject Property (if known) is: (a) **1775 and 1791 Prospector Avenue, Park City, Summit County, Utah 84060**. Neither the failure to designate an address nor any inaccuracy in the address designated shall affect the validity or priority of the lien of this Deed of Trust on the Subject Property as described on **Exhibit A**. In the event of any conflict between the provisions of **Exhibit A** and said address, **Exhibit A** shall control.

## **ARTICLE II. OBLIGATIONS SECURED**

2.1 **Obligations Secured.** Trustor makes this grant and assignment for the purpose of securing the following obligations (each, a "Secured Obligation" and collectively, the "Secured Obligations"):

(a) performance of the obligations contained herein and in that certain Construction Loan Agreement dated as of even date herewith to which Trustor and Beneficiary are parties, as the same may be amended, revised, amended and restated, replaced, supplemented or otherwise modified from time to time ("Construction Loan Agreement"), which Construction Loan Agreement provides for, among other things, the construction of certain improvements on the Subject Property (and any capitalized terms used in this Deed of Trust but not otherwise defined herein shall have the meanings ascribed to such terms in the Construction Loan Agreement); and

(b) payment to Beneficiary of all sums at any time owing and performance of all other obligations arising under or in connection with that certain construction loan note ("Construction Note") dated as of even date herewith in the principal amount of **SIX MILLION NINE HUNDRED NINETY-THREE THOUSAND FOUR HUNDRED SEVENTY-SEVEN AND 00/100 DOLLARS (\$6,993,477.00)**, with interest as provided therein, executed by Trustor and payable to Beneficiary or its order, together with the payment and performance of any other indebtedness or obligations incurred in connection with the credit accommodation evidenced by the Note, whether or not specifically referenced therein; and

(c) payment to Beneficiary of all sums at any time owing and performance of all other obligations arising under or in connection with that certain term commitment note ("Term Commitment Note"; and together with the Construction Note, the "Note") dated as of even date herewith in the principal amount of **ONE MILLION SIX THOUSAND FIVE HUNDRED TWENTY-THREE AND 00/100 DOLLARS (\$1,006,523.00)**, with interest as provided therein, executed by Trustor and payable to Beneficiary or its order, together with the payment and performance of any other indebtedness or obligations incurred in connection with the credit accommodation evidenced by the Note, whether or not specifically referenced therein; and

(d) payment and performance of all obligations of Trustor under this Deed of Trust, together with all advances, payments or other expenditures made by Beneficiary or Trustee as or for the payment or performance of any such obligations of Trustor; and

(e) payment and performance of all obligations, if any, and the contracts under which they arise, which any rider attached to and recorded with this Deed of Trust recites are secured hereby; and

(f) payment to Beneficiary of all liability, whether liquidated or unliquidated, defined, contingent, conditional or of any other nature whatsoever, and performance of all other obligations, arising under any swap, derivative, foreign exchange or hedge transaction or arrangement (or other similar transaction or arrangement howsoever described or defined) at any time entered into with Beneficiary in connection with any Secured Obligation; and

(g) payment and performance of all future advances and other obligations that the then record owner of the Subject Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Beneficiary, when any such advance or other obligation is evidenced by a writing which recites that it is secured by this Deed of Trust; and

(h) all modifications, extensions and renewals of any of the Secured Obligations (including without limitation, (i) the conversion to the Permanent Loan as contemplated by the Construction Loan Agreement, (ii) modifications, extensions or renewals at a different rate of interest, or (iii) deferrals or accelerations of the required principal payment dates or interest payment dates or both, in whole or in part), however evidenced, whether or not any such modification, extension or renewal is evidenced by a new or additional promissory note or notes.

2.2 Obligations. The term "obligations" is used herein in its broadest and most comprehensive sense and includes, and shall be deemed to include, any and all advances, debts, obligations and liabilities heretofore, now or hereafter made, incurred or created, whether

voluntary or Involuntary and however arising, whether due or not due, absolute or contingent, liquidated or unliquidated, determined or undetermined, joint or several, including without limitation, all principal, interest, charges, including prepayment charges and late charges, and loan fees at any time accruing or assessed on any Secured Obligation, together with all costs of collecting the Secured Obligations. For purposes of Utah Code Annotated § 57-1-28, Trustor agrees that all default interest, late charges, prepayment premiums, and similar amounts, if any, owing from time to time under the Note or other Secured Obligation shall constitute a part of and be entitled to the benefits of Beneficiary's Deed of Trust lien upon the Subject Property, and (ii) Beneficiary, in its sole discretion, may add all such default interest, late charges, prepayment premiums, and similar amounts owing from time to time to the principal balance of the Note or other Secured Obligation, and in any case, Beneficiary may include all such amounts in any credit that Beneficiary may make against Its bid at a foreclosure sale of the Subject Property pursuant to this Deed of Trust. However, notwithstanding anything to the contrary set forth herein or any of the Loan Documents, this Deed of Trust shall not secure the obligations evidenced by or arising under any environmental indemnity made by Trustor or any guarantor of the Loan with respect to the Subject Property.

2.3 Incorporation. All terms of the Secured Obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Subject Property are hereby deemed to have notice of the terms of the Secured Obligations and to have notice, if provided therein, that: (a) the Note or any other Secured Obligation may permit borrowing, repayment and reborrowing; and (b) the rate of interest on one or more of the Secured Obligations may vary from time to time.

2.4 Future Advances. This Deed of Trust is given to secure both (i) existing obligations that are specifically or generally identified, described, or referenced in this Deed of Trust as being secured hereby and all advances made at or prior to the registration of this Deed of Trust, and (ii) future advances and/or future obligations that are specifically or generally identified, described, or referenced in this Deed of Trust as being secured hereby that may from time to time be made or incurred.

2.5 Protective Advances. This Deed of Trust also secures advances made by Trustee and/or Beneficiary with respect to the Subject Property for the payment of taxes, assessments, maintenance charges, and insurance premiums, costs incurred by Trustee and/or Beneficiary for the protection of the Subject Property or the lien of this Deed of Trust, expenses and costs incurred by Trustee and/or Beneficiary in the exercise of their rights hereunder, and expenses incurred by Trustee and/or Beneficiary by reason of the occurrence of a Default (as hereinafter defined) and the priority of such advances, costs and expenses shall also relate back to the date of this Deed of Trust, or to such later date as required by any applicable law.

### **ARTICLE III. ASSIGNMENT OF LEASES AND RENTS**

3.1 Assignment. For the purposes and upon the terms and conditions set forth herein, Trustor hereby irrevocably assigns to Beneficiary all of Trustor's right, title and interest in, to and under all present and future leases, licenses, rental agreements and other agreements of any kind relating to the management, operation, leasing, use or occupancy of any of the Subject Property, or any portion thereof, whether existing as of the date hereof or at any time hereafter

entered into, together with all subleases and other agreements for the use or occupancy of the Subject Property or any portion thereof, all guarantees of and security for any tenant's or lessee's performance thereunder, the right to exercise any landlord's liens and other remedies to which the landlord is entitled, and all amendments, extensions, renewals and modifications thereto (each, a "Lease" and collectively, the "Leases"), together with any and all other rents, issues, revenues, receipts, deposits, and profits of the Subject Property, including, without limitation, all amounts payable and all rights and benefits accruing to Trustor under the Leases (collectively, "Rents"). This assignment shall not impose upon Beneficiary any duty to produce Rents from the Subject Property, nor cause Beneficiary to be: (a) a "mortgagee in possession" for any purpose; (b) responsible for performing any of the obligations of the lessor or landlord under any Lease; (c) responsible for any waste committed by any person or entity at any time in possession of the Subject Property or any part thereof, or for any dangerous or defective condition of the Subject Property, or for any negligence in the management, upkeep, repair or control of the Subject Property; or (d) directly or indirectly liable to Trustor or any other person as a consequence of the exercise or failure to exercise any of the rights, remedies, or powers granted to Beneficiary hereunder or to perform or discharge any obligation, duty or liability of Trustor arising under the Leases. This is an absolute assignment, not an assignment for security only, and Beneficiary's right to Rents is not contingent upon and may be exercised without possession of the Subject Property. Trustor agrees to execute and deliver to Beneficiary, within ten (10) Business Days of Beneficiary's written request, such additional documents as Beneficiary or Trustee may reasonably request to further evidence the assignment to Beneficiary of any and all Leases and Rents. Beneficiary or Trustee, at Beneficiary's option and without notice, may notify any lessee or tenant of this assignment of the Leases and Rents. This Article III is subject to the Utah Uniform Assignment of Rents Act, Utah Code Annotated § 57-26-101, et. seq. (the "Act"), and in the event of any conflict or inconsistency between the provisions of this Article III and the provisions of the Act, the provisions of the Act shall control and Beneficiary shall have all rights and remedies available under the Act, which rights and remedies shall be cumulative with all rights and remedies hereunder.

3.2 Protection of Security. To protect the security of this Assignment, Trustor agrees:

(a) At Trustor's sole cost and expense: (i) to perform each obligation to be performed by the lessor or landlord under each Lease and, in Trustor's reasonable business judgment, use commercially reasonable efforts to enforce or secure the performance of each obligation to be performed by the lessee or tenant under each Lease; (ii) to use a Beneficiary approved form of residential tenant lease; (iii) not to modify any commercial Lease in any material respect, nor accept surrender under or terminate the term of any commercial Lease, except with the written consent of Beneficiary, such consent not to be unreasonably withheld; (iv) not to anticipate the Rents under any Lease; and (v) not to waive or release any commercial lessee or tenant of or from any Lease obligations, except with the written consent of Beneficiary, such consent not to be unreasonably withheld and provided that, if Beneficiary does not respond to a written request for such consent within ten (10) Business Days, such consent shall be deemed to have been granted, provided that Trustor's written request for Beneficiary's approval refers specifically to this deemed approval provision. Trustor assigns to Beneficiary all of Trustor's right and power to modify the terms of any Lease, to accept a surrender under or terminate the term of or anticipate the Rents under any Lease, and to waive or release any lessee or tenant of or from any Lease obligations, and any attempt on the part of Trustor to exercise any

such rights or powers without Beneficiary's prior written consent shall be a breach of the terms hereof.

(b) At Trustor's sole cost and expense, to defend any action in any manner connected with any Lease or the obligations thereunder, and to pay all costs of Beneficiary or Trustee, including reasonable attorneys' fees, in any such action in which Beneficiary or Trustee may appear.

(c) That, should Trustor fail to do any act required to be done by Trustor under a Lease, then Beneficiary or Trustee, but without obligation to do so and without notice to Trustor and without releasing Trustor from any obligation hereunder, may make or do the same in such manner and to such extent as Beneficiary or Trustee deems necessary to protect the security hereof, and, in exercising such powers, Beneficiary or Trustee may employ attorneys and other agents, and Trustor shall pay necessary costs and reasonable attorneys' fees incurred by Beneficiary or Trustee, or their agents, in the exercise of the powers granted herein. Trustor shall give prompt notice to Beneficiary of any default by any lessee or tenant under any commercial Lease, and of any notice of default on the part of Trustor under any commercial Lease received from a lessee or tenant thereunder, together with an accurate and complete copy thereof.

(d) To pay to Beneficiary immediately upon demand all sums expended under the authority hereof, including reasonable attorneys' fees, together with interest thereon from the date that is five (5) days following the date of demand until paid in full at the highest rate per annum payable under any Secured Obligation, and the same, at Beneficiary's option, may be added to any Secured Obligation and shall be secured hereby.

**3.3 License.** Beneficiary confers upon Trustor a license ("License") to collect and retain the Rents as, but not before, they come due and payable, and the right to possession and management of the Subject Property, until the occurrence of any Default. Upon the occurrence of any Default, the License may be revoked by Beneficiary or Trustee, and Beneficiary or Trustee may, at Beneficiary's option and without notice, either in person or by agent, with or without bringing any action, or by a receiver to be appointed by a court: (a) enter, take possession of, manage and operate the Subject Property or any part thereof; (b) make, cancel, enforce or modify any Lease; (c) obtain and evict tenants, fix or modify Rents, and do any acts which Beneficiary or Trustee deems proper to protect the security hereof; and (d) either with or without taking possession of the Subject Property, in its own name, sue for or otherwise collect and receive all Rents, including those past due and unpaid, and apply the same in accordance with the provisions of this Deed of Trust; and all payments thereafter collected by Trustor shall be held by Trustor as trustee under a constructive trust for the benefit of Beneficiary. Trustor hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Beneficiary for the payment to Beneficiary of any rentals or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no duty to inquire as to whether any Default has actually occurred or is then existing. Trustor hereby relieves the tenants from any liability to Trustor by reason of relying upon and complying with any such notice or demand by Beneficiary. The entering and taking possession of the Subject Property, the collection of Rents and the application thereof as aforesaid, shall not cure or waive any Default,

nor waive, modify or affect any notice of default hereunder, nor invalidate any act done pursuant to any such notice. The License shall not grant to Beneficiary or Trustee the right to possession, except as provided in this Deed of Trust. At such time as Trustor shall have cured all Defaults and no Defaults have occurred or are continuing, Beneficiary or Trustee shall not later than twenty (20) Business Days or such longer period as reasonably required to allow Beneficiary or Trustee to redeliver possession of the Subject Property, after demand in writing redeliver possession of the Subject Property to Trustor, who shall retain such possession unless and until another Default shall occur, whereupon Beneficiary or Trustee may, at its election, again take possession of the Subject Property under the terms of this Deed of Trust.

#### **ARTICLE IV. SECURITY AGREEMENT AND FIXTURE FILING**

4.1 **Security Interest.** Trustor hereby grants and assigns to Beneficiary a security interest, to secure payment and performance of all of the Secured Obligations, in all of the following described personal property in which Trustor now or at any time hereafter has any interest (collectively, the "Collateral"):

All goods, building and other materials, supplies, inventory, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property and embedded software included therein and supporting information, wherever situated, which are or are to be incorporated into, used in connection with, or appropriated for use on the Subject Property; together with all Rents, other payments and security deposits derived from the Subject Property; all inventory, accounts, cash receipts, deposit accounts, accounts receivable, contract rights, licenses, agreements, general intangibles, payment intangibles, software, chatter paper (whether electronic or tangible), instruments, documents, promissory notes, drafts, letters of credit, letter of credit rights, supporting obligations, insurance policies, insurance and condemnation awards and proceeds, proceeds of the sale of promissory notes, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the ownership, management, leasing, operation, sale or disposition of the Subject Property or any business now or hereafter conducted thereon by Trustor; all development rights and credits, and any and all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Subject Property; all water and water rights, wells and well rights, canals and canal rights, ditches and ditch rights, springs and spring rights, and reservoirs and reservoir rights appurtenant to or associated with the Subject Property, whether decreed or undecreed, tributary, non-tributary or not non-tributary, surface or underground or appropriated or unappropriated, and all shares of stock in water, ditch, lateral and canal companies, well permits and all other evidences or any of such rights; all deposits or other security now or hereafter made with or given to utility companies by Trustor with respect to the Subject Property; all advance payments of insurance premiums made by Trustor with respect to the Subject Property; all plans, drawings and specifications relating to the Subject Property; all loan funds held by Beneficiary, whether or not disbursed; all funds deposited with Beneficiary pursuant to any loan documents, all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Subject Property or any portion thereof; all of Trustor's right, title and interest, now or hereafter acquired, to the payment of money from Beneficiary to Trustor under any swap, derivative, foreign exchange or hedge transaction or arrangement (or similar transaction or arrangement howsoever described or defined) at any time entered into between Trustor and Beneficiary in connection with the Note; together with all

replacements and proceeds of, and additions and accessions to, any of the foregoing; together with all books, records and files relating to any of the foregoing.

As to all of the above described personal property which is or which hereafter becomes a "fixture" under applicable law, it is intended by Trustor and Beneficiary that this Security Instrument constitutes a fixture filing filed with the real estate records of Summit County, Utah, under the Uniform Commercial Code, as amended or recodified from time to time, from the state wherein the Property is located ("UCC") and is acknowledged and agreed to be a "construction mortgage" under the UCC. For purposes of this fixture filing, the "Debtor" is the Trustor and the "Secured Party" is the Beneficiary. A description of the land which relates to the fixtures is set forth in Exhibit A attached hereto. Trustor is the record owner of such land. The filing of a financing statement covering the Collateral shall not be construed to derogate from or impair the lien or provisions of this Security Instrument with respect to any property described herein which is real property or which the parties have agreed to treat as real property. Similarly, nothing in any financing statement shall be construed to alter any of the rights of Beneficiary under this Security Instrument or the priority of Beneficiary's lien created hereby, and such financing statement is declared to be for the protection of Beneficiary in the event any court shall at any time hold that notice of Beneficiary's priority interest in any property or interests described in this Security Instrument must, in order to be effective against a particular class of persons, including but not limited to the Federal government and any subdivision, agency or entity of the Federal government, be filed in the UCC records.

4.2 Rights of Beneficiary. Upon the occurrence of a Default, Beneficiary shall have all the rights of a "Secured Party" under the UCC. In addition to such rights, Beneficiary may, but shall not be obligated to, at any time without notice and at the expense of Trustor: (a) give notice to any person of Beneficiary's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Collateral or any rights or interests of Beneficiary therein; (c) inspect the Collateral; and (d) endorse, collect and receive any right to payment of money owing to Trustor under or from the Collateral. Beneficiary may: (i) upon written notice, require Trustor to assemble any or all of the Collateral and make it available to Beneficiary at a place designated by Beneficiary; (ii) without prior notice, enter upon the Subject Property or other place where any of the Collateral may be located and take possession of, collect, sell and dispose of any or all of the Collateral, and store the same at locations acceptable to Beneficiary at Trustor's expense; and/or (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become the purchaser at any such sales. Notwithstanding the above, in no event shall Beneficiary be deemed to have accepted any property other than cash in satisfaction of any obligation of Trustor to Beneficiary unless Beneficiary shall make an express written election of said remedy under the UCC or other applicable law. Trustor acknowledges and agrees that a disposition of the Collateral in accordance with Beneficiary's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that ten (10) days prior notice of such disposition is commercially reasonable notice. Trustor further agrees that any sale or other disposition of all or any portion of the Collateral may be applied by Beneficiary first to the reasonable expenses in connection therewith, including reasonable attorneys' fees and disbursements, and then to the payment of the Secured Obligations.



## **ARTICLE V. RIGHTS AND DUTIES OF THE PARTIES**

5.1 **Title.** Trustor warrants that, except as set forth on **Exhibit B**, attached hereto, Trustor lawfully possesses and holds unencumbered fee simple title to the Subject Property without limitation on the right to encumber, as herein provided, and that this Deed of Trust is a valid lien on the Subject Property and all of Trustor's interest therein.

5.2 **Taxes and Assessments.** Subject to the right, if any, of Trustor to contest payment of the following pursuant to any other agreement between Trustor and Beneficiary, Trustor shall pay prior to delinquency all taxes, assessments, levies and charges imposed: (a) by any public or quasi-public authority or utility company which are or which may become a lien upon or cause a loss in value of the Subject Property or any interest therein; or (b) by any public authority upon Beneficiary by reason of its interest in any Secured Obligation or in the Subject Property, or by reason of any payment made to Beneficiary pursuant to any Secured Obligation; provided however, that Trustor shall have no obligation to pay any income taxes of Beneficiary. Promptly upon request by Beneficiary, Trustor shall furnish to Beneficiary satisfactory evidence of the payment of all of the foregoing. Beneficiary is hereby authorized to request and receive from the responsible governmental and non-governmental personnel written statements with respect to the accrual and payment of any of the foregoing.

5.3 **Performance of Secured Obligations.** Trustor shall promptly pay and perform each Secured Obligation when due.

5.4 **Liens, Encumbrances and Charges.** Trustor shall within thirty (30) days following the imposition thereof, discharge or bond over any lien on the Subject Property not approved by Beneficiary in writing. Except as otherwise provided in any Secured Obligation or other agreement with Beneficiary, Trustor shall pay when due all obligations secured by or reducible to liens and encumbrances which shall now or hereafter encumber the Subject Property, whether senior or subordinate hereto, including without limitation, any mechanics' liens.

5.5 **Utah Construction Registry.**

(a) Trustor shall timely comply with all requirements of Title 38 Chapter 1a of Utah Code Annotated with regard to filings and notices. Trustor shall cause Beneficiary to be named as a person interested in receiving electronic notices of all filings with respect to the Subject Property in the State Construction Registry in accordance with Utah Code Annotated § 38-1a-201. Trustor shall also provide to Beneficiary copies of all preliminary notices or other notices filed by any contractor, subcontractor or supplier with respect to the Subject Property that are included in the State Construction Registry and/or received by Trustor.

(b) Trustor represents and warrants to Beneficiary that it has inspected the records of the State Construction Registry and that such inspection reveals no current filings of a preliminary notice or notice of retention filed by any lien claimant (whether a pre-construction lien or a construction lien) except as disclosed to Beneficiary by Trustor in writing. Trustor further represents and warrants that no mechanic's lien claim, notice of lien, lis pendens or

similar filing has been filed in the State Construction Registry in any form prior to the date hereof with respect to the Subject Property or recorded against the Subject Property.

(c) If Beneficiary or its title insurer determines that a preliminary notice has been filed in the State Construction Registry prior to the time of the recording of this Security Instrument, Trustor shall provide to Beneficiary written evidence acceptable to Beneficiary and its title insurer that the lien claimant has accepted payment in full for construction services that the claimant furnished pursuant to Utah Code Annotated § 38-1a-503(2)(b) such that the priority for any pre-construction services lien or a construction services lien dates immediately after the recording of this Security Instrument.

(d) Trustor shall cause, as a condition precedent to the closing of the loan secured hereby, Beneficiary's title insurer to insure in a manner acceptable to Beneficiary in its sole discretion, that this Security Instrument shall be a valid and existing first priority lien on the Subject Property free and clear of any and all exceptions for mechanic's and materialman's liens and all other liens and exceptions except as set forth in the mortgagee's policy of title insurance accepted by Beneficiary, and such title insurance policy may not contain an exception for broken lien priority and may not include any pending disbursement endorsement, or any similar limitation or coverage or requiring future endorsements to increase mechanic lien coverage under Covered Risk 11(a) of the 2006 Form of ALTA Mortgage's Title Insurance Policy.

(e) Trustor shall pay and promptly discharge, at Trustor's cost and expense, all liens, encumbrances and charges upon the Subject Property (other than the Permitted Encumbrances set forth on Exhibit B hereto), or any part thereof or interest therein whether inferior or superior to this Security Instrument and keep and maintain the same free from the claim of all persons supplying labor, services or materials that will be used in connection with or enter into the construction of any and all buildings now being erected, if any, or that hereafter may be erected on the Subject Property regardless of by whom such services, labor or materials may have been contracted; provided, however, that Trustor shall have the right to contest any such claim or lien so long as Trustor previously records a notice of release of lien and substitution of alternate security as contemplated by Utah Code Annotated § 38-1a-804 and otherwise complies with the requirements of Utah Code Annotated § 38-1a-804 to release the Subject Property from such lien or claim. Notwithstanding the foregoing, Trustor may (A) with the prior written consent of Beneficiary, contest the amount of any such lien or claim related to services, labor or materials in accordance with Utah Code Annotated § 38-1a-804(7) without previously recording a notice of release of lien and substitution of alternate security or (B) appropriately bond or reserve (in cash deposited with Beneficiary) for any such lien or claim, as determined in Beneficiary's reasonable discretion.

(f) If Trustor shall fail to remove and discharge any such lien, encumbrance or charge, or if Trustor shall dispute the amount thereof in contravention of the requirements hereof, then, in addition to any other right or remedy of Beneficiary, Beneficiary may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the release of the Subject Property from the effect of such lien, encumbrance or charge by obtaining a bond in the name of and for the account Trustor of and recording a notice of release of lien and substitution of alternate security in the name of Trustor, each as contemplated by *Utah Code Annotated* § 38-1a-804 or other applicable law, or otherwise by giving security for

such claim. Trustor shall, immediately upon demand therefor by Beneficiary, pay to Beneficiary an amount equal to all costs and expenses incurred by Beneficiary in connection with the exercise by Beneficiary of the foregoing right to discharge any such lien, encumbrance or charge, including costs of any bond or additional security, together with interest thereon from the date that is five (5) days following the date of such expenditure at the default rate set forth in the Note.

5.6 Insurance. Trustor shall insure the Subject Property against loss or damage by fire and such other risks as Beneficiary shall from time to time require. Trustor shall carry commercial general liability insurance, flood insurance as required by applicable law and such other insurance as Beneficiary may reasonably require, including without limitation, terrorism, business interruption insurance or loss of rental value insurance. Trustor shall maintain all required insurance at Trustor's expense, under policies issued by companies and in form and substance satisfactory to Beneficiary. Neither Beneficiary nor Trustee, by reason of accepting, rejecting, approving or obtaining insurance, shall 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. All policies and certificates of insurance shall name Beneficiary as loss payee, and shall provide that the insurance cannot be terminated as to Beneficiary except upon a minimum of ten (10) days' prior written notice to Beneficiary. Immediately upon any request by Beneficiary, Trustor shall deliver to Beneficiary the original of all such policies or certificates, with receipts evidencing annual prepayment of the premiums.

5.7 Tax and Insurance Impounds. After the occurrence and during the continuance of a Default, at Beneficiary's option and upon its demand, Trustor shall, until all Secured Obligations have been paid in full, pay to Beneficiary monthly an amount estimated by Beneficiary to be equal to: (a) all taxes, assessments, levies and charges imposed by any public or quasi-public authority or utility company which are or may become a lien upon the Subject Property and will become due for the tax year during which such payment is so directed; and (b) premiums for fire, other hazard and mortgage insurance next due. If Beneficiary determines that amounts paid by Trustor are insufficient for the payment in full of such taxes, assessments, levies and/or insurance premiums, Beneficiary shall notify Trustor of the increased amount required for the payment thereof when due, and Trustor shall pay to Beneficiary such additional amount within thirty (30) days after notice from Beneficiary. All amounts so paid shall not bear interest, except to the extent and in the amount required by law. Beneficiary shall apply said amounts to the payment of, or at Beneficiary's sole option release said funds to Trustor for application to and payment of, such taxes, assessments, levies, charges and insurance premiums. Trustor hereby grants and transfers to Beneficiary a security interest in all amounts so paid and held in Beneficiary's possession, and all proceeds thereof, to secure the payment and performance of each Secured Obligation. Upon assignment of this Deed of Trust, Beneficiary shall have the right to assign all amounts collected and in its possession to its assignee, whereupon Beneficiary and Trustee shall be released from all liability with respect thereto. The existence of said impounds shall not limit Beneficiary's rights under any other provision of this Deed of Trust or any other agreement, statute or rule of law. Within sixty (60) days following (i) such time as Trustor shall have cured all Defaults and no Default is continuing, (ii) full repayment of all Secured Obligations (other than as a consequence of a foreclosure or conveyance in lieu of foreclosure of the liens and security interests securing any Secured Obligation), or (iii) at such earlier time as Beneficiary in its discretion may elect, the balance of all amounts collected and in

Beneficiary's possession shall be paid to Trustor, and no other party shall have any right of claim thereto.

5.8 Damages: Insurance and Condemnation Proceeds.

(a) (i) All awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation (or transfer in lieu thereof) for public or private use affecting all or any part of or any interest in the Subject Property; (ii) all other claims and awards for damages to or decrease in value of all or any part of or any interest in the Subject Property; (iii) all proceeds of any insurance policies payable by reason of loss sustained to the Subject Property; and (iv) all interest which may accrue on any of the foregoing, are all absolutely and irrevocably assigned to and shall be paid to Beneficiary. Subject to subsections (b) and (c) below, and subject to applicable law if any, and without regard to any requirement contained in any other Section hereof, Beneficiary may apply all or any of the proceeds it receives to its expenses in settling, prosecuting or defending any such claim and apply the balance to the Secured Obligations in any order, and release all or any part of the proceeds to Trustor upon any conditions Beneficiary may impose. Beneficiary may commence, appear in, defend or prosecute any assigned claim or action, and may adjust, compromise, settle and collect all claims and awards assigned to Beneficiary; provided however, that in no event shall Beneficiary be responsible for any failure to collect any claim or award, regardless of the cause of the failure.

(b) (1) In the event of any loss sustained to the Subject Property by reason of fire or other hazard or casualty (collectively, a "Casualty") for which the estimated cost of repair, restoration, rebuilding or replacement (collectively, the "Repair Costs") does not exceed \$500,000, then proceeds of insurance equal to the Repair Costs shall be paid over to Trustor (provided that no Default has occurred and is continuing), on the condition that such insurance proceeds shall be used by Trustor solely for the purpose of repairing, restoring, rebuilding or replacing the affected portion of the Subject Property promptly, diligently, and in a good workmanlike manner, to the same quality and condition as existed prior to such Casualty; and (2) in the event of any Casualty for which the estimated Repair Costs exceed \$500,000, all proceeds of insurance shall be paid to Beneficiary and Beneficiary shall release so much of the insurance proceeds as may be required to pay for the Repair Costs in accordance with the provisions of subsection (c) below, on the conditions that (i) no Default has occurred and is continuing, and (ii) such insurance proceeds shall be used by Trustor solely for the purpose of repairing, restoring, rebuilding or replacing the Subject Property promptly, diligently, and in a good workmanlike manner, and to the same quality and condition as existed prior to such Casualty (and any excess insurance proceeds, provided no Default has occurred and is continuing, shall be released to Trustor upon satisfactory completion of all repair and restoration work as approved by Beneficiary in its sole discretion), and (iii) in the event the insurance proceeds are not sufficient to complete such repair, restoration, rebuilding and/or replacement, Trustor shall deposit with Beneficiary such additional funds which Beneficiary determines are needed to cover any such deficiency.

(c) With respect to the insurance proceeds paid to Beneficiary in accordance with Section 5.8(b)(2), Beneficiary will release so much of the insurance proceeds as may be required

to pay for the Repair Costs in accordance with the same terms and conditions for construction related soft cost and hard cost advances as set forth in the Construction Loan Agreement.

5.9 Maintenance and Preservation of Subject Property. Subject to the provisions of any Secured Obligation, Trustor covenants:

(a) to keep the Subject Property in good condition and repair, except during the construction of the Improvements in accordance with the Construction Loan Agreement;

(b) except with Beneficiary's prior written consent, or as otherwise permitted in the Construction Loan Agreement, not to remove or demolish the Subject Property, nor alter, restore or add to the Subject Property, nor initiate or acquiesce in any change in any zoning or other land classification which affects the Subject Property, except as permitted under the Construction Loan Agreement;

(c) to restore promptly and in good workmanlike manner any portion of the Subject Property which may be damaged or destroyed;

(d) to comply with and not to suffer violation of any or all of the following which govern acts or conditions on, or otherwise affect the Subject Property: (i) laws, ordinances, regulations, standards and judicial and administrative rules and orders; (ii) covenants, conditions, restrictions and equitable servitudes, whether public or private; and (iii) requirements of insurance companies and any bureau or agency which establishes standards of insurability;

(e) not to commit or permit waste of the Subject Property; and

(f) to do all other acts which from the character or use of the Subject Property may be reasonably necessary to maintain and preserve its value.

5.10 Intentionally Deleted.

5.11 Protection of Security. Trustor shall, at Trustor's sole expense: (a) protect, preserve and defend the Subject Property and Trustor's title and right to possession of the Subject Property against all adverse claims; and (b) protect, preserve and defend the security of this Deed of Trust and the rights and powers of Beneficiary and Trustee under this Deed of Trust against all adverse claims. Trustor shall give Beneficiary and Trustee prompt notice in writing of the assertion of any claim, the filing of any action or proceeding, or the occurrence of any damage, condemnation offer or other action relating to or affecting the Subject Property and, if Trustor's interest in the Subject Property is a leasehold interest or estate, of any notice of default or demand for performance under the lease or other agreement pursuant to which such leasehold interest or estate was created or exists.

5.12 Acceptance of Trust; Powers and Duties of Trustee. Trustee accepts this trust when this Deed of Trust is executed. From time to time, upon written request of Beneficiary and, to the extent required by applicable law presentation of this Deed of Trust for endorsement, and without affecting the personal liability of any person for payment of any indebtedness or performance of any of the Secured Obligations, Beneficiary, or Trustee at Beneficiary's direction, may, without obligation to do so or liability therefor and without notice: (a) reconvey

all or any part of the Subject Property from the lien of this Deed of Trust; (b) consent to the making of any map or plat of the Subject Property; and (c) join in any grant of easement or declaration of covenants and restrictions with respect to the Subject Property, or any extension agreement or any agreement subordinating the lien or charge of this Deed of Trust. Trustee or Beneficiary may from time to time apply to any court of competent jurisdiction for aid and direction in the execution of the trusts and the enforcement of its rights and remedies available under this Deed of Trust, and may obtain orders or decrees directing, confirming or approving acts in the execution of said trusts and the enforcement of said rights and remedies. Trustee has no obligation to notify any party of any pending sale or any action or proceeding (including, but not limited to, actions in which Trustor, Beneficiary or Trustee shall be a party) unless held or commenced and maintained by Trustee under this Deed of Trust. Trustee shall not be obligated to perform any act required of it under this Deed of Trust unless the performance of the act is requested in writing and Trustee is reasonably indemnified against all losses, costs, liabilities and expenses in connection therewith.

5.13 Compensation: Exculpation: Indemnification.

(a) Trustor shall pay all Trustee's fees and reimburse Trustee for all expenses in the administration of this trust, including reasonable attorneys' fees and fees for accountings and restatement quotes as may be required by Utah Code Annotated § 57-1-31.5. Trustor shall pay Beneficiary reasonable compensation for services rendered concerning this Deed of Trust, including without limitation, the providing of any statement of amounts owing under any Secured Obligation. Beneficiary shall not directly or indirectly be liable to Trustor or any other person as a consequence of: (i) the exercise of any rights, remedies or powers granted to Beneficiary in this Deed of Trust (ii) the failure or refusal of Beneficiary to perform or discharge any obligation or liability of Trustor under this Deed of Trust or any Lease or other agreement related to the Subject Property; or (iii) any loss sustained by Trustor or any third party as a result of Beneficiary's failure to lease the Subject Property after any Default or from any other act or omission of Beneficiary in managing the Subject Property after any Default unless such loss is caused by the willful misconduct or gross negligence of Beneficiary; and no such liability shall be asserted or enforced against or imposed upon Beneficiary, and all such liability is hereby expressly waived and released by Trustor.

(b) Trustor shall indemnify Trustee and Beneficiary against, and hold them harmless from, any and all losses, damages, liabilities, claims, causes of action, judgments, court costs, reasonable attorneys' fees and other legal expenses, costs of evidence of title, costs of evidence of value, and other expenses which either may suffer or incur. (i) by reason of this Deed of Trust; (ii) by reason of the execution of this trust or the performance of any act required or permitted hereunder or by law; (iii) as a result of any failure of Trustor to perform Trustor's obligations; or (iv) by reason of any alleged obligation or undertaking of Beneficiary to perform or discharge any of the representations, warranties, conditions, covenants or other obligations contained in any other document related to the Subject Property, including without limitation, the payment of any taxes, assessments, rents or other lease obligations, liens, encumbrances or other obligations of Trustor under this Deed of Trust, except to the extent caused by the gross negligence or willful misconduct of Beneficiary or Trustee. Trustor's duty to indemnify Trustee and Beneficiary shall survive the payment, discharge or cancellation of the Secured Obligations and the release or reconveyance, in whole or in part, of this Deed of Trust.

(c) Trustor shall pay all indebtedness arising under this Section immediately upon demand by Trustee or Beneficiary, together with interest thereon from the date that is five (5) days following the date of demand until paid in full at the highest rate per annum payable under any Secured Obligation. Beneficiary may, at its option, add any such indebtedness to any Secured Obligation.

**5.14 Substitution of Trustees.** From time to time, by a writing signed and acknowledged by Beneficiary and recorded in the Office of the Recorder of each County in which the Subject Property is situated, Beneficiary may appoint another trustee to act in the place and stead of Trustee or any successor. Such writing shall set forth the recordation date and any recording or other information required by law. The recordation of such instrument of substitution shall discharge Trustee herein named and shall appoint the new trustee as the trustee hereunder with the same effect as if originally named Trustee herein. A writing recorded pursuant to the provisions of this Section shall be conclusive proof of the proper substitution of such new Trustee.

**5.15 Due on Sale or Encumbrance.** Except as permitted by the provisions of any Secured Obligation, including the Construction Loan Agreement or applicable law, if the Subject Property or any portion thereof or any interest therein shall be sold, transferred (including without limitation, where applicable, through sale or transfer of a majority or controlling interest of the corporate stock, or any general partnership, limited liability company or other similar interests, of Trustor), mortgaged, assigned, encumbered or leased, whether voluntarily, involuntarily or by operation of law (each of which actions and events is called a "Transfer"), without Beneficiary's prior written consent, THEN Beneficiary may, at its sole option, declare all Secured Obligations immediately due and payable in full. Trustor shall notify Beneficiary in writing of each Transfer within ten (10) Business Days of the date thereof.

**5.16 Releases, Extensions, Modifications and Additional Security.** Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Subject Property or the Collateral or in any manner obligated under any Secured Obligation other than Trustor (each, an "Interested Party"), Beneficiary may, from time to time, release any Interested Party from liability for the payment or performance of any Secured Obligation, take any action or make any agreement extending the maturity or otherwise altering the terms or increasing the amount of any Secured Obligation, accept additional security, and enforce, waive, subordinate or release all or a portion of the Subject Property or the Collateral or any other security for any Secured Obligation. None of the foregoing actions shall release or reduce the personal liability of any Interested Party, nor release or impair the priority of the lien of, or the security interests created by, this Deed of Trust upon the Subject Property.

**5.17 Reconveyance.** Upon Beneficiary's written request, and solely to the extent required by applicable law upon surrender of this Deed of Trust and every note or other instrument setting forth any Secured Obligations to Trustee for cancellation, Trustee shall reconvey, without warranty, the Subject Property, or that portion thereof then covered hereby, from the lien of this Deed of Trust. The recitals of any matters or facts in any reconveyance executed hereunder shall be conclusive proof of the truthfulness thereof. To the extent permitted by law, the reconveyance may describe the grantee as "the person or persons legally entitled thereto." Neither Beneficiary nor Trustee shall have any duty to determine the rights of persons

claiming to be rightful grantees of any reconveyance. When the Subject Property has been fully reconveyed, the last such reconveyance shall operate as a reassignment of all future Rents to the person or persons legally entitled thereto. Upon Beneficiary's demand, Trustor shall pay all costs and expenses incurred by Beneficiary in connection with any reconveyance.

5.18 **Subrogation.** Beneficiary shall be subrogated to the lien of all encumbrances, whether or not released of record, paid in whole or In part by Beneficiary pursuant to this Deed of Trust or by the proceeds of any Secured Obligation.

## **ARTICLE VI. DEFAULT PROVISIONS**

6.1 **Default.** The occurrence of any of the following shall constitute a "Default" under this Deed of Trust: (a) Trustor shall fail to observe or perform any obligation or agreement contained herein and no other notice period is specified and such failure shall continue for a period of twenty (20) days after receipt of notice from Beneficiary; (b) any representation or warranty of Trustor herein shall prove to be incorrect, false or misleading in any material respect when made; or (c) any default, which is not waived, in the payment or performance of any obligation beyond any applicable notice and cure periods, or any defined event of default under any provisions of the Note, the Construction Loan Agreement, or any other contract, instrument or document executed in connection with, or with respect to, any Secured Obligation.

6.2 **Rights and Remedies.** Upon the occurrence of any Default, and at any time thereafter, Beneficiary and Trustee shall have all the following rights and remedies:

(a) With or without notice, to declare all Secured Obligations immediately due and payable in full.

(b) With or without notice, without releasing Trustor from any Secured Obligation and without becoming a mortgagee in possession, to cure any Default of Trustor and, in connection therewith: (i) to enter upon the Subject Property and to do such acts and things as Beneficiary or Trustee deems necessary or desirable to protect the security of this Deed of Trust, including without limitation, to control, lease, manage and operate the Subject Property or any part thereof, to appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust or the rights or powers of Beneficiary or Trustee hereunder; (ii) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the judgment of either Beneficiary or Trustee, is senior in priority to this Deed of Trust, the judgment of Beneficiary or Trustee being conclusive as between the parties hereto; (iii) to obtain, and to pay any premiums or charges with respect to, any insurance required to be carried hereunder; and (iv) to employ counsel, accountants, contractors and other appropriate persons to assist them.

(c) To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this Deed of Trust as a mortgage or to obtain specific enforcement of the covenants of Trustor under this Deed of Trust, and Trustor agrees that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy.



(d) To apply to a court of competent jurisdiction for and obtain appointment of a receiver of the Subject Property and the Collateral as a matter of strict right and without regard to: (i) the adequacy of the security for the repayment of the Secured Obligations; (ii) the existence of a declaration that the Secured Obligations are Immediately due and payable; or (iii) the filing of a notice of default and Trustor consents to such appointment

(e) To take and possess all documents, books, records, papers and accounts of Trustor or the then owner of the Subject Property; to make, enforce or modify Leases of, and other agreements with respect to, the Subject Property upon such terms and conditions as Beneficiary deems proper; and to make repairs, alterations and improvements to the Subject Property deemed necessary, in Trustee's or Beneficiary's judgment, to protect or enhance the security hereof, and to continue and complete construction of the improvements of the Subject Property as necessary in Beneficiary's sole judgment.

(f) To execute or cause Trustee to execute a written notice of such Default and of its election to cause the Subject Property to be sold to satisfy the Secured Obligations. Trustee shall give and record such notice as the law then requires as a condition precedent to a trustee's sale. When the minimum period of time required by law after such notice has elapsed, Trustee, without notice to or demand upon Trustor, except as otherwise required by law, shall sell the Subject Property at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as directed by Beneficiary in its sole discretion, at public auction to the highest bidder for cash, in lawful money of the United States, payable at the time of sale. Except as required by law, neither Trustor nor any other person or entity shall have the right to direct the order in which the Subject Property is sold. Subject to requirements and limits imposed by law, Trustee may postpone any sale of the Subject Property by public announcement at such time and place of sale; provided, if the sale is postponed for longer than 45 days beyond the date designated in the notice sale, notice of the time, date, and place of sale shall be given in the same manner as the original notice of sale as required by Utah Code Annotated § 57-1-27. Trustee shall deliver to the purchaser at such sale a deed conveying the Subject Property or portion thereof so sold, but without any covenant or warranty, express or implied. The recitals in said deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustee, Trustor or Beneficiary, may purchase at such sale. Trustor agrees to pay any deficiency arising from any cause, to which Beneficiary may be entitled after applications of the proceeds of any sale, and Beneficiary may commence suit to collect such deficiency in accordance with Utah Annotated Code § 57-1-32 or other applicable law.

(g) To resort to and realize upon the security hereunder and any other security now or later held by Beneficiary to secure the Secured Obligations concurrently or successively and in one or several consolidated or independent judicial actions or lawfully taken non-judicial proceedings, or both, and to apply the proceeds received in accordance with the Section hereof entitled Application of Foreclosure Sale Proceeds, all in such order and manner as Beneficiary shall determine in its sole discretion.

(h) Upon sale of the Subject Property at any judicial or non-judicial foreclosure, Beneficiary may credit bid (as determined by Beneficiary in its sole discretion) all or any portion of the Secured Obligations. In determining such credit bid, Beneficiary may, but is not obligated

to, take into account all or any of the following: (i) appraisals of the Subject Property as such appraisals may be discounted or adjusted by Beneficiary in its sole underwriting discretion; (ii) expenses and costs incurred by Beneficiary with respect to the Subject Property prior to foreclosure; (iii) expenses and costs which Beneficiary anticipates will be incurred with respect to the Subject Property after foreclosure, but prior to resale, including without limitation, costs of structural reports and other due diligence, costs to carry the Subject Property prior to resale, costs of resale (e.g., commissions, attorneys' fees, and taxes), Hazardous Materials clean-up and monitoring, deferred necessary maintenance, repair, refurbishment and retrofit, and costs of defending or settling litigation affecting the Subject Property; (iv) trends in real property values generally and with respect to properties similar to the Subject Property; (v) anticipated discounts upon resale of the Subject Property as a distressed or foreclosed property; (vi) the existence of additional collateral, if any, for the Secured Obligations, and (vii) such other factors or matters that are commercially reasonable. Trustor acknowledges and agrees that (A) Beneficiary is not required to use any or all of the foregoing factors to determine the amount of its credit bid; (B) this Section does not impose upon Beneficiary any additional obligations that are not imposed by law at the time the credit bid is made; (C) the amount of Beneficiary's credit bid need not have any relation to any loan-to-value ratios specified in any agreement between Trustor and Beneficiary or previously discussed by Trustor and Beneficiary; and (D) Beneficiary's credit bid may be, at Beneficiary's sole discretion, higher or lower than any appraised value of the Subject Property.

6.3 Application of Foreclosure Sale Proceeds. After deducting all costs, fees and expenses of Trustee, and of this trust, including costs of evidence of title and attorneys' fees in connection with a sale, all proceeds of any foreclosure sale shall be applied first, to payment of all Secured Obligations (including without limitation, all sums expended by Beneficiary under the terms hereof and not then repaid, with accrued interest at the highest rate per annum payable under any Secured Obligation), in such order and amounts as Beneficiary in its sole discretion shall determine; and the remainder, if any, to the person or persons legally entitled thereto.

6.4 Application of Other Sums. All Rents or other sums received by Beneficiary or any agent or receiver hereunder, less all costs and expenses incurred by Beneficiary or such agent or receiver, including reasonable attorneys' fees, shall be applied to payment of the Secured Obligations in such order as Beneficiary shall determine in its sole discretion; provided however, that Beneficiary shall have no liability for funds not actually received by Beneficiary.

6.5 No Cure or Waiver. Neither Beneficiary's, Trustee's or any receiver's entry upon and taking possession of all or any part of the Subject Property and Collateral, nor any collection of Rents, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise of, or failure to exercise, any other right or remedy by Beneficiary, Trustee or any receiver shall impair the status of the security of this Deed of Trust, or cure or waive any breach, Default or notice of default under this Deed of Trust, or nullify the effect of any notice of default or sale (unless all Secured Obligations and any other sums then due hereunder have been paid in full and Trustor has cured all other Defaults), or prejudice Beneficiary or Trustee in the exercise of any right or remedy, or be construed as an affirmation by Beneficiary of any tenancy, lease or option of the Subject Property or a subordination of the lien of this Deed of Trust.

6.6 Costs, Expenses and Attorneys' Fees. Trustor agrees to pay to Beneficiary immediately upon demand the full amount of all payments, advances, charges, costs and out of pocket expenses, including court costs and reasonable third-party attorneys' fees, reasonably expended or incurred by Trustee or Beneficiary pursuant to this Article V, whether incurred at the trial or appellate level, in an arbitration proceeding or otherwise, and including any of the foregoing incurred in connection with any bankruptcy proceeding (including without limitation, any adversary proceeding, contested matter or motion brought by Beneficiary or any other person) relating to Trustor or in any way affecting any of the Subject Property and/or the Collateral or Beneficiary's ability to exercise any of its rights or remedies with respect thereto. All of the foregoing shall be paid by Trustor with interest from the date that is five (5) days following the date of demand until paid in full at the highest rate per annum payable under any Secured Obligation.

6.7 Power to File Notices and Cure Defaults. Trustor hereby irrevocably appoints Beneficiary and its successors and assigns as Trustor's true attorney-in-fact to perform any of the following powers, which agency is coupled with an interest (a) to execute and/or record any notices of completion, cessation of labor, or any other notices that Beneficiary deems appropriate to protect Beneficiary's interest in its commercially reasonable discretion; (b) upon the issuance of a deed pursuant to the foreclosure of the lien of this Security Instrument or the delivery of a deed in lieu of foreclosure, to execute all instruments of assignment or further assurance with respect to the Subject Property and Collateral, Leases and Rents in favor of the grantee of any such deed, as may be necessary or desirable for such purpose; and (c) to prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve Beneficiary's security interests and rights in or to any of the Subject Property and Collateral; and (d) upon the occurrence of a Default, to perform any obligation of Trustor hereunder; provided, however, that Beneficiary, as such attorney-in-fact, shall only be accountable for such funds as are actually received by Beneficiary, and Beneficiary shall not be liable to Trustor or any other person or entity for any failure to act under this Section.

6.8 Remedies Cumulative; No Waiver. All rights, powers and remedies of Beneficiary and Trustee hereunder are cumulative and are in addition to all rights, powers and remedies provided by law or in any other agreements between Trustor and Beneficiary. No delay, failure or discontinuance of Beneficiary in exercising any right, power or remedy hereunder shall affect or operate as a waiver of such right, power or remedy; nor shall any single or partial exercise of any such right, power or remedy preclude, waive or otherwise affect any other or further exercise thereof or the exercise of any other right, power or remedy. Beneficiary may enforce any one or more remedies or rights hereunder successively or concurrently. By accepting payment or performance of any of the Secured Obligations after its due date, Beneficiary shall not be deemed to have waived the agreement contained herein that time is of the essence, nor shall Beneficiary be deemed to have waived either its right to require prompt payment or performance when due or the remainder of the Secured Obligations or its right to consider the failure to so pay or perform, a Default.

6.9 Compliance with Applicable Law. Trustor, Trustee and Beneficiary hereby agree and acknowledge that, notwithstanding anything in this Article VI to the contrary, the exercise of remedies by Trustee or Beneficiary pursuant to this Article VI upon a Default shall be subject

in all respects to the terms and provisions of all applicable laws of the jurisdiction in which the Subject Property is located and shall be exercised in accordance therewith and, to the extent that any remedy provided herein is not in compliance with such applicable laws, the terms and provisions of such applicable laws shall govern and such exercise shall be made in accordance therewith.

## **ARTICLE VII. MISCELLANEOUS PROVISIONS**

7.1 **No Merger.** No merger shall occur as a result of Beneficiary's acquiring any other estate in, or any other lien on, the Subject Property unless Beneficiary specifically consents to a merger in writing.

7.2 **Execution of Documents; Incorporation of Exhibits.** Trustor agrees, upon demand by Beneficiary or Trustee, to execute any and all documents and instruments reasonably required to effectuate the provisions hereof. For all intents and purposes, all exhibits, schedules or other items attached hereto are deemed incorporated into this Deed of Trust by such attachment.

7.3 **Right of Inspection.** Beneficiary or its agents or employees may enter onto the Subject Property at any reasonable time upon forty-eight (48) hours prior written notice to Trustor for the purpose of inspecting the Subject Property and ascertaining Trustor's compliance with the terms hereof.

7.4 **Notices.** All notices, requests and demands which Trustor or Beneficiary is required or may desire to give to the other party must be in writing, delivered to Beneficiary at the following addresses:

WELLS FARGO BANK, NATIONAL ASSOCIATION  
MAC J9226-154  
125 High Street, 15th Floor  
Boston, MA 02110-2704

WELLS FARGO BANK, NATIONAL ASSOCIATION  
MAC R4057-01R  
7711 Plantation Road  
Roanoke, Virginia 24019  
Attn: Loan Documentation

and to Trustor at its address set forth at the signature lines below, or at such other address as either party shall designate by written notice to the other party in accordance with the provisions hereof.

Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days' notice to the other party in the manner set forth hereinabove. Trustor shall forward to Beneficiary, without delay, any notices, letters or other communications delivered to the Property or to Trustor naming Beneficiary or the "Construction Lender" or any similar designation as addressee, or which could reasonably be deemed to affect the construction of the improvements or the ability of Trustor to perform its obligations to Beneficiary under the Loan Documents.

7.5 Successors; Assignment. This Deed of Trust shall be binding upon and inure to the benefit of the heirs, executors, administrators, legal representatives, successors and assigns of the parties hereto; provided however, that this Section does not waive the provisions of the Section hereof entitled Due on Sale or Encumbrance. Beneficiary reserves the right to sell, assign, transfer, negotiate or grant participations in all or any part of, or any interest in, Beneficiary's rights and benefits under the Note, any and all other Secured Obligations and this Deed of Trust In connection therewith, Beneficiary may disclose all documents and information which Beneficiary now has or hereafter acquires relating to the Subject Property and/or the Collateral, all or any of the Secured Obligations and/or Trustor and, as applicable, any partners, joint venturers or members of Trustor, whether furnished by any Trustor or otherwise.

7.6 Rules of Construction. (a) When appropriate based on the identity of the parties or other circumstances, the masculine gender includes the feminine or neuter or both, and the singular number includes the plural; (b) the term "Subject Property" means all and any part of or interest in the Subject Property; (c) all Section headings herein are for convenience of reference only, are not a part of this Deed of Trust, and shall be disregarded in the interpretation of any portion of this Deed of Trust; (d) if more than one person or entity has executed this Deed of Trust as "Trustor," the obligations of all such Trustors hereunder shall be joint and several; (e) all terms of Exhibit A, and each other exhibit and/or rider attached hereto and recorded herewith, are hereby incorporated into this Deed of Trust by this reference; and (f) any reference to a statute, regulation or other similar provision shall refer to such statute, regulation or other such provision as it may be amended, modified, re-enacted or replaced.

7.7 Severability of Provisions. If any provision of this Deed of Trust shall be held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or Invalidity without invalidating the remainder of such provision or any remaining provisions of this Deed of Trust.

7.8 Recourse to Separate Property. Any married person who executes this Deed of Trust as a Trustor and who is obligated under any Secured Obligation agrees that any money Judgment which Beneficiary or Trustee obtains pursuant to the terms of this Deed of Trust or any other obligation of that married person secured by this Deed of Trust may be collected by execution upon that person's separate property, and any community property of which that person is a manager.

7.9 Reserved.

7.10 Governing Law. With respect to matters relating to the creation, perfection and procedures relating to the enforcement of the liens created pursuant to this Deed of Trust, this Deed of Trust shall be governed by, and construed in accordance with, the laws of Utah, it being understood that, except as expressly set forth above in this paragraph and to the fullest extent permitted by the laws of Utah, the laws of Massachusetts shall govern any and all matters, claims, controversies or disputes arising under or related to this Deed of Trust, the relationship of the parties, and/or the interpretation and enforcement of the rights and duties of the parties relating to this Deed of Trust, the Loan Agreement and the other Loan Documents and all of the indebtedness or obligations arising thereunder or hereunder. Trustor hereby consents to the jurisdiction of any federal or state court within Massachusetts or Utah having proper venue and

also consents to service of process by any means authorized by Massachusetts, Utah, or federal law.

7.11 Arbitration.

(a) **Arbitration.** The parties hereto agree, upon demand by any party, to submit to binding arbitration all claims, disputes and controversies between or among them (and their respective employees, officers, directors, attorneys, and other agents), whether in tort, contract or otherwise in any way arising out of or relating to this Deed of Trust and its negotiation, execution, collateralization, administration, repayment, modification, extension, substitution, formation, inducement, enforcement, default or termination. In the event of a court ordered arbitration, the party requesting arbitration shall be responsible for timely filing the demand for arbitration and paying the appropriate filing fee within 30 days of the abatement order or the time specified by the court. Failure to timely file the demand for arbitration as ordered by the court will result in that party's right to demand arbitration being automatically terminated.

(b) **Governing Rules.** Any arbitration proceeding will (i) proceed in a location in Massachusetts selected by the American Arbitration Association ("AAA"); (ii) be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any conflicting choice of law provision in any of the documents between the parties; and (iii) be conducted by the AAA, or such other administrator as the parties shall mutually agree upon, in accordance with the AAA's commercial dispute resolution procedures, unless the claim or counterclaim is at least \$1,000,000.00 exclusive of claimed interest, arbitration fees and costs in which case the arbitration shall be conducted in accordance with the AAA's optional procedures for large, complex commercial disputes (the commercial dispute resolution procedures or the optional procedures for large, complex commercial disputes to be referred to herein, as applicable, as the "Rules"). If there is any inconsistency between the terms hereof and the Rules, the terms and procedures set forth herein shall control. Any party who fails or refuses to submit to arbitration following a demand by any other party shall bear all costs and expenses incurred by such other party in compelling arbitration of any dispute. Nothing contained herein shall be deemed to be a waiver by any party that is a bank of the protections afforded to it under 12 U.S.C. §91 or any similar applicable state law.

(c) **No Waiver of Provisional Remedies, Self-Help and Foreclosure.** The arbitration requirement does not limit the right of any party to (i) foreclose against real or personal property collateral; (ii) exercise self-help remedies relating to collateral or proceeds of collateral such as setoff or repossession; or (iii) obtain provisional or ancillary remedies such as replevin, injunctive relief, attachment or the appointment of a receiver, before during or after the pendency of any arbitration proceeding. This exclusion does not constitute a waiver of the right or obligation of any party to submit any dispute to arbitration or reference hereunder, including those arising from the exercise of the actions detailed in sections (i), (ii) and (iii) of this paragraph.

(d) **Arbitrator Qualifications and Powers.** Any arbitration proceeding in which the amount in controversy is \$5,000,000.00 or less will be decided by a single arbitrator selected according to the Rules, and who shall not render an award of greater than \$5,000,000.00. Any dispute in which the amount in controversy exceeds \$5,000,000.00 shall be decided by majority

vote of a panel of three arbitrators; provided however, that all three arbitrators must actively participate in all hearings and deliberations. The arbitrator will be a neutral attorney licensed in the State of Massachusetts or a neutral retired judge of the state or federal judiciary of Massachusetts, in either case with a minimum of ten years experience in the substantive law applicable to the subject matter of the dispute to be arbitrated. The arbitrator will determine whether or not an issue is arbitratable and will give effect to the statutes of limitation in determining any claim. In any arbitration proceeding the arbitrator will decide (by documents only or with a hearing at the arbitrator's discretion) any pre-hearing motions which are similar to motions to dismiss for failure to state a claim or motions for summary adjudication. The arbitrator shall resolve all disputes in accordance with the substantive law of Massachusetts (except to the extent, as stated above, the substantive law of Utah applies) and may grant any remedy or relief that a court of such state could order or grant within the scope hereof and such ancillary relief as is necessary to make effective any award. The arbitrator shall also have the power to award recovery of all costs and fees, to impose sanctions and to take such other action as the arbitrator deems necessary to the same extent a judge could pursuant to the Federal Rules of Civil Procedure, the Massachusetts Rules of Civil Procedure or other applicable law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The institution and maintenance of an action for judicial relief or pursuit of a provisional or ancillary remedy shall not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration if any other party contests such action for judicial relief.

(e) **Discovery.** In any arbitration proceeding, discovery will be permitted in accordance with the Rules. All discovery shall be expressly limited to matters directly relevant to the dispute being arbitrated and must be completed no later than 20 days before the hearing date. Any requests for an extension of the discovery periods, or any discovery disputes, will be subject to final determination by the arbitrator upon a showing that the request for discovery is essential for the party's presentation and that no alternative means for obtaining information is available.

(f) **Class Proceedings and Consolidations.** No party hereto shall be entitled to join or consolidate disputes by or against others in any arbitration, except parties who have executed this Deed of Trust or any other contract, instrument or document relating to any Secured Obligation, or to include in any arbitration any dispute as a representative or member of a class, or to act in any arbitration in the interest of the general public or in a private attorney general capacity.

(g) **Payment of Arbitration Costs and Fees.** The arbitrator shall award all costs and expenses of the arbitration proceeding.

(h) **Real Property; Judicial Reference.** Notwithstanding anything herein to the contrary, no dispute shall be submitted to arbitration unless: (i) Beneficiary specifically elects in writing to proceed with the arbitration; or (ii) all parties to the arbitration waive any rights or benefits that might accrue to them by virtue of the single action rule statute of Utah, thereby agreeing that all Secured Obligations, and all mortgages, liens and security interests securing any of the Secured Obligations, shall remain fully valid and enforceable. If any such dispute is not submitted to arbitration, the dispute shall be referred to a master in accordance with Utah Rule of Civil Procedure 53, and this general reference agreement is intended to be specifically

enforceable. A master with the qualifications required herein for arbitrators shall be selected pursuant to the AAA's selection procedures. Judgment upon the decision rendered by a master shall be entered in the court in which such proceeding was commenced in accordance with Utah Rule of Civil Procedure 53(e).

(i) **Miscellaneous.** To the maximum extent practicable, the AAA, the arbitrators and the parties shall take all action required to conclude any arbitration proceeding within 180 days of the filing of the dispute with the AAA. No arbitrator or other party to an arbitration proceeding may disclose the existence, content or results thereof, except for disclosures of information by a party required in the ordinary course of its business or by applicable law or regulation. If more than one agreement for arbitration by or between the parties potentially applies to a dispute, the arbitration provision most directly related to the documents between the parties or the subject matter of the dispute shall control. This arbitration provision shall survive termination, amendment or expiration of any of the documents or any relationship between the parties.

(j) **Small Claims Court.** Notwithstanding anything herein to the contrary, each party retains the right to pursue in Small Claims Court any dispute within that court's jurisdiction. Further, this arbitration provision shall apply only to disputes in which either party seeks to recover an amount of money (excluding attorneys' fees and costs) that exceeds the Jurisdictional limit of the Small Claims Court.




IN WITNESS WHEREOF, Trustor has executed this Deed of Trust as of the date first set forth above.

Trustor(s)

Address(es)

**SMP 1791 LLC,**  
a Delaware limited liability company

1796 Prospector Avenue  
Park City, UT 84060

By:   
Edward B.R. Lewis,  
Manager

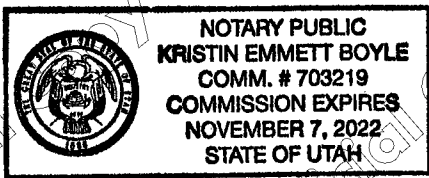
State of ~~MA~~ Utah )  
County of ~~Suffolk~~ Summit ) SS.

On June 27, 2019, before me, the undersigned Notary Public, personally appeared Edward B.R. Lewis, Manager of SMP 1791 LLC, a Delaware limited liability company, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(les) and that his/her/their signature(s) on the instrument the person(s) or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

  
Notary Public

My Commission Expires: November 7, 2022



**EXHIBIT A**  
**(Description of Property)**

Exhibit A to Construction Deed of Trust, Assignment of Rents and Leases, Security Agreement, and Fixture Filing executed by SMP 1791 LLC, a Delaware limited liability company, as Trustor, to WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION, as Trustee, for the benefit of WELLS FARGO BANK, NATIONAL ASSOCIATION, as Beneficiary.

The land in the County of Summit, State of Utah described as:

All of Lot 48A, PROSPECTOR SQUARE SUPPLEMENTAL AMENDMENT TO LOT G SUBDIVISION, according to the official plat thereof recorded May 12, 2010 as Entry No. 898070, on file and of record in the office of the Summit County Recorder, Summit County, Utah. Parcel No. PSA-48A-SP-AM.

All of Lot 48F, PROSPECTOR SQUARE SECOND SUPPLEMENTAL AMENDMENT TO LOT G AMENDING LOT 48B & LOT 48C, according to the official plat thereof recorded January 23, 2018 as Entry No. 1085418, on file and of record in the office of the Summit County Recorder, Summit County, Utah. Parcel No. PSA-48F-SP-2AM

TOGETHER WITH the easements, rights and benefits contained in that certain Amended and Restated Declaration of Covenants, Conditions and Restrictions of Prospector Square Subdivision, recorded as Entry No. 458513 in Book 979, Page 311, in the office of the Summit County Recorder, Summit County, Utah.

TOGETHER WITH the easements, rights and benefits contained in that certain Property Exchange and Easement Agreement, recorded as Entry No. 899311 in Book 2033, Page 806, in the office of the Summit County Recorder, Summit County, Utah.

TOGETHER WITH the easements, rights and benefits contained in that certain Encroachment Agreement, recorded as Entry No. 1095464 in Book 2471, Page 1877, as amended by that certain First Amendment to Encroachment Agreement, recorded as Entry No. 1103155 in Book 2490, Page 455, in the office of the Summit County Recorder, Summit County, Utah.

TOGETHER WITH the easements, rights and benefits contained in that certain Easement Agreement, recorded May 30, 2019 as Entry No. 1111714 in Book 2510, Page 1721, in the office of the Summit County Recorder, Summit County, Utah.

TOGETHER WITH the easements for the benefit of Lots 48A and 48F (formerly Lots 48B and 48C), as per the plat notes shown on the plats recorded as Entry No. 898070 and Entry No. 1085418.

**EXHIBIT B  
(Permitted Encumbrances)**

**Exhibit B to Construction Deed of Trust, Assignment of Rents and Leases, Security Agreement, and Fixture Filing executed by SMP 1791 LLC, a Delaware limited liability company, as Trustor, to WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION, as Trustee, for the benefit of WELLS FARGO BANK, NATIONAL ASSOCIATION, as Beneficiary.**

**Those matters set forth in items 5 through 16 and item 18 of Schedule B, Part I of the Lender's Policy of Title Insurance issued by First American Title Insurance Company to the Beneficiary with respect to this Deed of Trust.**