

December 15, 2008

Michael R. Thornton  
D 919.743.7305  
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**VIA FEDERAL EXPRESS**

Ralph D. Karpinos, Esq.  
Town Attorney  
Town Hall  
405 Martin Luther King Jr. Boulevard  
2nd Floor  
Chapel Hill, North Carolina 27514

Re: ***140 West Franklin Street***

Dear Mr. Karpinos:

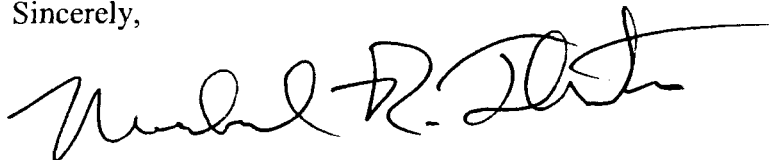
In accordance with the instructions of my colleague Glen Hardymon, I have enclosed two (2) copies of the Third Amendment To and Assignment of General Development Agreement with regards to the above-referenced matter for countersignature by the Town Manager. Please date the documents upon execution, send a copy to my office and send one (1) original to the developer's attorney at the following address:

Holly H. Alderman, Esq.  
Schell Bray Aycock Abel & Livingston PLLC  
100 Europa Drive  
Suite 360  
Chapel Hill, North Carolina 27517

If you have any questions, please do not hesitate to contact me.

Thank you for your assistance in this matter.

Sincerely,



Michael R. Thornton

Enclosures

cc: Glen Hardymon (w/enclosure)

REC'D  
12-16-08

THIRD AMENDMENT TO AND ASSIGNMENT OF GENERAL DEVELOPMENT  
AGREEMENT

THIS THIRD AMENDMENT TO AND ASSIGNMENT OF GENERAL DEVELOPMENT AGREEMENT (this "Third Amendment") is entered into this the \_\_\_\_\_ day of December, 2008, by and between The Town of Chapel Hill, a municipal corporation organized and existing under the laws of North Carolina (hereinafter referred to as "Town"); Ram Development Company, a Florida corporation (hereinafter referred to as the "Ram") and 140 West Franklin LLC, a North Carolina limited liability company (hereinafter referred to as "140 West Franklin").

WITNESSETH:

WHEREAS, the Town and the Ram entered into that certain General Development Agreement dated February 12, 2007, as amended pursuant to that certain First Amendment to General Development Agreement dated April 3, 2007, and as further amended by that certain Second Amendment to General Development Agreement dated September 6, 2007 (collectively, the "Development Agreement") regarding the proposed development of a parking garage, public space and mixed-use retail and residential building on property owned by the Town, commonly known as Town Public Parking Lot 5;

WHEREAS, capitalized terms used in this Third Amendment not expressly defined herein shall have the meaning ascribed to such terms in the Development Agreement;

WHEREAS, Ram desires to assign its rights under the Development Agreement to 140 West Franklin;

WHEREAS, the Town and 140 West Franklin desire to amend the terms and provisions of the Ground Lease attached as **Exhibit D** to the Development Agreement as more particularly set forth herein.

NOW, THEREFORE, in consideration of their mutual promises, covenants and agreements contained in this Third Amendment, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

- A. Ram hereby assigns, transfers, and conveys to 140 West Franklin all of Ram's right, title and interest in and to the Development Agreement, and 140 West Franklin hereby assumes all of Ram's duties and obligations under the Development Agreement arising after the date hereof.
- B. Ram hereby represents and warrants to 140 West Franklin that: (i) Ram has the full and lawful authority to execute this Third Amendment; and (ii) the Ram has not made any previous assignments of its interest in the Development Agreement.

- C. In consideration for Ram's agreement to remain primarily liable for Developer's obligations under the Development Agreement, notwithstanding the assignment contained in this Third Amendment, the Town hereby acknowledges and consents to Ram's assignment of its interest in the Development Agreement to 140 West Franklin. Ram hereby agrees and acknowledges that it remains primarily liable for Developer's obligations under the Development Agreement.
- D. The Ground Lease attached as Exhibit D to the Development Agreement is hereby deleted in its entirety and the Ground Lease attached hereto as Exhibit D and incorporated herein shall be inserted in lieu thereof.
- E. Except as amended hereby all the terms and provisions of the Development Agreement are hereby reaffirmed and remain in full force and effect. In the event that there is a conflict between the terms and provisions of the Development Agreement and the terms and provisions of this Third Amendment the terms and provisions of this Third Amendment shall control.

IN WITNESS WHEREOF, the parties have executed this Third Amendment as of the date and year first set forth above.

**TOWN OF CHAPEL HILL**

[TOWN SEAL]

ATTEST

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Town Manager

\_\_\_\_\_  
Town Clerk

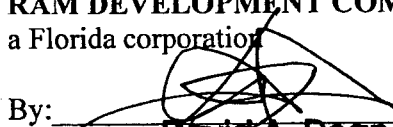
This instrument has been pre-audited in the manner required by the "Local Government Budget and Fiscal Control Act."

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Finance Director

[Signatures continue on following page]

IN WITNESS WHEREOF, the parties have executed this Third Amendment as of the date and year first set forth above.

**RAM DEVELOPMENT COMPANY,**  
a Florida corporation

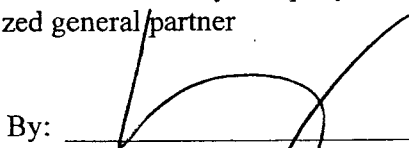
By:   
Name: David A. Dean  
Title: Vice President

**140 WEST FRANKLIN LLC,**  
a North Carolina limited liability company

By: Ram Realty II NR, LLC, a Delaware limited liability company, its sole member

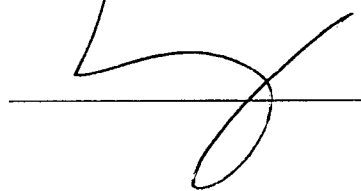
By: Ram Realty Partners II, LP, a Delaware limited partnership, its sole member

By: Ram Realty Associates II, LLC, a Delaware limited liability company, its authorized general partner

By:   
Keith L. Cummings,  
its authorized manager

The undersigned, being Guarantor under that certain Guaranty Agreement dated February 12, 2007 ("Guaranty"), which was delivered in connection with the Development Agreement, hereby consents to this Third Amendment and all amendments prior thereto, and acknowledges his continuing liability under the Guaranty, notwithstanding the assignment contained herein.

KEITH L. ("CASEY") CUMMINGS

  
\_\_\_\_\_

ATTACH REVISED GROUND LEASE AS EXHIBIT D

## EXHIBIT D

### GROUND LEASE

This **GROUND LEASE** ("Lease") is made and entered into as of \_\_\_\_\_, 200\_ (the "Effective Date"), by and between **THE TOWN OF CHAPEL HILL**, a North Carolina municipal corporation ("Landlord"), and **140 WEST FRANKLIN LLC**, a North Carolina limited liability company (together with its permitted successors and assigns, "Tenant"), with respect to the following facts, and is as follows:

### RECITALS

A. Landlord is the owner of that certain land condominium unit defined as the Building Unit in the Development Agreement (as hereinafter defined) and established pursuant to that certain Declaration of Condominium for the Lot 5 Land Condominium recorded in Book \_\_\_, Page \_\_\_ of the Orange County Register of Deeds Office (the "Land Condominium Declaration"), which Building Unit is located in The Town of Chapel Hill, Orange County, North Carolina, and is more particularly described in Exhibit A attached hereto and incorporated herein (together with all appurtenant easements thereto, collectively referred to as the "Leased Premises").

B. Landlord has entered into that certain General Development Agreement with Tenant dated February 12, 2007, as amended pursuant to that certain First Amendment to General Development Agreement dated April 3, 2007, as further amended by that certain Second Amendment to General Development Agreement dated September 6, 2007, and as further amended by that certain Third Amendment to and Assignment of General Development Agreement dated December \_\_\_, 2008 governing the development of the Leased Premises and adjoining land condominium units owned by Landlord (the "Development Agreement").

C. Landlord desires to lease the Leased Premises to Tenant and, subject to the terms hereof, transfer the "Special Declarant Rights" (as hereinafter defined) with respect to the Leased Premises for the limited purpose of permitting Tenant to construct on the Leased Premises the Building (as such term is hereinafter defined) and other improvements as may be permitted under the terms of this Lease and thereafter create one or more additional condominium regimes (referred to in the Development Agreement as the "Lot 5 Condominium" but which Tenant intends to name as the "140 West Franklin Condominium") within the Leased Premises (together with the Leased Premises, the "Property").

D. All terms with initial capitalization not otherwise defined herein shall have the same meanings ascribed to such terms in the Development Agreement. All references herein to the "140 West Franklin Condominium Association, Inc.," the "140 West Franklin Condominium Declaration," and the "140 West Franklin Condominium Unit owners" shall have the same meaning as is ascribed to the terms "Lot 5 Condominium Association(s)," the "Lot 5 Condominium Declaration" and "Lot 5 Condominium Unit owners" as set forth in the Development Agreement.

**1. BASIC TERMS; DEFINITIONS.**

**1.1** This **Section 1.1** contains the Basic Terms used in this Lease between Landlord and Tenant. Other Sections of the Lease referred to in this **Section 1.1** explain and define the Basic Terms and are to be read in conjunction with the Basic Terms.

**1.1.1 Address of Tenant:** 140 West Franklin LLC  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Keith L. "Casey" Cummings, President  
Fax: (561) 630-6717

With a copy to: Ram Development Company  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Karen Geller, General Counsel  
Fax: (461) 630-6717

And to: 140 West Franklin LLC  
126 West Franklin Street  
Chapel Hill, North Carolina 27514  
Attn: Jon Keener, \_\_\_\_\_  
Fax: \_\_\_\_\_

And to: Schell Bray Aycock Abel & Livingston PLLC  
100 Europa Drive, Suite 360  
Chapel Hill, NC 27517  
Attn: Holly H. Alderman, Esq.  
Fax: (919) 882-9495

**1.1.2 Address of Landlord:**

405 Martin Luther King Jr., Blvd.  
Chapel Hill, NC 27514  
Attn: Ralph D. Karpinos, Esq.  
Fax: (919) 969-2063

With a copy to: K&L Gates, LLP  
4350 Lassiter at North Hills Avenue  
Suite 300  
Raleigh, NC 27609  
Attn: Michael R. Thornton  
Fax: (919) 516-2005

And to:

K&L Gates, LLP  
The Hearst Tower  
214 N. Tryon Street, 47<sup>th</sup> Floor  
Charlotte, NC 28202  
Attn: Real Estate Department

**1.1.3 Lease Term:** ninety-nine (99) years beginning on the Commencement Date (See **Section 2.2**) or such other date as is specified in this Lease, and ending on the Expiration Date (See **Section 2.2**) ("Lease Term").

**1.1.4 Permitted Uses:** See **Section 5**

**1.1.5 Rent and Other Charges Payable by Tenant:** One Dollar (\$1.00) per year ("Base Rent").

**1.2** This **Section 1.2** contains the Definitions used in this Lease between Landlord and Tenant not otherwise defined in the Development Agreement named below.

**1.2.1** "Additional Rent" shall have the meaning set forth in **Section 4.1** of this Lease.

**1.2.2** "Application or Filings" shall have the meaning set forth in **Section 5.11** of this Lease.

**1.2.3** "Base Rent" shall have the meaning set forth in **Section 1.1.5** of this Lease.

**1.2.4** "Building" refers to the approximately 25,500 net leasable square feet of retail/commercial space on the ground level (more or less) and approximately 140 "for sale" residential units (more or less) above the same, together with ancillary appurtenances to the Building such as loading docks and dumpster pads, and open space consisting of a "courtyard" and an "arcade" to facilitate access and to provide outdoor dining and shopping areas to be developed by the Tenant on the Leased Premises pursuant to the Development Agreement.

**1.2.5** "Casualty" shall have the meaning set forth in **Section 7.1** of this Lease.

**1.2.6** "Commencement Date" shall have the meaning set forth in **Section 2.2** of this Lease.

**1.2.7** "Condemnation" shall have the meaning set forth in **Section 8** of this Lease.



1.2.8 "Default" shall have the meaning set forth in **Section 10.1** of this Lease.

1.2.9 "Development Agreement" See Recital B.

1.2.10 "Effective Date" shall mean the date of this Lease as set forth in the initial paragraph of this Lease.

1.2.11 "Expiration Date" shall mean the date that is ninety-nine (99) years after the Commencement Date, provided that the option to purchase provided in **Section 13.9** of this Lease is not exercised or this Lease is not otherwise canceled, extended, or terminated earlier in accordance with its provisions.

1.2.12 "FF&E" shall have the meaning set forth in **Section 13.16** of this Lease.

1.2.13 "Hazardous Material" shall have the meaning set forth in **Section 5.7** of this Lease.

1.2.14 "Improvements" shall mean the Building and any other related structures and improvements expressly permitted to be located on the Leased Premises pursuant to the terms of this Lease.

1.2.15 "Landlord" shall mean The Town of Chapel Hill, North Carolina, a North Carolina municipal corporation.

1.2.16 "Lease-Related Documents" shall have the meaning set forth in **Section 15.1.1** of this Lease.

1.2.17 "Leasehold Estate" shall have the meaning set forth in **Section 11.2** of this Lease.

1.2.18 "Lender's Security Instrument" shall have the meaning set forth in **Section 11.2** of this Lease.

1.2.19 "Leases and Rents" shall have the meaning set forth in **Section 11.3** of this Lease.

1.2.20 "Legal Requirements" shall have the meaning set forth in **Section 6.1.2** of this Lease.

1.2.21 "Lender" shall have the meaning set forth in **Section 11.2** of this Lease.

1.2.22 Intentionally deleted.

**1.2.23** "Property" shall mean the Leased Premises and the Improvements located thereon.

**1.2.24** "Real Property Taxes" shall have the meaning set forth in **Section 4.2.1** of this Lease.

**1.2.25** "Rent" shall have the meaning set forth in **Section 5.8** of this Lease.

**1.2.26** "Required Covenants" shall have the meaning set forth in **Section 11.4.3** of this Lease.

**1.2.27** "Special Declarant Rights" shall mean and refer to the rights as defined in Section 47C-1-103(23) of the North Carolina Condominium Act and as set forth in Article II, Section 6 of the Land Condominium Declaration.

**1.2.28** "Tenant" shall mean 140 West Franklin LLC, a North Carolina limited liability company or its permitted successors and/or assigns.

**1.2.29** "Unrelated Entity" shall have the meaning set forth in **Section 9.2** of this Lease.

**1.3 Exhibits:** The following Exhibits are attached to and made a part of this Lease:

<b><u>Exhibit A</u></b>	<b>Legal Description</b>
<b><u>Exhibit B-1</u></b>	<b>Lender's Non-Disturbance and Estoppel Agreement</b>
<b><u>Exhibit B-2</u></b>	<b>Leasehold Condominium Unit Owners Non-Disturbance Agreement</b>
<b><u>Exhibit C</u></b>	<b>Form of Lease Amendment (provided in Section 5.9)</b>
<b><u>Exhibit D</u></b>	<b>Lease Guaranty</b>

## **2. LEASE TERM**

**2.1 Lease of Leased Premises For Lease Term.** Subject to the terms, provisions and conditions hereof, Landlord leases the Leased Premises to Tenant and Tenant leases and rents the Leased Premises from Landlord for the Lease Term. The Lease Term is for the period stated in **Section 1.1.4** above and shall begin and end on the dates specified in **Section 2.2**, unless the beginning or end of the Lease Term is changed under any provision of this Lease. The Commencement Date (as hereinafter defined) shall be the date specified in **Section 2.2** unless advanced or delayed under any other provision of this Lease.

**2.2 Lease Term.** This Lease shall commence on \_\_\_\_\_ (the "Commencement Date"). This Lease shall expire, if not canceled, extended, or

terminated earlier in accordance with its provisions, ninety-nine (99) years after the Commencement Date (the "Expiration Date").

**2.3 Holding Over.** This Lease shall terminate at the end of the Lease Term hereof without the necessity of any notice from either Landlord or Tenant. Tenant hereby waives notice to vacate the Property and agrees that Landlord shall be entitled to the summary recovery of possession of the Property should Tenant hold over to the same extent as if statutory notice had been given.

### **3. BASE RENT**

**Time and Manner of Payment.** Subject to the provisions of this Lease, Tenant shall pay Landlord Base Rent in the amount of One Dollar (\$1.00) per year, in advance beginning on the Commencement Date and continuing each year thereafter on the anniversary of the Commencement Date during the Lease Term. The Base Rent shall be payable at Landlord's address or at such other place as Landlord may designate in writing. At the election of Tenant, the aggregate amount or any lesser portion of the Base Rent due for the Lease Term may be prepaid at any time during the Lease Term. Landlord acknowledges that it has received Ninety-Nine Dollars (\$99.00) contemporaneously with the execution of this Lease as advance payment of all Base Rent due under this Lease.

### **4. OTHER CHARGES PAYABLE BY LESSEE**

**4.1 Additional Rent.** All charges payable by Tenant other than Rent are called "Additional Rent." Unless this Lease provides otherwise, Tenant shall pay or cause the 140 West Franklin Condominium Association, Inc. to pay all Additional Rent annually prior to delinquency.

#### **4.2 Property Taxes.**

**4.2.1 Real Property Taxes.** Tenant shall pay directly to the tax collector, prior to delinquency, all ad valorem taxes and assessments on the Property which are due and payable during the Lease Term as levied by the applicable taxing authorities in accordance with applicable law (the "Real Property Taxes"). If the Real Property Taxes are not paid when due, Landlord shall have the right, but not the obligation, to pay the taxes, and Tenant shall reimburse Landlord for the amount of such tax payment as Additional Rent. The Real Property Taxes for the year in which the Commencement Date occurs shall be prorated between the parties, with Tenant paying the Real Property Taxes attributed to the portion of the first year of the Lease Term from the Commencement Date through December 31<sup>st</sup> of said calendar year, but only to the extent any such Real Estate Taxes are due and payable. Taxes for the year in which the Lease ends shall be prorated between Landlord and Tenant as of the ending date.

#### **4.2.2 Personal Property Taxes.**

**4.2.2.1** Tenant shall pay all taxes levied or assessed against trade fixtures, furnishings, equipment or any other personal property belonging to Tenant or anyone claiming by or through Tenant.

**4.2.2.2** If any personal property is taxed with the Leased Premises, Tenant shall pay all such taxes prior to their delinquency.

**4.2.3 Tenant's Right to Contest Taxes.** Tenant may attempt to have the assessed valuation of the Leased Premises reduced or may initiate proceedings to contest the Real Property Taxes. If required by law, Landlord shall join in the proceedings brought by Tenant and shall not enter an objection to such contest. However, Tenant shall pay all costs of the proceedings, including any out of pocket costs or fees incurred by Landlord upon Landlord's demand.

**4.2.4 Tenant Entitled to any Refund.** Tenant shall be entitled to any refund of any Real Property Taxes (and penalties and interest paid by Tenant), to the extent attributable to periods within the Lease Term, whether such refund is made during or after the Lease Term.

#### **4.3 Insurance; Indemnity.**

**4.3.1** During the Lease Term, Tenant shall maintain or cause to be maintained a policy of insurance consistent with the operation of a typical mixed use building in the Chapel Hill, North Carolina area, including commercial general liability insurance in the initial minimum amount of \$25 million per occurrence. Tenant shall name Landlord as an additional insured under such policy and may name the Lenders allowed under this Lease as additional insureds. The liability insurance obtained by Tenant under this **Section 4.3.1** shall be primary and non-contributing. The amount and coverage of such insurance shall not limit Tenant's liability nor relieve Tenant of any other obligation under this Lease. At no additional cost to Tenant, Landlord may also obtain comprehensive public liability insurance in an amount and with coverage determined by Landlord insuring Landlord against liability arising out of ownership, operation, use or occupancy of the Leased Premises and/or Improvements.

**4.3.2 Property Insurance.** During the Lease Term, Tenant shall maintain policies of insurance covering loss of or damage to the Improvements in the full amount of its replacement value. Such policy shall provide protection against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (all risk), sprinkler leakage and any other perils which Tenant deems reasonably necessary. Tenant shall not do or permit anything to be done that invalidates any such insurance policies. Landlord shall be shown as an additional insured party under said policies.

**4.3.3 Workers' Compensation Insurance.** Tenant shall carry workers' compensation insurance required to be carried by Tenant by North Carolina law in amounts not less than the amount required by law. Tenant shall require all contractors that Tenant enters into contracts with in connection with the Improvements to promise to carry workers' compensation insurance in amounts not less than the amount required by law covering all persons employed by the contractor in connection with the Improvements and with respect to whom death, bodily injury, or sickness insurance claims could be asserted against Landlord or Tenant.

**4.3.4 Builders' Risk Insurance.** During the course of any alteration, construction, or reconstruction of the Improvements, Tenant shall provide or cause to be provided builders' risk insurance.

**4.3.5 Payment of Premiums.** Tenant shall pay all premiums for the insurance policies described in Sections 4.3.1 and 4.3.2 no later than the due date. Tenant shall deliver to Landlord a copy of any policy of insurance which Tenant is required to maintain under this Article 4. As an alternative to providing a policy of insurance, Tenant shall have the right to provide Landlord evidence of insurance (Accord Form 27), executed by an authorized officer of the insurance company, showing that the insurance which Tenant is required to maintain under this Article 4 is in full force and effect and containing such other information which Landlord reasonably requires.

**4.3.6 General Insurance Provisions.**

**4.3.6.1** If Tenant fails to deliver any policy, evidence of insurance or renewal to Landlord required under this Lease within fifteen (15) business days after written notice from Landlord, or if any such policy is canceled or modified in any material manner during the Lease Term without Landlord's consent, Landlord may obtain such insurance, in which case Tenant shall reimburse Landlord for the cost of such insurance within fifteen (15) business days after receipt of a statement that indicates the cost of such insurance.

**4.3.6.2** Tenant shall maintain all insurance required under this Lease with companies holding a "General Policy Rating" of A-, VIII or better, as set forth in the most current issue of "Best Key Rating Guide". Landlord makes no representation that the limits of liability specified to be carried by Tenant are adequate to protect Tenant. Tenant may obtain, at Tenant's sole election and expense, such additional insurance coverage as Tenant deems adequate. Landlord shall have the right to increase the insurance requirements hereunder from time to time as may be necessary to maintain adequate insurance coverages as measured by insurance then typically required for land and improvements similar to the Property in the greater Chapel Hill, North Carolina metropolitan area. All such policies

of insurance as provided under this Lease shall be non-accessible and shall contain language to the effect that the policies cannot be cancelled, materially changed or not renewed except after thirty (30) days' written notice by the insurer to the Landlord.

**4.3.6.3** Unless prohibited under any applicable insurance policies maintained, to the extent of the proceeds of insurance paid with respect to a claim of loss or damage, Landlord and Tenant each hereby waive any and all rights of recovery against the other, or against the officers, employees, agents or representatives of the other, for loss of or damage to its property or the property of others under its control, if such loss or damage is covered by any insurance policy in force (whether or not described in this Lease) at the time of such loss or damage. Upon obtaining the required policies of insurance, Landlord and Tenant shall give notice to the insurance carriers of this mutual waiver of subrogation.

**4.3.6.4** Tenant shall be relieved from these insurance requirements as to any leasehold condominium unit insured in an identical manner by the 140 West Franklin Condominium Association, Inc..

**4.3.7 Indemnity.** Tenant shall indemnify Landlord, its respective officers, directors, Town Council members, employees and agents from any and all liability, damages, suits, claims and judgments arising from or in connection with any injury or death to a person or any damage to property arising out of or in connection with Tenant's use or occupancy of the Leased Premises or any negligence or willful misconduct of Tenant or its respective contractors, employees, officers, directors, or agents. Likewise, Landlord shall, to the extent permitted by applicable law, indemnify Tenant and its respective contractors, employees, officers, directors and agents from any and all liability, damages, suits, claims and judgments arising from or in connection with any injury or death to a person or any damage to property arising out of or in connection with Landlord's use or occupancy of the Leased Premises or any negligence or willful misconduct of Landlord or its respective contractors, officers, directors, Town Council members, employees and agents. Landlord's obligation to indemnify hereunder, with respect to claims of or by third parties (which shall include agents and employees of Landlord) shall be limited to the extent of insurance proceeds actually collected from the policies of insurance maintained by or on behalf of Landlord; provided, however, that nothing herein contained shall constitute or be construed as a waiver of Landlord's governmental immunity. Landlord shall not be liable to Tenant or Tenant's employees, agents, patrons or visitors, or to any other person whomsoever, for any injury to person or damage to property on or about the Leased Premises, caused by the acts or omissions of Tenant, its agents, employees, patrons or visitors, or of any other person entering upon the Leased Premises, or caused by the Improvements becoming out of repair, or caused by leakage of gas, oil, water or steam or by electricity emanating from the Leased Premises, or due to any cause whatsoever, unless caused by the negligence or

misconduct of Landlord, its agents, employees, patrons or visitors. Tenant shall not be liable to Landlord or Landlord's employees, agents, patrons or visitors, or to any other person whomsoever, for any injury to person or damage to property on or about the Leased Premises, caused by the acts or omissions of Landlord, its agents, employees, patrons or visitors, or of any other person entering upon the Leased Premises, or due to any cause whatsoever, unless caused by the negligence or misconduct of Tenant, its agents, employees, patrons or visitors.

**4.3.8 Release.** Except with respect to the representations and warranties of Landlord set forth in the Development Agreement, each of which is affirmed by Landlord as if set forth herein in full, Tenant acknowledges that Landlord makes no additional warranty, express or implied, and expressly disclaims any and all oral, written or implied representations or commitments as to the suitability or fitness of the Leased Premises or any of the contemplated Improvements thereon, or as to the existence or non-existence of radon or any other substance in, on, under or about the Leased Premises, or as to the quality, condition or suitability of the Leased Premises for the making of any Improvements or construction thereon, or as to the economic viability of the proposed Improvements. Except for Landlord's liability arising out of an Event of Default under the Development Agreement, Tenant, for itself, its successors, heirs and assigns, and any and all future 140 West Franklin Condominium Unit owners, hereby releases Landlord from any and all liability in connection with or arising out of the construction, development and operation of the Improvements for retail and residential condominium purposes as more fully described in the Development Agreement, and Tenant shall indemnify Landlord, its respective officers, directors, Town Council members, employees and agents from any and all liability, damages, suits, claims and judgments arising from or in connection with any injury or death to a person or any damage to property arising out of or in connection with the construction, development and operation of the Improvements for retail and residential condominium purposes as more fully described in the Development Agreement.

**4.3.9 Landlord's Insurance.** Except with respect to the Leased Premises, Landlord shall maintain all policies of insurance required under the Land Condominium Declaration and Landlord further agrees not to amend such requirements of insurance under the Land Condominium Declaration, without the prior written consent of Tenant, which consent shall not be unreasonably withheld, conditioned or delayed.

**4.4 Cost of Loans to be Paid by Tenant.** Tenant affirms that it shall bear all of the costs and expenses charged by any lender in connection with any debt on Tenant's Leasehold Estate (as defined below) for the Property and all Improvements located thereon.

**4.5 Assessments and Other Charges Imposed.** Tenant shall further pay, as an Additional Rent, all annual assessments or charges levied by the Lot 5 Land

Condominium Owner's Association, Inc., its successors and assigns (the "Association"), all special assessments for capital improvements levied by the Association, and all additional assessments levied by the Association with respect to the Building Unit and after it becomes a portion of the Leased Premises, the Private Parking Unit. Tenant shall further be responsible for paying as Additional Rent hereunder any and all other fees, charges or expenses, including late fees and interest imposed by the Association with respect to all or any portion of the Leased Premises. Landlord agrees to be responsible for and pay, or cause to be paid, all annual assessments or charges levied by the Association, all special assessments for capital improvements levied by the Association, and all additional assessments levied by the Association with respect to the Public Space Unit and Public Parking Unit.

**4.6 Direct Payment by Landlord.** If any Additional Rent must be paid directly by Landlord and the payee refuses to accept payment from Tenant, then: (a) Landlord appoints Tenant as Landlord's attorney-in-fact for making such payment; and (b) if the payee nevertheless refuses to accept payment from Tenant, then Tenant shall notify Landlord of such fact and shall pay such amount to Landlord in a timely manner accompanied by reasonable instructions on the further remittance of such payment. Landlord shall with reasonable promptness comply with Tenant's reasonable instructions. Landlord shall indemnify and hold harmless Tenant against Landlord's failure to timely remit such payment.

**4.7 Payment of Rent.** Base Rent and Additional Rent shall be paid by Tenant without demand, deduction, abatement or set off, and without diminution by reason of any obligations which are to be borne by Landlord under this Lease. Upon the giving of such notice as shall be required by **Article 10** hereof and Tenant's failure to cure any Default within the time period(s) specified in **Article 10**, Landlord shall have the right (but not the obligation) to advance such sums as are in Landlord's reasonable opinion necessary to cure a Default by Tenant in payment of Additional Rent, and Tenant covenants to pay as Additional Rent the amount of any such expenditures together with interest thereon at the lesser of: (i) the highest rate of interest permitted by law or (ii) the prime rate of interest posted by Bank of America, or the prime rate of a comparable bank as reasonably determined by Landlord if Bank of America's prime rate is not available, as adjusted from time to time plus 3% from the date due until paid.

## **5. USE OF PROPERTY**

### **5.1 Use of Property.**

- (a) The Leased Premises shall be used only for the construction, development and operation of the Improvements for retail and residential condominium purposes, and upon execution and delivery of the Lease Amendment, for parking purposes, as more fully described in the Development Agreement, and for no other purpose whatsoever unless otherwise approved in writing by Landlord in its sole discretion. The use of the Leased Premises shall at all times either (i) comply with, (ii) be granted a variance from, (iii) be authorized under a special use permit, or (iv) be grandfathered from



compliance with the Municipality zoning regulations. At Tenant's sole cost and expense, Tenant shall, subject to limitations in **Section 5.2**, construct the Improvements on the Leased Premises as more particularly described in the Development Agreement. Tenant and its successors and assigns, including purchasers of 140 West Franklin Condominium Units comprising a portion of the Improvements, shall be deemed the owner of Improvements that it constructs for the duration of the Lease Term. Landlord and Tenant acknowledge that it is the intention of the parties that, to the extent Tenant performs all of its obligations under this Lease, Landlord relinquishes, during the Lease Term, any and all rights to share in the income of the Leased Premises and Improvements on account of its interest in the Leased Premises, its interest under this Lease or otherwise.

- (b) Landlord acknowledges and understands that Tenant proposes to develop on the Leased Premises leasehold condominiums consistent with Section 47C-2-106 of the North Carolina Condominium Act. In furtherance thereof, Landlord agrees that: (i) this Lease shall be recorded in its entirety; (ii) Landlord will join in and sign the 140 West Franklin Condominium Declaration creating the leasehold condominiums provided that Landlord has reviewed the same and confirmed it includes such provisions as are required by and consistent with the provisions contemplated in the Development Agreement; (iii) neither Landlord nor any successor in interest of Landlord may terminate the leasehold interest of a 140 West Franklin Condominium Unit owner, who, after demand, makes timely payment of his share of the Rent determined in proportion to his common element interest and otherwise complies with all covenants which, if violated, would entitle Landlord to terminate this Lease; (iv) a 140 West Franklin Condominium Unit owner's interest is not affected by failure of any other person to pay Rent or fulfill any other covenant as set forth in this Lease; and (v) the acquisition of a 140 West Franklin Condominium Unit by Landlord or the owner of the reversion or remainder hereunder, does not merge the leasehold and fee simple interest unless the leasehold interest of all 140 West Franklin Condominium Unit owners subject to the reversion or remainder is acquired.
- (c) As contemplated by the Development Agreement, Landlord shall use, operate and maintain the improvements located in the Public Space Unit and the Public Parking Garage Unit in accordance with the Land Condominium Declaration.

**5.2 Affordable Housing Requirement.** Notwithstanding anything contained in this Lease to the contrary, during the Lease Term Tenant shall provide a minimum of fifteen affordable dwelling units with at least 21 bedrooms with approximately 12,000 square feet of floor area, comprised of 1-bedroom, 2-bedroom and/or 3-bedroom dwelling units, with the final design and configuration of the affordable units to be reviewed by the Orange Community Housing and Land Trust (the "Land Trust") and to

be approved by the Town Manager, as more particularly described in the Development Agreement. As specified in Article VIII of the Development Agreement, in the event the Land Trust or such other entity as designated from time to time by the Landlord has not purchased all of the affordable dwelling units from the Tenant on or before the date that is thirty (30) months after Substantial Completion of the Project, the Tenant shall be entitled to sell such remaining unit(s) at market rates, at which time, the Landlord and Tenant shall amend this Lease and such other documents as is necessary to reflect that the first sentence of this Section 5.2 has been modified so that said unit(s) is no longer restricted for use as an affordable dwelling unit.

**5.3 Manner of Use.** Tenant shall not cause or permit the Leased Premises to be used in any way which constitutes a violation of any applicable law, ordinance, or governmental regulation or order, or which constitutes a nuisance or waste. Tenant shall obtain and pay for all permits, including a Certificate of Occupancy (to the extent applicable), required for Tenant's occupancy of the Improvements and shall promptly take all actions necessary to comply with, be granted a variance from, or be grandfathered from compliance with all applicable statutes, ordinances, rules, regulations, orders and requirements regulating the use by Tenant of the Property.

**5.4 Compliance with Zoning.** Tenant agrees that any improvements constructed on the Leased Premises shall at all times be maintained in compliance (or be granted a variance from or "grandfathered" in its compliance) with all applicable zoning, environmental, land use, safety and health laws and regulations.

**5.5 Utilities.** Prior to delinquency, Tenant shall pay, directly to the appropriate supplier, the cost of all natural gas, heat, light, power, sewer service, telephone, water, refuse disposal and other utilities and services supplied to the Improvements located within Building Unit and after the Lease Amendment, to the Private Parking Unit.

**5.6 Compliance with Declaration.** Tenant shall at all times comply with all terms, provisions and conditions of the Declaration applicable to the Building Unit.

**5.7 Hazardous Materials.** Tenant shall not violate any law or regulation of any federal, state or local governmental authority having jurisdiction over Hazardous Material. As used in this Lease, the term "Hazardous Material" means any flammable items, explosives, radioactive materials, hazardous or toxic substances, material or waste or related materials, including any substances defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials" or "toxic substances" now or subsequently regulated under any applicable federal, state or local laws or regulations, including without limitation petroleum-based products, paints, solvents, lead, cyanide, DDT, printing inks, acids, pesticides, ammonia compounds and other chemical products, asbestos, PCBs and similar compounds, and including any different products and materials which are subsequently found to have adverse effects on the environment or the health and safety of persons. Tenant shall have the duty and obligation to cure any environmental contamination in connection with the Building caused by Tenant and first

occurring on or after the date Tenant takes possession of the Leased Premises, and Tenant agrees to indemnify and hold harmless Landlord from and against all claims and damages of whatsoever nature, asserted against Landlord, or the Leased Premises relating to or as a result of Tenant's or any sub-lessee's use and occupancy of the Property, including but not limited to all clean-up and remediation costs, claims of personal injury or property damage, and court costs and reasonable attorneys' fees incurred in any mediation, arbitration trial or appellate proceeding pertaining thereto. Tenant shall have no obligation to remediate any preexisting Hazardous Substances on the Leased Premises and Landlord agrees to indemnify and hold harmless Tenant from the same to the extent permitted by law. Landlord shall be responsible for any violation of any environmental laws, rules or regulations, or the presence of any Hazardous Substances in connection with the Leased Premises first occurring prior to the date Tenant takes possession of the Leased Premises, shall pay for the remediation thereof as set forth in the Development Agreement and shall, to the extent permitted by applicable law, indemnify Tenant with respect thereto.

**5.8 Quiet Possession.** If Tenant pays the Base Rent and Additional Rent (collectively referred to herein as the "Rent") and complies with all other terms of this Lease and the Land Condominium Declaration, Tenant or its subtenant(s) may occupy and enjoy the Property for the full Lease Term without molestation or disturbance by or from Landlord or anyone claiming by or through Landlord or having title to the Leased Premises paramount to Landlord, and free of any encumbrance created or suffered by Landlord.

**5.9 Addition to the Leased Premises.** The Land Condominium Declaration creates three separate condominium units: the Building Unit which constitutes the Leased Premises hereunder, the Public Space Unit owned by Landlord and the Parking Garage Unit, initially owned by Landlord. Following Substantial Completion of the Parking Garage, the Parking Garage Unit shall be divided into two separate Land Condominium Units: the Private Parking Unit consisting of approximately 177 parking spaces within the Parking Garage and the Public Parking Unit consisting of approximately 161 parking spaces in the Parking Garage. Within thirty (30) days after the subdivision of the Parking Garage Unit into two (2) separate Land Condominium Units, this Lease shall be amended to include (i) the Private Parking Unit and (ii) any Excess Spaces (if applicable), as a portion of the Leased Premises and as a permitted use hereunder. The amendment to this Lease for the purpose of adding the Private Parking Unit as a portion of the Leased Premises shall be substantially in the form attached hereto as Exhibit C (the "Lease Amendment").

**5.10 Nondisturbance.** Landlord may pledge, hypothecate, or otherwise encumber its interest as Landlord under the terms of this Lease, provided that in so doing, Landlord will deliver to Tenant (and, upon written request, any Lender) a subordination, nondisturbance and attornment agreement with commercially reasonable provisions reasonably satisfactory to Tenant and its Lender recognizing the rights of Tenant (and any Lender) in, to and under this Lease.

**5.11 Applications and Filings.** Upon Tenant's request, Landlord shall, without cost to Landlord, promptly join in and execute any Application or Filing (as defined below) as Tenant may from time to time request, provided that: (a) such Application or Filing is in customary form; (b) Landlord will incur no cost, expense or liability in connection therewith, and (c) no uncured Default (as defined below) exists beyond any notice or grace period. For purposes of this Section 5.11 of the Lease, the term "Application or Filings" shall mean and refer to any instrument, document, agreement, certificate, or filing (or amendment of any of the foregoing): (a) necessary or appropriate for any construction work this Lease or the Development Agreement allows, including any application for any utility service or hookup, easement, covenant, condition, restriction, subdivision plat, variance or such other instruments as Tenant may from time to time request in connection with such construction work; (b) subject to the provisions of Section 5.1 hereof, to enable Tenant from time to time to seek any approval or to use and operate the Property in accordance with this Lease; (c) otherwise reasonably necessary and appropriate to permit Tenant to realize the benefits of the Property under this Lease; or (d) that this Lease or the Development Agreement otherwise requires Landlord to sign for Tenant.

## **6. MAINTENANCE, REPAIRS AND ALTERATIONS**

### **6.1 Tenant's Obligations.**

**6.1.1** Except as provided in Section 7 (Damage or Destruction) and Section 8 (Condemnation), Tenant shall keep all portions of the Improvements (including structural, nonstructural, interior and exterior areas, portions, systems, equipment, and landscaping) in good order, condition and repair as needed, excluding ordinary wear, tear, casualty and condemnation. Tenant's obligations shall extend to both structural and non-structural items, and to all maintenance, repair and replacement work, including but not limited to unforeseen and extraordinary items.

**6.1.2** Tenant shall, at its own cost and expense, promptly observe and keep all laws, rules, orders, ordinances and regulations of the federal, state and city governments and any and all of their departments and bureaus and those of any other competent authority applicable to the Leased Premises (the "Legal Requirements"), whether or not such Legal Requirements affect the interior or exterior of the Improvements, necessitate structural changes or improvements, or interfere with the use and enjoyment of the Property, and whether or not compliance with the Legal Requirements is required by reason of any condition, event, or circumstance existing before or after the Lease Term commences; and shall promptly comply with all laws, rules, orders, regulations and requirements of the issuer(s) of the insurance policy(ies) contemplated under this Lease, and will use no part of said Property for any unlawful purposes. If Tenant in good faith shall desire to contest any Legal Requirements requiring repairs, alterations or changes in the Leased Premises or in any building at any time situated thereon, Tenant may contest same provided (a) Tenant shall promptly comply with the

Legal Requirements that it wishes to contest unless such compliance would prevent Tenant from pursuing a contest of such Legal Requirements and (b) if such compliance would prevent Tenant from pursuing a contest of such Legal Requirements, then Tenant shall not be required to make such repairs, alterations, or changes so long as it shall, in good faith, at its own expense, contest the same or the validity thereof by appropriate proceedings, and any such delay of Tenant in complying with any such laws, rules, orders, ordinances and regulations until final determination of such disputed matter shall not be deemed a Default in the conditions of this Lease. Tenant shall hold Landlord harmless of all costs, expenses, and fines that may in any manner arise out of or be imposed because of the failure of Tenant to comply with any Legal Requirement as aforesaid.

**6.1.3** Tenant shall fulfill all of Tenant's obligations under this **Section 6** at Tenant's sole expense. If Tenant fails to maintain, repair or replace any material element of the Improvements to the condition required hereunder within thirty (30) days of written notice from Landlord, Tenant shall be deemed to be in Default of its obligations under **Section 6.1** hereof; provided, however, that if the nature of the maintenance, repair or replacement is such that it cannot, in the exercise of reasonable diligence, be cured within such thirty (30) day period, Tenant shall not be in Default if Tenant commences performance within such period and diligently proceeds to cure the default within a reasonable time period.

**6.1.4** If Tenant refuses or neglects to repair, replace, or maintain the Leased Premises, or any part thereof (including any Improvements thereon), in a manner reasonably satisfactory to Landlord and consistent with Tenant's obligations under this Lease, Landlord shall have the right, but not the obligation, upon giving Tenant reasonable notice of its election to do so, to enter the Leased Premises and make such repairs or perform such maintenance or replacements on behalf of and for the account of Tenant. Nothing herein contained shall imply any duty of Landlord to do any work that, under any provision of this Lease, Tenant is required to do, nor shall Landlord's performance of any repairs or maintenance work on behalf of Tenant constitute a waiver of Tenant's default in failing to do the same. No exercise by Landlord of any rights herein reserved shall entitle Tenant to any compensation, damages or abatement of Rent from Landlord for any injury or inconvenience occasioned thereby. If Landlord performs any maintenance or other obligations that Tenant is required to perform under the terms of this Lease, Tenant shall, upon demand, pay to Landlord (as Additional Rent) the costs and expenses incurred by Landlord in doing the same (or shall deposit with Landlord the anticipated amounts thereof).

**6.1.5** Except for the negligence or willful misconduct of Landlord, Tenant shall indemnify, defend and hold Landlord harmless from and against any and all liability, claim, loss, cost, expense, damage (including reasonable attorneys' fees and consultants fees), lien, judgment or penalty arising in any manner whatsoever out of, involving, or in connection with, the use and/or

occupancy of the Property by Tenant and/or its subtenants or any one else claiming by or through Tenant.

## **6.2 Alterations, Additions, and Improvements.**

**6.2.1** All alterations, additions, and Improvements to the Leased Premises shall be done in a good and workmanlike manner, in conformity with all applicable laws and regulations. The initial Improvements constructed and developed on the Leased Premises shall be in accordance with the Approved Architectural Drawings and the terms and provisions of the Development Agreement. Landlord's prior written consent (such consent not to be unreasonably withheld, conditioned or delayed) will be required for all exterior or structural improvements or modifications to the Improvements (a) not necessitated by repairs, alterations or maintenance required by laws applicable to the Improvements constructed on the Leased Premises; (b) not otherwise authorized by Landlord in connection with retail tenant upfitting improvements, or (c) not otherwise authorized by the Municipality in connection with the removal of a common wall between two residential condominium units to the extent allowed by the North Carolina Condominium Act.

**6.2.2** Tenant shall pay when due all claims for labor and material furnished on or about the Leased Premises or in connection with the Improvements.

**6.2.3** Tenant shall have no power to do any act or to make any contract that may create or be the foundation for any lien, mortgage, or other encumbrance on the reversion or other estate of Landlord or that would be prior to any interest of Landlord in the Leased Premises. Tenant shall not suffer or permit any liens to attach to the interest of Tenant in all or any part of the Property by reason of any work, labor, services, or materials done for, or supplied to, or claimed to have been done for or supplied to Tenant or anyone occupying or holding an interest in all or any part of the Improvements on the Property through or under Tenant. If any mechanic's, construction or other liens or orders for the payment of money shall be filed against the Property or any improvements thereon by reason of, or arising out of any labor or material furnished to, or for Tenant at the Property or for or by reason of any change, alteration or addition, by Tenant, or the cost or expense thereof, or any contract relating thereto, or against Landlord as leased fee owner thereof by reason of Tenant's work or contract relating thereto, then within thirty (30) days, Tenant shall cause the same to be canceled and discharged of record, by bond or otherwise, at the election and expense of Tenant, and shall also defend on behalf of Landlord, at Tenant's sole cost and expense, any action, suit or proceeding which may be brought thereon or for the enforcement of such lien, liens or orders, and Tenant will pay any damages and discharge any judgment entered therein and hold Landlord harmless from any loss, claim or damage resulting therefrom, including reasonable attorneys' fees.

Nothing in this Lease shall be deemed to be, or be construed in any way as constituting, the consent or request of Landlord, express or implied, by inference or otherwise, to any person, firm, or entity for the performance of any labor or the furnishing of any materials for any construction, rebuilding, alteration, or repair of or to the Property or to the Improvements, or as giving Tenant any right, power, or authority to contract for or permit the rendering of any services or the furnishing of any materials that might in any way give rise to the right to file any lien against Landlord's interest in the Property or against Landlord's interest, if any, in the Improvements. Tenant is not intended to be an agent of Landlord for the construction of Improvements on the Property. Landlord shall have the right to post and keep posted at all reasonable times on the Property and on the Improvements any notices that Landlord may reasonably wish to post for the protection of Landlord and of the Property and of the Improvements from any such lien. The foregoing shall not be construed to diminish or vitiate any rights of Tenant to the extent permitted in this Lease to construct, alter, or add to the Improvements.

## **7. DAMAGE OR DESTRUCTION**

**7.1 Casualty.** If Tenant becomes aware of any significant damage or destruction to all or any material portion of the Improvements, whether ordinary or extraordinary, foreseen or unforeseen, affecting any or all Improvements and/or the Leased Premises (each, a "Casualty"), Tenant shall promptly notify Landlord of such fact.

**7.2 Effect of Casualty.** No Rent shall abate in the event of a Casualty. Except as set forth below, if a Casualty occurs and the Improvements are damaged or destroyed by fire or other casualty, Tenant, at its sole cost and expense, shall rebuild and/or restore the Improvements damaged by such Casualty to, as nearly as possible, the same condition as existed immediately prior to such Casualty and in conformance with this Lease, except for any modifications approved by Landlord in writing, such approval not to be unreasonably withheld, conditioned or delayed. Tenant shall commence its restoration work within ninety (90) days after the later of the date (a) the Casualty occurs, (b) Tenant receives written confirmation from the Land Condominium Association that it will rebuild the improvements in the Public Space Unit and the Public Parking Unit, (c) the Land Condominium Association and the Tenant have agreed upon a coordinated plan to restore the improvements within and on all of the Land Condominium Units (recognizing that some of the improvements outside the Leased Premises also provide the necessary support and access to the Improvements), (d) the Tenant receives all necessary approvals and permits as required under the Legal Requirements to commence the restoration work, (e) the insurance proceeds have been received and deposited as contemplated in Section 7.3 herein, said date being the "Restoration Commencement Date" and Tenant shall complete such work with due diligence, but not longer than five hundred forty (540) days after the date such work is commenced. Landlord acknowledges that Tenant will construct a "leasehold condominium" on the Leased Premises. Accordingly, notwithstanding the above, if a Casualty occurs to the Property

and (i) the 140 West Franklin Condominium Declaration is terminated, or (ii) repair or replacement of the Improvements would be illegal under applicable Legal Requirements, including local health or safety statutes or ordinances, or (iii) the 140 West Franklin Condominium Unit owners decide not to rebuild by an eighty percent (80%) vote (including one hundred percent (100%) approval of owners of 140 West Franklin Condominium Units not to be rebuilt or owners assigned to limited common elements not to be rebuilt) or (iv) the unit owners of the Land Condominium decide not to rebuild, being hereinafter called a "Termination Event"), then Tenant shall have the option of terminating this Lease upon notice to Landlord, which termination shall be effective as of the date set forth in said notice, provided that in no event shall such date be earlier than the date of such Casualty. In the event of such a termination, Tenant shall have no obligation to repair or restore any damage caused by such Casualty, but shall be obligated to remove (i) all Improvements and return the Leased Premises as near as practicable to the condition existing upon commencement of construction of the Improvements and receive the balance of the insurance proceeds, or (ii) but only with Landlord's written permission, that portion of the Improvements damaged by such Casualty and receive the balance of the insurance proceeds. If as a result of the occurrence of a Casualty Tenant has the right pursuant to the provisions of this Lease to terminate this Lease but Tenant does not elect to so terminate this Lease as provided hereunder, then Tenant, at its sole cost and expense, shall rebuild and/or restore the Improvements damaged by such Casualty to, as nearly as possible, the same condition as existed immediately prior to such Casualty and in conformance with this Lease, except for any modifications approved by Landlord in writing, such approval not to be unreasonably withheld, conditioned or delayed.

**7.3 Adjustment of Claims; Use of Property Insurance Proceeds.** Tenant shall be solely responsible for adjusting any insurance claim(s) pertaining to any Casualty, subject to the rights of any Lender. If Tenant is required by the terms of this **Article 7** or if Tenant otherwise elects to rebuild the Improvements, then insurance proceeds shall be disbursed directly to a depository acceptable to Lender and Landlord to be disbursed for the safeguarding, clearing, repair, restoration, alteration, replacement, rebuilding and reconstruction of the portion of the Improvements damaged by such Casualty, to rebuild, repair and/or restore the affected Improvements to a condition that complies with applicable laws and is otherwise consistent with Tenant's permitted use of the Property. If such insurance proceeds are insufficient for the foregoing purposes, prior to its commencement of work, Tenant or its Lender shall pay the deficiency out of its own funds to the depository agreed upon by Lender, Landlord and Tenant. In the event all of the insurance proceeds collected from such Casualty are not used for such repairs or restoration, then Tenant shall be entitled to any excess in the amount of such proceeds. Should Tenant fail or refuse to make the repairs or restoration, if and as hereinabove required by the provisions of this **Article 7**, such failure or refusal shall constitute a Default under this Lease upon notice and the expiration of the applicable cure period, and all insurance proceeds so collected shall be forthwith paid over to Landlord or an insurance trustee designated by the Landlord to be applied, together with any funds received from Tenant on account of any shortfall, to the costs of repair or reconstruction of the Improvements, to be disbursed in the same manner as if they were proceeds from a



construction loan from a commercial lender and Tenant shall pay all costs and fees associated therewith. Notwithstanding the foregoing, if sufficient funds are not received from Tenant or Tenant's Lender, Landlord shall have the option to either provide such funds as are necessary to repair or reconstruct the Improvements and such funds shall constitute Additional Rent, payable to Landlord as set forth herein, or to elect to expend such of the insurance proceeds as are necessary to remove all damaged Improvements from the Leased Premises and restore the Leased Premises to its condition prior to the construction of such Improvements, as far as practical, and any remaining insurance proceeds shall be paid to any Lender to satisfy any financing constituting a lien on the Property, and the remainder, if any, to be retained by Tenant.

**7.4 Waiver.** Tenant waives the protection of any statute, code or judicial decision which grants a tenant the right to terminate a lease in the event of the substantial or total destruction of the leased property. Tenant agrees that the provisions of **Section 7** hereof shall govern the rights and obligations of Landlord and Tenant in the event of any such Casualty.

**8. CONDEMNATION.** If a portion of the Property is taken under the power of eminent domain or sold under the threat of that power (all of which are called "Condemnation"), the Condemnation award shall be distributed in the following order of priority:

**8.1** First, to Landlord, in an amount calculated to reflect its reversionary interest in the Leased Premises so taken as encumbered by the Option as defined in **Section 13.19**; and

**8.2** Second, to Tenant or its assigns, in an amount equal to the balance of the Condemnation award, including the award for the Improvements and Tenant's leasehold interest in the Property.

**8.3** If title to the whole or materially all of the Property shall be taken or condemned, this Lease shall cease and terminate, and all rental and other charges hereunder payable by Tenant shall be apportioned as of the date of vesting of title in such taking or condemnation proceedings. For the purposes of this Section, a taking or condemnation of materially all of the Property, as distinguished from a taking or condemnation of the whole of the Property, means a taking of such scope that the untaken portion of the Property is insufficient to permit the restoration of the then existing Improvements thereon in Tenant's judgment, reasonably exercised, taking into consideration the performance of all covenants, agreements and provisions herein provided to be performed by Tenant.

**8.4** In the event of a partial taking or condemnation, i.e., a taking or condemnation of less than materially all of the Property, this Lease (except as hereinafter provided) shall continue, and Tenant shall promptly restore the Improvements, as provided below. The award for the said taking or condemnation in respect to the Property shall be held by a depository approved by Landlord and Lender; and the award balance shall be used and paid as follows and in the following priority:

- (a) First - so much as shall be necessary to repair and restore the Improvements to, as nearly as reasonably possible but subject to the extent of the Condemnation award, the condition existing prior to the taking or condemnation; and
- (b) Second - the balance shall be shared by Landlord and Tenant in the same proportion set forth in **Section 8.1** and **Section 8.2** that they would have shared in the award balance were there to have been a taking or condemnation of the whole or materially all of the Property at the time of the partial taking or condemnation.

The Tenant shall undertake its work of repair and restoration as soon as reasonably practicable on the same terms and conditions as set forth in Section 7.2 and 7.3; and Tenant shall make such repairs and restoration.

**8.5** In the event of a temporary Condemnation, i.e., one that will affect the Leased Premises for less than \_\_\_ days, this Lease shall continue, and Tenant shall receive all of the award attributable to the Leased Premises. If a temporary Condemnation relates to a period longer than \_\_\_ days, then Tenant may, by written notice to Landlord within sixty (60) days of receiving written notice regarding the length of the temporary Condemnation, terminate this Lease and the award shall be allocated as set forth in Section 8.1 and Section 8.2. If Tenant does not terminate this Lease, then Tenant shall receive all of the award attributable to the Leased Premises.

## **9. ASSIGNMENT AND SUBLETTING**

**9.1 Tenant's Right to Sublease.** Subject to the terms of the Development Agreement, Tenant shall have the right, without the prior consent of Landlord, to sell, convey, lease, or assign all or a portion of its leasehold ownership rights hereunder to buyers and tenants of (i) the residential leasehold condominium units in the Building and/or (ii) the retail space or leasehold condominium unit(s) of the Building. After the Project has been Substantially Completed and at least seventy five percent (75%) of the residential leasehold condominium units created under the 140 West Franklin Condominium Declaration have been transferred by Tenant to a third party, Tenant shall have the right, without the prior consent of Landlord, to convey, transfer and assign to the 140 West Franklin Condominium Association, Inc., any or all of its rights and obligations under this Lease; provided, however, that Tenant shall remain primarily liable unless the 140 West Franklin Condominium Association, Inc. agrees in writing to expressly assume all such obligations in a manner reasonably acceptable to Landlord.

**9.2 No Assignment.** Except as set forth above in **Section 9.1** and the Development Agreement, this Lease shall not be assigned without the prior written consent of Landlord, which Landlord may grant or withhold in its reasonable discretion. It shall be deemed unreasonable for Landlord to withhold its consent if the assignment is requested more than three (3) years after the Project has been Substantially Completed

and the proposed assignee has agreed to assume any obligations under this Lease not previously assumed by the 140 West Franklin Condominium Association in a manner reasonably acceptable to Landlord. Notwithstanding the provisions of this **Section 9.2**, (a) Tenant shall be permitted to assign or otherwise transfer its interest in this Lease to a newly created entity controlled by the managers of Tenant in connection with a reorganization of entities controlled by such managers and (b) a Lender shall have the right to assign this Lease in accordance with the provisions of **Article 11** hereof.

## **10. DEFAULTS; REMEDIES**

**10.1 Defaults.** Tenant shall be in material default (herein referred to as a "Default") under this Lease:

**10.1.1** If Tenant shall fail to make any payment of Base Rent or Additional Rent for a period of ten (10) days following receipt of written notice from Landlord of such default; or

**10.1.2** Except as expressly provided otherwise herein, in the event that there is an Event of Default by Tenant under the Development Agreement or Tenant shall default or fail in the performance of a material covenant or agreement to be performed by it under this Lease including, without limitation, its obligations under **Section 7** and **Section 8** hereof, and such default shall not have been cured for a period of thirty (30) days after receipt by Tenant of written notice of such default or failure in performance; provided, however, if such default or failure cannot, with due diligence, be cured within thirty (30) days after receipt by Tenant of any such written notice, and Tenant shall not have commenced the remedying thereof within such period or shall not be proceeding with due diligence to remedy such default or failure (it being intended in connection with any such default or failure that is not susceptible of being cured by Tenant with due diligence within any such thirty (30) day period, that the time within which to remedy that default or failure shall be extended for such period as may be necessary to complete same with due diligence); or

**10.1.3** Abandonment of the Property; or

**10.1.4** If Tenant shall make an assignment for the benefit of creditors or file a voluntary petition in bankruptcy or be adjudicated a bankrupt or insolvent by any court, or file a petition for reorganization or an arrangement under the Federal Bankruptcy Code or any state insolvency act, or a receiver or trustee for its property shall be appointed in any proceeding other than a bankruptcy proceeding, and such appointment shall not be vacated within ninety (90) days after it has been made; or

**10.1.5** Subject to events of force majeure, if Tenant (i) fails to "substantially complete" (as defined in the Development Agreement) the Improvements on or before the deadlines established in the Development

Agreement, or (ii) fails for ninety (90) days within any one hundred twenty (120) day period to continuously and diligently pursue the completion of construction of the Improvements after commencement of construction; or

**10.1.6** Subject to casualty, condemnation and/or events of force majeure, if the Building shall cease to operate consistent with the provision set forth in **Section 5.1** hereof or such other use as is permitted under the provisions of said **Section 5.1** on the Property for more than three hundred sixty (360) consecutive days.

**10.2 Landlord's Remedies.** Upon the occurrence of an event of Default, subject to the provisions of **Article 11** below and the special limitations set forth in **Section 5.1(b)**, Landlord may, at Landlord's sole option and without order of any court or further written notice to Tenant, and without limiting in any manner any other remedies available at law or equity, exercise any one or more of the remedies set forth in this **Section** or any other remedy available under applicable law or contained in this Lease. If any voluntary or involuntary proceeding for a reorganization or an arrangement is instituted, and no application is made in any such proceeding and no relief is requested therein by Tenant to reject this Lease, or to reform or recast the same or for any change, modification or alteration of any of the terms, covenants and conditions of this Lease or to relieve Tenant from the punctual payment of the Rent, including Base Rent and Additional Rent, or other charges required to be paid by Tenant under this Lease, and if all Rent, including Base Rent and Additional Rent, and other charges due from Tenant under this Lease are paid within the time period(s) hereinbefore provided, and all of the terms, covenants and conditions of this Lease required to be performed by Tenant are promptly performed and complied with within the time period(s) hereinbefore provided, then Tenant shall have the continuous and uninterrupted quiet enjoyment and exclusive possession of the Property during the Lease Term; provided however, nothing herein contained shall modify the rights of Landlord or the obligations of Tenant with respect to this Lease under the Federal Bankruptcy Code in the event of the filing of a petition thereunder by Tenant.

Landlord may terminate this Lease whereupon the Tenant shall be obligated, without further action by the Landlord, to comply with the provisions of **Section 13.16** hereof.

Landlord or Landlord's agents and employees may by summary ejectment proceedings or by any suitable action or proceeding at law, with or without terminating this Lease, enter upon and take possession of the Property, securing it against unauthorized entry and expel or remove Tenant and any other occupant therefrom and alter locks and other security devices at the Property, without being liable to indictment, prosecution, or damages.

Landlord may relet the whole or any part of the Property from time to time, either in the name of Landlord or otherwise, to such tenants, for such terms ending before, on,

or after the expiration date of the Lease Term, at such rentals and on such other conditions as Landlord may determine to be appropriate.

Landlord may recover its damages, including without limitation all lost rentals, all legal expenses including reasonable attorneys' fees, all costs incurred by Landlord in restoring the Property (except, as to an event of casualty, Tenant shall be liable only to the extent that such restoration costs are not covered by insurance proceeds received by Landlord) or otherwise preparing the Property for reletting for any purposes consistent with the Permitted Uses, and all costs incurred by Landlord in reletting the Property and interest thereon at the rate set forth above for past due Rent under this Lease.

If Tenant should fail to make any payment, perform any obligation, or cure any default hereunder after such notice and the expiration of such cure period as provided herein, Landlord, without obligation to do so and without thereby waiving such failure or default, may make such payment, perform such obligation, and/or remedy such other default for the account of Tenant (and enter the Property for such purpose), and Tenant shall pay, as Additional Rent, upon demand all costs, expenses and disbursements (including reasonable attorney's fees) incurred by Landlord in taking such remedial action, plus interest thereon at the rate set forth above for past due Rent under this Lease.

No failure by Landlord to insist on the strict performance of any agreement, term, covenant, or condition of this Lease or to exercise any right or remedy consequent upon a breach, and no acceptance of full or partial Rent during the continuance of any such breach, constitutes a waiver of any such breach or of such agreement, term, covenant, or condition. No agreement, term, covenant, or condition to be performed or complied with by Tenant, and no breach by Tenant shall be waived, altered, or modified except by a written instrument executed by Landlord. No waiver of any breach shall affect or alter this Lease, but each and every agreement, term, covenant, and condition of this Lease shall continue in full force and effect with respect to any other then-existing or subsequent breach. Tenant shall have no liability for any consequential or incidental damages of Landlord, or anyone claiming by, through or under Landlord, for any reason whatsoever.

Upon expiration or earlier termination of this Lease, Tenant hereby covenants and agrees to surrender and deliver the Property peaceably to Landlord together with all the Improvements described in this Lease in their then current "as is" condition, together with an assignment of Tenant's Development Rights and Special Declarant Rights as defined in the North Carolina Condominium Act. FF&E may be removed by Tenant or any subtenant at or before this Lease terminates, provided, however, that the removal will not injure the Improvements or necessitate repairs to the same, or if such repairs are required, those repairs will be made promptly following any such removal. Tenant shall pay or cause to be paid to Landlord the cost of repairing any damage arising from such removal and restoration of the Improvements to their condition before such removal. Any personal property of Tenant that shall remain on the Property for a period of more than thirty (30) days after the termination of this Lease and the removal of Tenant from

the Property may, at the option of Landlord, be deemed to have been abandoned by Tenant and may either be retained by Landlord as its property or be disposed of, without accountability, in such manner as Landlord may see fit, or if Landlord gives written notice to Tenant to such effect, such property, shall be removed by Tenant at Tenant's sole cost and expense.

**10.3 Landlord's Default.** Landlord shall be in Default under this Lease:

**10.3.1** If there is an Event of Default by Landlord under the Development Agreement; or

**10.3.2** If the Land Condominium Declaration is terminated; or

**10.3.3** In the event Landlord shall have failed to perform an obligation required herein within thirty (30) days (or such additional time as is reasonably required to perform such obligation) after receipt of written notice from Tenant specifying the manner in which Landlord has breached this Lease. Tenant shall have all rights available to it hereunder or at law or in equity. To the extent Landlord's Default is the failure to maintain and/or restore the improvements located in the Public Space Unit or Public Parking Unit in keeping with other first class downtown public spaces and other first class parking garages located in the Chapel Hill, North Carolina, or as required to allow Tenant to maintain and/or restore the Improvements as required under this Lease, Tenant shall have the right, but not the obligation to do so and without thereby waiving such failure or default, to make such payment, perform such obligation, and/or remedy such other default for the account of Landlord (and enter the Public Space Unit and Public Parking Unit for such purpose), and Landlord shall pay to Tenant, upon demand all costs, expenses and disbursements (including reasonable attorney's fees) incurred by Tenant in taking such remedial action, plus interest thereon at the rate set forth in this Lease for past due Rent. Tenant's right to seek any remedy for Landlord's default shall not be deemed waived by the failure to exercise said right nor shall any such failure estop Tenant from afterward asserting said right to seek any remedy as provided herein or as provided by law or in equity. The remedies of Tenant shall be cumulative, and include any and all remedies as provided herein or by law or in equity, and no one of them shall be construed as exclusive of any other or of any remedy provided herein or by law or in equity. Any prior waiver of any of Tenant's rights under the Lease shall not constitute a waiver of Tenant's rights to damages in event of subsequent default or breach of Landlord. In the event a court of competent jurisdiction finds that Landlord has breached the terms and conditions of this Lease, in addition to any civil remedies, Tenant shall be entitled to its reasonable attorneys' fees associated with such suit and/or claim. Landlord shall have no liability for any consequential or incidental damages of Tenant, or anyone claiming by, through or under Tenant, for any reason whatsoever.

**10.4 No Indirect Damages.** In no event shall either party hereto be liable under any provision of this Lease for any special, indirect, incidental, consequential, exemplary, treble or punitive damages, in contract, tort or otherwise, whether or not caused by or resulting from the sole or concurrent negligence of such party or any of its affiliates or related parties. Notwithstanding the foregoing, except as may otherwise be provided herein, this limitation of liability shall not apply to third-party claims.

**10.5 Remedies Are Cumulative.** Each right and remedy provided for in this Lease shall be cumulative and shall be in addition to every other right or remedy provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Landlord or Tenant of any one or more of the rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by the party in question of any or all other rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise.

## **11. PROTECTION OF LENDERS AND LEASEHOLD CONDOMINIUM OWNERS**

**11.1 Consent to Encumbrance of Leasehold Interest.** Tenant or its approved assignee shall be responsible for funding the entire cost of, and securing all financing required, in order to complete construction of the Improvements in accordance with the Development Agreement and provide the necessary tenant upfitting desired by Tenant or its assigns, and Landlord hereby consents to the encumbrance of Tenant's leasehold estate created under this Lease; provided, however, that the fee simple ownership interest of Landlord to the Leased Premises shall be prior, superior and paramount to the lien of any mortgage or deed of trust which may now or hereafter affect the leasehold interest of Tenant in and to the Leased Premises, or any part thereof. Notwithstanding the foregoing, Landlord will provide to Tenant's Lender an appropriate non-disturbance agreement in the form more particularly attached hereto as Exhibit B-1 and incorporated herein by reference and to any purchaser of a 140 West Franklin Condominium Unit a non-disturbance agreement in the form attached hereto as Exhibit B-2. Tenant acknowledges and understands that under no circumstances will any party providing financing for the Improvements be permitted to encumber in any manner by lien of a deed of trust, mortgage, security agreement or other encumbrance, Landlord's fee simple title to the Leased Premises.

**11.2 Definition.** As used in this Lease, "Lender" shall collectively mean, each and every lender which (a) takes a security interest in, or otherwise encumbers, Tenant's leasehold interest in the Property (the "Leasehold Estate"), which security interest is evidenced by a deed of trust, or mortgage, or other security instrument (herein referred to, collectively, as the "Lender's Security Instrument") as recorded in the office of the County Recorder of Orange County, in the State of North Carolina, and (b) has notified Landlord of such recorded Lender's Security Instrument.

**11.3 General.** All rights acquired under any Lender's Security Instrument shall be subject and subordinate to the terms of this Lease and to all rights and interests of Landlord hereunder, and shall incorporate all relevant terms and requirements contained herein, including, without limitation, a statement that Lender disclaims any interest or lien against Landlord's fee simple interest in the Leased Premises and improvements thereon, a statement that insurance proceeds from Casualty or proceeds from condemnation or payments in lieu thereof shall be used for the repair or rebuilding of the Improvements if so required by this Lease and not to the repayment of Lender (except as expressly set forth in this Lease), and a statement that Landlord shall have no liability whatsoever in connection with the financing under the agreement, notes, and security instruments executed, delivered and/or recorded in connection with such financing. Notwithstanding the foregoing, Landlord acknowledges and agrees that Lender's Security Instrument may include an after acquired property clause that will be effective upon the Option Closing. At all times during the Lease Term, Lender shall have the right to (a) exercise its remedies pursuant to its Lender's Security Instrument and to transfer, convey, and assign Tenant's Leasehold Estate created hereby to any purchaser at any foreclosure sale, trustee's sale, or other sale held pursuant to such Lender's Security Instrument, and to acquire and succeed to the interest of Tenant hereunder by virtue of any such sale, without the consent of Landlord. In furtherance of the foregoing, if Lender is the successful bidder at such sale held pursuant to any such Lender's Security Instrument (or a senior security instrument) then Lender shall be entitled to further assign or transfer this Lease or sublet the Property in the same manner as provided under **Article 9**, above, without the prior written consent of Landlord; and (b) to accept an assignment in lieu of foreclosure under the Lender's Security Instrument, without the consent of Landlord or otherwise acquire Tenant's Leasehold Estate, by assignment or conveyance in lieu of any such foreclosure proceedings, in which case the Lender's rights and interest under its Lender's Security Instrument shall not merge into the Leasehold Estate but shall remain separate and distinct in all respects, the Lender's Security Instruments shall remain in full force and effect; and the Lender shall be entitled to further assign or transfer this Lease or sublet the Property in the same manner as provided under **Article 9**, above, without the prior written consent of Landlord. Landlord hereby subordinates all of its present and future claims and rights, if any, to any and all Leases and Rents (as defined below) to the full payment in cash of the loan obligations. For these purposes, the term "Leases and Rents" means any and all subleases now or hereafter affecting the Property or any part thereof and all of the rents, issues, profits, revenues, awards and other benefits now or hereafter arising from the Property or any part thereof. Landlord agrees that as long as any of the Lender's Security Instruments remain outstanding, Landlord will not take any action or initiate any proceedings, judicial or otherwise, to enforce any of Landlord's rights or remedies with respect to any Leases and Rents.

**11.4 Lender Protections.** If any Lender sends to Landlord a true copy of its Lender's Security Instrument, together with written notice specifying the name and address of the Lender and the pertinent recording data with respect to such Lender's Security Instrument, then from and after Landlord's receipt of Lender's notice and so long as any such Lender's Security Instrument shall remain unsatisfied of record, or until



written notice of satisfaction is given by Lender to Landlord, the following provisions shall apply:

**11.4.1** Except as set forth with respect to a Default (beyond applicable notice and cure periods) by Tenant in the terms of this Lease, and except for Tenant's right to terminate this Lease pursuant to **Section 7** and **Section 8** hereof, there shall be no cancellation, surrender, amendment or modification of this Lease by joint action of Landlord and Tenant without the prior consent in writing of the Lender and except for a voluntary surrender by Tenant under **Section 7** and **Section 8** Landlord shall not accept Tenant's voluntary surrender of the Leasehold Estate so long as the Lender's Security Instrument is outstanding;

**11.4.2** While such Lender's Security Instrument remains unsatisfied of record, Landlord shall simultaneously serve upon the Lender (in the manner required by the provisions of **Section 13.4** hereof and any notice from Lender to Landlord will likewise be sent in the manner required by the provisions of **Section 13.4** hereof) a copy of any notice of Default or other notice under this Lease served upon the Tenant. If any Default occurs pursuant to any provision of this Lease, and before the expiration of sixty (60) days from the date of service of notice of Default upon such Lender, if such Lender notifies Landlord in writing of its desire to nullify such notice, pays to Landlord all Rent and other payments herein provided for and then in Default, complies or commences the work of complying with all of the other requirements of this Lease, if any are then in Default, and prosecutes the same to completion with reasonable diligence, then Landlord shall not be entitled to exercise any remedies set forth in this Lease for such Default and any notice of Default theretofore given shall be void and of no effect. Landlord and Tenant agree that Lender may enter upon the Property to cure any Default of Tenant hereunder at all reasonable times, and that neither Landlord nor Tenant shall in any way obstruct or limit Lender's right of entry upon the Property. Nothing contained herein shall in any manner obligate Lender to cure any Default of Tenant.

**11.4.3** In no event shall Landlord exercise any default remedies because of any Default by Tenant which is not susceptible of being cured by Lender or its assignee, so long as the following covenants of this Lease are being complied with (the "Required Covenants"): (i) Rent and other payments to be made by Tenant under the Lease are paid current, (ii) Tenant is diligently pursuing construction of the Parking Garage, Public Space improvements and Building as required by the Development Agreement, (iii) the Improvements are maintained in good repair or, in the event the circumstances set forth in **Section 7** or **Section 8** hereof are applicable, the Tenant is diligently complying with the same, (iv) the Improvements are in compliance (granted a variance from or "grandfathered" with respect to compliance) with all applicable laws, codes and regulations applicable to the Leased Premises, (v) no liens, other than that of the Lender's Security Instrument, against the Property remain uncanceled, (vi) all insurance policies to be carried by Tenant are in full force and effect; and (vii) the

other covenants and conditions of the Lease that are susceptible of being complied with by Lender are being complied with by Lender or its assignee. The obligation of Tenant to develop the Project, including the Parking Garage, Public Space improvements and the Building in accordance with the Development Agreement is a material obligation of Tenant and a Required Covenant; a default by Tenant under the Development Agreement is a Default under this Lease which may be cured by Lender performing Tenant's obligations under the Development Agreement; and that will be binding upon the Lender or any assignee of the Lender under any new lease for the Property entered into in accordance with the provisions of Section 11.4.5. In case any Default by Tenant under the Lease, as to which notice has been given as provided herein, remains uncured after the time within which the same may be cured under the Lease, and notice of Default is given as above provided, and Lender or its assignee takes steps required above to cure and thereby render the notice of Default void and of no effect, such Lender or its assignee shall be entitled, at its option and upon notice to Landlord within thirty (30) days after the date of such cure and upon the payment of all sums then due to the Landlord from Tenant under this Lease and any expenses, including reasonable attorneys' fees, to which Landlord shall have been subjected by reason of such Default, to enter into a new lease for the Property in accordance with the provisions of Section 11.4.5.

**11.4.4** The name of the Lender shall be added to the "loss payable endorsement" of any and all insurance policies required to be carried by Tenant hereunder, and the Lender shall be added to such policies as mortgagee as its interest may appear; provided that the Lender shall expressly provide that the insurance proceeds are to be applied in accordance with the provisions of this Lease.

**11.4.5** In the event of the commencement of a bankruptcy proceeding concerning Tenant, Landlord agrees and acknowledges that the actual or deemed rejection of the Lease (or any new lease entered into pursuant to the terms of this Lease) under any provision of the Bankruptcy Code, or any successor law having similar effect, shall not effect a termination of the Lease, or affect or impair the Lender's lien thereon or rights with respect thereto. If it appears necessary to the Lender, in order to give legal or practical effect to the preceding sentence, or if a court of competent jurisdiction determines that the Lease has been terminated by operation of law, Landlord agrees that, promptly upon the written request of the Lender made within thirty (30) days of such rejection of this Lease and upon the payment of all sums then due Landlord from Tenant under this Lease and any expenses, including reasonable attorney's fees, to which Landlord shall have been subjected by reason of such Default, the Landlord will enter into a new lease of the Property to Lender, or its designee, upon the same terms and conditions as the Lease, and having a term expiring on the same date as the Lease (excluding requirements which are not applicable or which have already been fulfilled). In such event, all right, title and interest of Tenant in the Lease and in the Property shall be thereby terminated and ended, and, at Lender's

election, the parties shall execute and record a memorandum with the Register of Deeds of Orange County evidencing such new lease, provided, however, Tenant shall not be released of any of its liability arising under this Lease prior to such termination. Notwithstanding anything to the contrary in this Lease or any other document, the new lease shall be (and Landlord shall take all action necessary to cause the same to be) prior to any mortgage, deed of trust or other lien, charge or encumbrance on the fee interest of Landlord, and the new tenant shall have the same right, title, interest, and priority in and to the Property as the Tenant had under this Lease. The effectiveness of any provisions of the new lease entered into with Lender pursuant to this **Section 11.4.5** which are incapable of performance by Lender due to the laws, rules and regulations pertaining to Lender shall be suspended while the Lender is the tenant under the new lease; provided, however, that the Required Covenants shall not be suspended or modified during such period as the Lender is the tenant under the new lease. The new tenant may, subject to the prior written consent of Landlord, assign its interest under the new lease, by written assignment, pursuant to which the assignee assumes and agrees to perform all covenants of Tenant thereunder, and Landlord shall be delivered a copy of the written assignment promptly following its execution.

**11.4.6** Except as required by **Sections 11.4.3** and **11.4.5** upon Lender's assumption of this Lease, nothing herein contained shall impose any liability upon Lender for Tenant's obligations hereunder unless and until (and only for so long as) Lender becomes and is the holder of the leasehold interest hereunder (whether by foreclosure, assignment-in-lieu of foreclosure or otherwise) or otherwise assumes such liability. Any Lender which so acquires the Leasehold Estate shall be entitled to further assign or transfer this Lease or sublet the Property in the same manner as provided under **Article 9**, above, without the prior written consent of Landlord.

**11.4.7** If Lender shall acquire the Leasehold Estate by foreclosure of its Lender's Security Instrument or by assignment-in-lieu of foreclosure, Lender may, with Landlord's approval (which approval shall not be unreasonably conditioned, withheld or delayed if the Required Covenants have been performed), assign this Lease or such new lease, as the case may be, and shall thereafter be released from all liability for the performance or observance of the covenants and conditions in such lease contained on the Tenant's part to be performed and observed from and after such assignment, provided the assignee from Lender shall have assumed and agreed to perform such lease.

**11.5 Implementation of Lender Protection Provisions.** Landlord and Tenant shall cooperate to include in this Lease by suitable amendment from time to time any provision which may reasonably be requested by any proposed Lender for the purpose of implementing the "lender protection" provisions contained in this Lease and allowing such Lender reasonable means to protect or preserve such Lender's lien and security interest in the Leasehold Estate on the occurrence of a Default under the terms of this

Lease. Landlord and Tenant shall execute and deliver (and acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term of this Lease or Rent under this Lease, nor otherwise in any material respect adversely affect any rights of Landlord under this Lease; and further provided, however, that Landlord shall not be obligated to encumber its fee interest or reversionary interest in the Property ("subordinate the fee"), execute any document creating personal liability on the part of Landlord, or otherwise subject Landlord or Landlord's interest in the Property to liability whatsoever for such loan. Notwithstanding the foregoing, Landlord and/or its lender shall be required to execute any reasonable subordination and non-disturbance agreement requested by any Lender to ensure that Lender's interest in the Leasehold Estate shall not be disturbed by Landlord and/or any of Landlord's lenders on the Leased Premises (if any) in the event of a foreclosure action.

**11.6 Merger of Estates.** In the event Tenant acquires the reversionary interest of Landlord in the Property and any Lender holds a Lender's Security Instrument encumbering the Leasehold Estate, then the Leasehold Estate shall not merge with such reversionary interest, but shall remain a separate and distinct estate until all obligations to all Lenders have been fully paid, performed and satisfied, and such security interest in the Leasehold Estate shall remain in full force and effect, unless and until such time as Tenant has executed an appropriate security interest in the Property in a form, and having a priority, acceptable to all such Lenders.

**11.7 Leasehold Condominium Owner Protections.** The rights of Landlord upon the occurrence of any Default by Tenant under this Lease shall be limited as to the owners of leasehold condominiums created by the 140 West Franklin Condominium Declaration as set forth in **Section 5.1(b)** and Section 47C-2-106 of the North Carolina Condominium Act as of the Commencement Date of this Lease (and as said Act may be modified or amended, but only to the extent that such modification or amendment by its terms has prospective application).

**11.8 Multiple Lenders.** If at any time multiple Lenders exist on a single 140 West Franklin Condominium Unit: (a) any consent by or notice to Lender refers to all Lenders; (b) except under clause "a," the most senior Lender may exercise all rights of Lender to the exclusion of junior Lender(s); (c) to the extent that the most senior Lender declines to do so, any other Lender may exercise those rights, in order of priority; and (d) if Lenders do not agree on priorities, a written determination of priority issued by a lawyer licensed in the State of North Carolina shall govern. Notwithstanding anything to the contrary in this Lease, Lender may: (i) exercise its rights through an affiliate, assignee, designee, nominee, subsidiary, or other entity acting in its own name or in Lender's name (and anyone acting on behalf of Lender shall automatically have the same protections, rights, and limitations of liability as Lender; (ii) refrain from curing any Default; or (iii) abandon such cure at any time.

**12. PROCEEDINGS.** If any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the prevailing party a reasonable

sum as attorneys' fees and costs both for trial and any appeal. The non-prevailing party in such action shall pay such attorneys' fees and costs both for trial and any appeal. Tenant agrees to indemnify and save harmless Landlord and its partners, officers, agents, employees and affiliates from and against any and all losses, claims, demands or suits by third parties in the manner contemplated in Section 6.1.5 (including reasonable attorneys' fees). If any action or proceeding is brought against Landlord by reason of any such claims, Tenant upon notice from Landlord covenants at Tenant's cost and expense to resist or defend such action or proceeding or to cause it to be resisted or defended by an insurer, or if uninsured by counsel reasonably acceptable to Landlord, appointed and paid by Tenant.

### **13. MISCELLANEOUS PROVISIONS**

**13.1 Representations.** Landlord represents and warrants to Tenant that the following facts and conditions exist and are true as of the Commencement Date and, to the extent specifically so stated, will remain true throughout the Lease Term:

**13.1.1 Due Authorization and Execution.** Landlord has full right, title, authority, and capacity to execute and perform this Lease, and any other agreements and documents to which Landlord is a party and referred to or required by this Lease (collectively, the "Lease-Related Documents"); the execution and delivery of the Lease-Related Documents has been duly authorized by all requisite actions of Landlord; the Lease-Related Documents constitute valid, binding, and enforceable obligations of Landlord; and neither the execution of the Lease-Related Documents nor the consummation of the transactions contemplated thereby violates any agreement (including Landlord's organizational documents), contract or other restriction to which Landlord is a party or is bound. Landlord's representations and warranties contained in this paragraph shall continue to apply in full force and effect throughout the Term as if made continuously during the Term.

**13.1.2 No Litigation.** There is no existing or, to Landlord's knowledge, pending or threatened litigation, suit, action, or proceeding before any court or administrative agency affecting the Leased Premises that would, if adversely determined, adversely affect the Leased Premises, or Tenant's ability to develop and operate the Property for the purposes set forth herein.

**13.1.3 Hazardous Materials.** To the best of its knowledge without independent investigation Lot 5 is free of storage tanks and all Hazardous Materials and no Hazardous Materials have been stored, disposed, treated, transported or located on or under Lot 5-except as set forth in that certain Phase I Environmental Site Assessment, dated August 18, 2004 prepared by Environmental Consulting Services for Stainback Public/Private Real Estate and referred to as ECS Project Number 12494, the Landlord is not aware of the use, storage or handling of Hazardous Materials on land adjacent to Lot 5 or of any pending, threatened or contingent proceedings concerning waste disposal on Lot 5; and Lot 5 is to the best of Landlord's knowledge without independent investigation in compliance with all environmental, health and safety laws, and

Landlord has received no correspondence from any regulatory agency regarding possible violations concerning Lot 5.

**13.1.4 Title.** Landlord is the owner of an indefeasible fee simple title in Lot 5, subject only to routine utility easements and rights-of-way that do not prevent or interfere with the reasonable use of the Lot 5 for the construction and use of the Project. There are no recorded and enforceable restrictions that would prevent Tenant from developing and constructing the Project. Landlord agrees that it will not enter into any covenant, restriction, encumbrance, right of lien, easement, lease or other contract that cannot be terminated with thirty (30) days notice pertaining to Lot 5 without the express written consent of Tenant. No other person or entity other than Landlord owns or has any legal or equitable interest in the Leased Premises.

**13.2 Severability.** A determination by a court of competent jurisdiction that any provision of this Lease or any part thereof is illegal or unenforceable shall not cancel or invalidate the remainder of such provision or this Lease, which shall remain in full force and effect.

**13.3 Interpretation.** The captions of the Sections of this Lease are to assist the parties in reading this Lease and are not a part of the terms or provisions of this Lease. Whenever required by the context of this Lease, the singular shall include the plural and the plural shall include the singular. The masculine, feminine and neuter genders shall each include the other. For purposes of this Lease, Tenant shall be deemed to have complied with a Legal Requirement if Tenant has obtained a variance from or is "grandfathered" from compliance of such Legal Requirement.

**13.4 Notices.** All notices require or permitted under this Lease shall be in writing and shall be personally delivered or sent by certified mail, return receipt requested, postage prepaid, or sent for overnight delivery by a nationally recognized courier such as Federal Express. Notices to Tenant shall be delivered to the address specified in **Section 1.1** above. Notices to Landlord shall be delivered to the address specified in **Section 1.2** above. All notices shall be effective upon delivery or delivery refused. Either party may change its notice address upon written notice to the other party.

**13.5 Waivers.** Except as otherwise provided under the terms of this Lease all waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provision of this Lease or its acceptance of Rent shall not be a waiver and shall not prevent Landlord from enforcing that provision or any other provision of this Lease in the future. No statement on a payment check from Tenant or in a letter accompanying a payment check shall be binding on Landlord. Landlord may, with or without notice to Tenant, negotiate such check without being bound to the conditions of such statement.

**13.6 Recordation of Lease.** Landlord shall record this Lease in the Office of the Recorder of Orange County, North Carolina contemporaneously with the Closing as

contemplated under the Development Agreement. Any transfer taxes or conveyance fees payable upon recordation of the Lease will be payable by Tenant.

**13.7 Binding Effect; Choice of Law.** This Lease binds any party who legally acquires any rights or interest in this Lease from Landlord or Tenant. However, Landlord shall have no obligation to Tenant's successor unless the rights or interests of Tenant's successor are acquired in accordance with the terms of this Lease. The laws of the state in which the Leased Premises is located shall govern this Lease.

**13.8 Corporate Authority; Partnership Authority.** If Tenant is a corporation or limited liability company, each person signing this Lease on behalf of Tenant represents and warrants that he has full authority to do so and that this Lease binds the corporation or limited liability company.

**13.9 Execution of Lease.** This Lease may be executed in counterparts and, when all counterpart documents are executed, the counterparts shall constitute a single binding instrument. Landlord's delivery of this Lease to Tenant shall not be deemed to be an offer to lease and shall not be binding upon either party until executed and delivered by both parties.

**13.10 Survival.** All representations and warranties of Landlord and Tenant shall survive the termination of this Lease.

**13.11 Lease Termination.** This Lease shall terminate on the Expiration Date.

**13.12 Controlling Document.** In the event that there is a conflict in the terms, conditions, rights, or obligations, including but not limited to Landlord's right to receive income, in any documents entered into by and between Landlord and Tenant, the terms, conditions, rights, and obligations of this Lease shall control. Notwithstanding the foregoing, the Development Agreement shall control in the event of any conflict with this Lease.

**13.13 Counterparts.** If this Lease is executed in any number of counterparts in the manner contemplated under **Section 13.9**, above, all such counterparts, taken together, shall constitute one and the same instrument.

**13.14 Waiver of Jury Trial.** To the fullest extent permitted by law, Landlord and Tenant waive any right to a trial by jury in any action or proceeding based upon, or related to, the subject matter of this Lease. This waiver is knowingly, intentionally, and voluntarily made by Landlord and Tenant, and Landlord and Tenant acknowledge that neither Landlord nor any person acting on behalf of Landlord nor Tenant nor any person acting on behalf of Landlord or Tenant has made any representations of fact to induce this waiver of trial by jury or in any way to modify or nullify its effect.

**13.15 Ownership of Improvements During Term.** During the Lease Term, title to any and all Improvements, including, without limitation, buildings, parking areas,

drives, walkways, landscape improvements and infrastructure improvements such as roadways, utilities, mains and lines, curbs and drainage facilities, which are constructed, installed or erected on the Leased Premises by Tenant during the Lease Term shall vest in Tenant and its permitted successors and assigns (unless any such improvements are dedicated to the local municipality or applicable utility service provider or attached and/or affixed to any building by Tenant), shall remain with Tenant and its permitted successors and assigns during the Lease Term or until the Expiration Date or earlier termination or cancellation of this Lease and shall thereupon automatically vest in Landlord as provided in **Section 13.16**, below. Notwithstanding the foregoing, title to any and all FF&E (as defined in **Section 13.16**, below) belonging to Tenant or any subtenant, shall keep and retain their character as personal property, shall not be deemed to be a part of the Leasehold Estate, and shall be and remain the property of Tenant or its subtenant, as applicable, during the Lease Term and thereafter, following the Expiration Date. Similarly, if this Lease is terminated as a result of Tenant exercising the Option, all Improvements shall be and remain the property of Tenant or its subtenant from and after the Option Closing.

**13.16 Expiration or Termination of Term.** Except in connection with the Option Closing, upon the Expiration Date or any early termination of this Lease by Tenant or termination by Landlord following a Tenant Default: (a) all Improvements constituting part of the Leased Premises (including any buildings) shall become Landlord's property and shall be vacated in broom-clean condition; (b) Tenant shall deliver to Landlord possession of the Property; (c) Tenant shall surrender any right, title, or interest in and to the Property; (d) Tenant shall, at Landlord's election, either (i) deliver the Property free and clear of all subleases, and all liens other than liens created as a result of Landlord's or any of its agents' acts or omissions (ii) assign to Landlord, without recourse, and give Landlord copies or originals of, any then current subleases that Landlord has elected to assume from Tenant, and all assignable licenses, permits, contracts, warranties, and guarantees then in effect for the Property, if any in which case the parties shall cooperate to achieve an orderly transition of operations from Tenant to Landlord without interruption, including delivery of such books and records (or copies thereof) as Landlord shall reasonably require; and (e) the parties shall terminate the recorded Lease. Notwithstanding anything to the contrary set for herein, Tenant may remove from the Property any FF&E (as defined herein) that Tenant or any subtenant acquired or utilized in connection with the use, operation and occupancy of the Property, but Tenant or its subtenant must do so, if at all, before or within thirty (30) days after the Expiration Date and repair all damages caused as a result of such removal. During such 30-day period: (a) Tenant may enter the Property for such purposes, without being deemed a holdover; (b) Landlord shall have no obligation to preserve or protect such FF&E; and (c) in entering the Property, Tenant shall comply with Landlord's reasonable instructions. During said thirty (30) day period Tenant shall keep in force all insurance coverages as required under the terms of this Lease, with Landlord being named as an additional insured. Tenant shall also indemnify, hold and save harmless Landlord from any and all claims, losses and damages of whatsoever nature that might occur or be claimed as a result of Tenant's actions during said thirty (30) day period. Tenant's FF&E not removed from the Property within thirty (30) days after the Expiration Date shall be



deemed abandoned. For purposes of this Lease, "FF&E" means all movable furniture, fixtures, equipment, and personal property of Tenant that may be removed from the Property without material damage thereto and without adversely affecting: (a) the structural integrity of the Property; (b) any electrical, plumbing, mechanical, or other system of the Property; (c) the present or future operation of any such system; or (d) the present or future provision of any utility service to the Property. FF&E includes, but is not limited to, such items such as such as factory equipment, furniture, fixtures and equipment, telephone, telecommunications and facsimile transmission equipment, point of sale equipment, televisions, radios, and computer systems.

**13.17 Force Majeure.** Notwithstanding anything in this Lease to the contrary, neither Landlord nor Tenant shall be deemed in Default with respect to the performance of any of the terms, covenants, and conditions of this Lease to be performed by it if any failure of its performance shall be due to any strike, lockout, civil commotion, war, warlike operation, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, inability to obtain any material or service, Act of God, or any other cause whatever beyond the reasonable control of such party, and the time for performance by Landlord, or Tenant as applicable, shall be extended by the period of delay resulting from or due to any of said causes.

**13.18 Right of First Refusal.** If during the term of this Lease, Landlord receives a bona fide offer from an unaffiliated third party to purchase all or any portion of the Leased Premises ("Third Party Offer") and Tenant is not in default hereunder beyond all applicable cure periods, to the extent permitted by applicable law, Landlord shall offer Tenant the right to purchase all or such portion of the Leased Premises by sending to Tenant a written notice of the specific terms of the Third Party Offer, including the price, payment terms, conditions of title, costs of escrow and other relevant terms. Tenant shall have fifteen (15) days after receipt of such notice to exercise its right of first refusal hereunder and to purchase all or a portion of the Leased Premises pursuant to the terms of the Third Party Offer by providing written notice of same to Landlord ("Tenant ROFR Notice"). If Tenant exercises its right of first refusal hereunder, such purchase and sale shall be on the same conditions as the Third Party Offer, and the closing shall occur within sixty (60) days of Landlord's receipt of the Tenant ROFR Notice. If Tenant does not elect to exercise its right of first refusal hereunder or Tenant fails to provide notice within said fifteen (15) day period, Tenant's right of first refusal under this Section 13.18 Landlord may accept such Third Party Offer and provided the conveyance of the Leased Premises is closed in accordance with the Third Party Offer, then and only then, Tenant's right of first refusal shall be deemed null and void. The right of first refusal as set forth in this Section 13.18 may be assigned by the Tenant to the 140 West Franklin Condominium Association, Inc. created under the 140 West Franklin Condominium Declaration, or any other permitted successors and assigns of Tenant under this Lease.

**13.19 Tenant Termination Right – Option to Purchase.**

**13.19.1 Exercise of the Option.** Provided Tenant is not in default hereunder beyond all applicable cure periods, commencing on (a) the first (1<sup>st</sup>) day of the month

following the fiftieth (50<sup>th</sup>) anniversary of the Commencement Date and continuing for a period of twenty four (24) consecutive calendar months thereafter; and (b) if applicable, the date Tenant receives written notice of a Condemnation of all or a portion of the Leased Premises of a magnitude such that Section 8.3 of this Lease is operative (provided said Condemnation occurs after the fifth anniversary of the Building being "Substantially Complete" as defined in the Development Agreement or before the period of time described in the immediately preceding subsection (a) and the owners of residential units in the 140 West Franklin Condominium elect to terminate the 140 West Franklin Condominium Declaration) and continuing for a period of twenty four (24) consecutive calendar months thereafter; (said periods of time set forth in the immediately preceding subsections (a) and (b) being hereinafter referred to individually as the "Option Period" or collectively as the "Option Periods," as the case may be), upon prior written notice to Landlord ("Option Notice"), Tenant shall have the right and option to purchase (the "Option") the Building Unit and the Private Parking Unit, together with all appurtenant easements thereto and any related air or subterranean rights (if the same shall be part of the Leased Premises at such time) (collectively, the "Option Property") for a purchase price of Two Million and No/100 Dollars (\$2,000,000.00) to be paid in full at the closing of such purchase by wire or other immediately available funds, which closing shall take place within ninety (90) days after Landlord's receipt of the Option Notice (the "Option Closing"). In the event Tenant fails to deliver to Landlord the Option Notice prior to the expiration of either of the Option Periods, Tenant's Option shall be deemed null and void and of no further force or effect. In the event Tenant exercises its Option during an Option Period that arises due to an event of Condemnation, Landlord shall credit against the purchase price all Condemnation proceeds Landlord has received for the Option Property or shall assign all right, title and interest Landlord has to receive and/or negotiate the proceeds due to Landlord for the Option Property pursuant to the Condemnation.

**13.19.2 Closing.** Upon the closing of such sale and purchase, Landlord shall deliver to the Tenant, a Special Warranty Deed conveying fee simple title to the Option Property free and clear of all monetary liens and encumbrances; provided, however, said Special Warranty Deed shall be subject to the terms of the Declaration, the 140 West Franklin Condominium Declaration and shall contain restrictions for the benefit of the Landlord as well as owners of 140 West Franklin Condominium Units, which such restrictions shall run with the land, incorporating the provisions of **Sections 5 and 6** hereof, including restrictions on the use of the Option Property to the construction, development and operation of the Improvements (including the construction, development and operation of the Building and the operation of the Private Parking Unit and Private Parking Spaces (if same are made a part of the Leased Premises), for retail and residential condominium purposes as more fully described in the Development Agreement. In addition to the Special Warranty Deed, Landlord shall deliver to Tenant at the Option Closing (i) an owner's affidavit in form and substance satisfactory to Tenant's title insurance company, (ii) a non-foreign affidavit, and (iii) such other reasonable documentation or information as is requested by Tenant or its title insurance company. At the Option Closing, Landlord and Tenant agree that all real property taxes related to the Option Property, shall be prorated on a calendar year basis as of date of the Option Closing. Landlord shall pay deed stamps and other conveyance fees or taxes to the extent required by applicable law, and Tenant shall pay recording costs, costs of any title search,

title insurance premiums and survey and other inspection costs. Each party shall be responsible for their own attorneys' fees.

**13.19.3 Assignment of Option.** The right and option of Tenant to purchase the Option Property may be assigned by the Tenant in whole or in part to the 140 West Franklin Condominium Association, Inc. for benefit of the owners of the 140 West Franklin Condominium Units within the Building, or any other permitted successors and assigns of Tenant under this Lease. As set forth in the proposed 140 West Franklin Condominium Declaration, if the Option is exercised, then the 140 West Franklin Association, Inc. "shall direct the [Landlord] to execute and deliver a deed conveying the fee simple interest in the Leased Premises to 'the current Owner of each Unit with respect to his Unit, the Limited Common Elements allocated thereto, and the Unit's Allocated Interest in the Common Elements, as the grantee, and expressly state in such deed that the fee simple interest being conveyed shall be subject to this [140 West Franklin Condominium] Declaration.'" It is the intention of both the Tenant and Landlord, that at the time the Landlord executes and delivers such Special Warranty Deed in connection with the Option Closing to accomplish the following: (a) the 140 West Franklin Condominium Declaration which will be a leasehold condominium shall convert automatically to be a fee simple Declaration; (b) each owner of a 140 West Franklin Condominium Unit shall automatically be deemed the fee simple owner of his Unit, the Limited Common Elements allocated thereto, and his Unit's Allocated Interest in the Common Elements, subject to this Declaration, subject to the Land Condominium; and (c) this Ground Lease shall be deemed to have merged by operation of law and be terminated. The Landlord agrees to include such language in the Special Warranty Deed as is reasonably required in order to accomplish the goals intended as set forth herein.

**13.20 Brokers.** Each party represents and warrants to the other that it has dealt with no broker, finder or other person with respect to this Lease. Landlord and Tenant each agree to indemnify and hold harmless one another against any loss, liability, damage, cost, expense or claim incurred by reason of any brokerage commission alleged to be payable because of any act, omission or statement of the indemnifying party. Such indemnity obligation shall be deemed to include the payment of reasonable attorneys' fees and court costs incurred in defending any such claim.

**13.21 Nondisturbance and Estoppel Certificates.**

**13.21.1** Within fifteen (15) days of request, Landlord and/or its lender, if any, shall be required to execute any reasonable subordination and non-disturbance agreement requested by any Lender to ensure that Lender's interest in the leasehold interest in the Property shall not be disturbed by Landlord and/or any of Landlord's lenders, if any, on the Leased Premises in the event of a foreclosure action by Landlord's lender.

**13.21.2** Within fifteen (15) days of request, Landlord and/or its lender, if any, shall be required to execute any reasonable subordination and non-disturbance agreement requested by any subtenant to ensure that subtenant's

interest in the leasehold interest in the Property shall not be disturbed by Landlord and/or any of Landlord's lenders, if any, on the Leased Premises in the event of a Default by Tenant.

**13.21.3** Within thirty (30) days of request, Landlord shall be required to execute any reasonable estoppel certificates requested by any lessee, Lender and/or any subtenant to confirm that there are no Tenant Defaults, that this Lease is in full force and effect, the Commencement Date, the Termination Date, the Rent, and any other matters reasonably requested.

**13.22 Incorporation of Recitals.** The Recitals are hereby incorporated into the terms of this Lease as if fully set forth herein.

**13.23 Lease Guaranty.** As an inducement for Landlord to enter into this Lease, this Lease is conditioned upon the guarantee of Tenant's obligations under this Lease by Tenant's affiliate Ram Development Company. Such guaranty shall be delivered at Lease execution in the form attached hereto as Exhibit D and is hereby made a part hereof.

**[SIGNATURES ON NEXT PAGE]**

**SIGNATURE PAGE**  
**Ground Lease**

**IN WITNESS WHEREOF**, the parties have executed this Lease as of the date first above written.

**Landlord:**

**THE TOWN OF CHAPEL HILL,**  
a North Carolina municipal corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Tenant:**

**140 WEST FRANKLIN LLC,**  
a North Carolina limited liability company

By: Ram Realty II NR, LLC, a Delaware  
limited liability company, its sole member

By: Ram Realty Partners II, LP, a Delaware limited  
partnership, its sole member

By: Ram Realty Associates II, LLC, a  
Delaware limited liability company, its  
authorized general partner

By: \_\_\_\_\_  
Keith L. Cummings, its authorized  
manager

**EXHIBIT A**

**Legal Description**

**[TO BE INSERTED]**

**EXHIBIT B-1**

**LENDER'S NON-DISTURBANCE, ATTORNMENT AND ESTOPPEL AGREEMENT**

This Agreement (the "Agreement") is made and entered into this \_\_\_ day of \_\_\_\_\_, 200\_\_, by and between the Town of Chapel Hill, a municipal corporation organized and existing under the laws of the State of North Carolina (the "Ground Lessor"), 140 West Franklin LLC, a North Carolina limited liability company ("Tenant"), and \_\_\_\_\_ ("Lender").

**WITNESSETH:**

WHEREAS, Ground Lessor as Landlord and Tenant, as Tenant have entered into a Ground Lease dated \_\_\_\_\_, 200\_\_ (the "Ground Lease"), recorded in Book \_\_\_\_, Page \_\_\_\_ of the Orange County Register of Deeds for certain real property legally described on Exhibit A attached hereto and incorporated herein by this reference (the "Leased Premises"); and

WHEREAS, Tenant has entered into that certain General Development Agreement dated as of February \_\_\_\_, 2007, with Landlord pursuant to which Tenant is undertaking to develop various improvements on the Leased Premises; and

WHEREAS, Ground Lessor has been advised that Tenant is concurrently herewith borrowing the sum of \_\_\_\_\_ (\$ \_\_\_\_\_) from Lender (the "Loan") and that Tenant is encumbering Tenant's leasehold interest under the Ground Lease and the Leased Premises with a Leasehold deed of trust [**insert other security documents**] (collectively, the "Deed of Trust"); and

WHEREAS, Ground Lessor is providing this Agreement to Tenant and Lender in accordance with the provisions of the Ground Lease.

NOW, THEREFORE, for and in consideration of the mutual promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Ground Lessor represents to the Tenant and the Lender that the Ground Lease is in full force and effect, and has not been amended, modified, supplemented or otherwise changed [**insert appropriate language if private parking unit has been added to the premises**]; that the term thereof commences on \_\_\_\_\_ and continues for a period of ninety-nine (99) years in accordance with the terms and provisions thereof, that the base rent for the entire term has been paid in full and that, as of the date hereof, no additional rent is unpaid under the Ground Lease. Ground Lessor further represents that Tenant is not in default with respect to any provision of, or obligation under, the Ground Lease and that Ground Lessor has no claim against Tenant for any act or failure to act concerning the Leased Premises. Tenant hereby represents that Ground Lessor is not in Default with respect to any provision of, or obligation under, the Ground Lease and that Tenant has no claim against Ground Lessor for any act or failure to act in any respect concerning the Leased Premises.

2. Ground Lessor hereby acknowledges receipt of a copy of the recorded Deed of Trust certified by Lender, or the recording officer, to be true and correct. Ground Lessor hereby agrees that Lender is entitled to the rights and benefits of a holder of a leasehold mortgage set forth in Section 11 of the Ground Lease. Ground Lessor hereby acknowledges that the making of the Loan and the encumbering of the Tenant's leasehold interest in the Leased Premises and the giving of the aforesaid Deed of Trust in favor of Lender do not constitute a Default under the Ground Lease.

3. Ground Lessor agrees that during the term of the Ground Lease, so long as the Tenant is not in Default thereunder beyond any applicable cure period, Tenant's possession of the Leased Premises shall not be terminated and Tenant's rights and privileges under the Ground Lease shall not be diminished or interfered with by the Ground Lessor.

4. In the event, by reason of foreclosure of the Deed of Trust for any reason, or deed in lieu of foreclosure, Lender or any successor or assignee of Lender, succeeds to the interest of the Tenant under the Ground Lease, then upon receipt by Ground Lessor of notice from Lender or such successor or assignee that is succeeded to the rights of the Tenant under the Ground Lease, Ground Lessor hereby agrees to recognize Lender or such successor or assignee as Ground Lessor's "tenant" under the Ground Lease, subject to Lender complying with the terms and provisions thereof, and the Ground Lease shall continue in accordance with its terms between the Ground Lessor as Landlord and Lender, as "tenant", or any successor-assignee of Lender as Tenant.

5. In the event of a default by the Tenant under the terms of the Ground Lease, the Ground Lessor shall, upon giving notice to the Tenant, simultaneously serve a copy of such notice upon the Lender. Lender agrees that in the event of a default by Tenant under the terms of the Deed of Trust, Lender shall, upon giving notice to the Tenant of such default simultaneously serve a copy of such notice upon the Ground Lessor.

6. Lender hereby acknowledges that Lender's Deed of Trust is junior in all respects to and subordinate to the Ground Lease.

7. To the extent of a conflict between the terms and provisions set forth in this Agreement and the terms and the terms and provisions sets in the Deed of Trust, the terms and provisions of this Agreement shall prevail.

8. All notices which may or are required to be sent pursuant to this Agreement shall be in writing, effective upon delivery or refusal to accept delivery, and shall be sent by certified U.S. mail, postage prepaid, return receipt requested, or by receipted overnight carrier, to the address appearing below or such other address as shall be provided in writing to the other parties:

If to Lender:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



If to Ground Lessor:

405 Martin Luther King Jr., Blvd.  
Chapel Hill, NC 27514  
Attn: Ralph D. Karpinos, Esq.  
Fax: (919) 969-2063

With a copy to:

K&L Gates, LLP  
The Hearst Tower  
214 N. Tryon Street, 47<sup>th</sup> Floor  
Charlotte, NC 28202  
Attn: Glen B. Hardymon, Esq.  
Fax: (704) 353-3146

If to Landlord:

140 West Franklin LLC  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Keith L. "Casey" Cummings, President  
Fax: (561) 630-6717

With a copy to:

Ram Development Company  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Karen Geller, General Counsel  
Fax: (461) 630-6717

And to:

140 West Franklin LLC  
126 West Franklin Street  
Chapel Hill, North Carolina 27514  
Attn: Jon Keener, \_\_\_\_\_  
Fax: \_\_\_\_\_

And to:

Schell Bray Aycock Abel & Livingston PLLC  
100 Europa Drive, Suite 360  
Chapel Hill, NC 27517  
Attn: Holly H. Alderman, Esq.  
Fax: (919) 882-9495

9. This Agreement shall inure to the benefit of and be binding upon the parties, their successors in interest, heirs and assigns and any subsequent owner of the Premises or any portion thereof.

10. Should any action or proceeding be commenced to enforce any of the provisions of this Agreement, the prevailing party in such action shall be awarded, in addition to any other relief it may obtain, its reasonable costs and expenses, including, but not limited to, taxable costs, and reasonable attorneys' fees.

11. Each party hereto hereby represents and warrants that it has obtained all necessary consents to the execution, delivery, performance and recordation of this Agreement.

12. Ground Lessor agrees that nothing contained herein shall be construed as an assumption by Lender of any obligations of Tenant under the Ground Lease.

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year first above written.

[EXECUTION]

**EXHIBIT B-2**

Prepared by and Return To:  
Glen B. Hardymon, Esq.  
K&L Gates, LLP  
The Hearst Tower  
214 N. Tryon Street, 47<sup>th</sup> Floor  
Charlotte, NC 28202

**GROUND LEASE NON-DISTURBANCE AGREEMENT**

This Ground Lease Non-Disturbance Agreement (this "Agreement") is made and entered into effective as of \_\_\_\_\_, 2007, by and between \_\_\_\_\_ (the "Tenant"), **140 West Franklin LLC, a North Carolina limited liability company** (the "Landlord") and **THE TOWN OF CHAPEL HILL**, a North Carolina municipal corporation (the "Ground Lessor").

**WITNESSETH:**

WHEREAS, Ground Lessor, as landlord, and Landlord, as tenant, have entered into a Ground Lease dated \_\_\_\_\_, 200\_\_ (the "Ground Lease") recorded in Book \_\_\_\_\_, Page \_\_\_\_\_ of the Orange County Register of Deeds, for certain real property legally described on Exhibit A attached hereto and incorporated herein by this reference (the "Premises"); and

WHEREAS, Landlord has caused to be filed in the Orange County Register of Deeds a Declaration of Leasehold Condominium in accordance with the provisions of the North Carolina Condominium Act (the "Act") creating a leasehold condominium with respect to the Improvements constructed on the Premises; and

WHEREAS, Landlord and Tenant have entered into a Leasehold Condominium Lease ("Lease") dated \_\_\_\_\_, 200\_\_, as evidenced by that certain Memorandum of Lease recorded in Book \_\_\_\_\_, Page \_\_\_\_\_ of the Orange County Register of Deeds, covering the leasehold condominium unit designated in the Declaration as unit \_\_\_\_\_ (the "Condominium Unit"); and

WHEREAS, Tenant has pledged, or in the future may pledge, its interest in the Lease to a lender (the "Lender") to finance Tenant's payment to Landlord of base rent due under the Lease, as permitted under the Lease and the Ground Lease; and

WHEREAS, the parties desire to assure Tenant's possession and control of the Condominium Unit under the Lease, and the Premises under the Ground Lease, and to the extent applicable, Lender's interest in the Condominium Unit under the Lease and the Premises under the Ground Lease as pledged to it by Tenant, all upon the terms and conditions contained in the Lease; and

NOW, THEREFORE, for and in consideration of the mutual promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties agree as follows:

1. Ground Lessor represents to the Tenant and the Lender that the Ground Lease is in full force and effect, and has not been amended, modified, supplemented or otherwise changed **[insert appropriate language if private parking unit has been added to the premises]**; that the term thereof commenced on \_\_\_\_\_ and continues for a period of ninety-nine (99) years in accordance with the terms and provisions thereof, that the base rent for the entire term has been paid in full and that, as of the date hereof, no additional rent is unpaid under the Ground Lease. Ground Lessor further represents that Landlord is not in default with respect to any provision of, or obligation under, the Ground Lease and that Ground Lessor has no claim against Landlord for any act or failure to act concerning the Leased Premises. Landlord hereby represents that Ground Lessor is not in Default with respect to any provision of, or obligation under, the Ground Lease and that Landlord has no claim against Ground Lessor for any act or failure to act in any respect concerning the Leased Premises. Ground Lessor hereby confirms that Landlord has Substantially Completed the construction of the Project as set forth in the Development Agreement and required under the terms of the Ground Lease. In the event that the Ground Lease is terminated in accordance with Section 7 or Section 8 of the Ground Lease, Ground Lessor shall have no liability or obligation hereunder.

2. In the event the Ground Lease is terminated for any reason other than the reason set forth in Section 7 or Section 8 of the Ground Lease, Ground Lessor hereby agrees that the rights of Tenant under the Lease (as the same may be pledged to Lender) shall remain in full force and effect and its possession of the Condominium Unit thereunder shall remain undisturbed during the term of the Lease, subject to the terms of the Lease. In such event, and provided that such termination is not a termination in accordance with Section 7 or Section 8 of the Ground Lease, Ground Lessor agrees that it, and its successors and assigns, shall perform and be bound by all of the obligations imposed on the Landlord by the Lease for the balance of the term of the Lease and any extensions or renewals thereof.

3. All notices which may or are required to be sent pursuant to this Agreement shall be in writing, effective upon delivery or refusal to accept delivery, and shall be sent by certified U.S. mail, postage prepaid, return receipt requested, or by receipted overnight carrier, to the address appearing below or such other address as shall be provided in writing to the other parties:

If to Tenant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to Ground Lessor:

405 Martin Luther King Jr., Blvd.  
Chapel Hill, NC 27514  
Attn: Ralph D. Karpinos, Esq.  
Fax: (919) 969-2063

With a copy to:

K&L Gates, LLP  
The Hearst Tower  
214 N. Tryon Street, 47<sup>th</sup> Floor  
Charlotte, NC 28202  
Attn: Glen B. Hardymon, Esq.  
Fax: (704) 353-3146

If to Landlord:

140 West Franklin LLC  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Keith L. "Casey" Cummings, President  
Fax: (561) 630-6717

With a copy to:

Ram Development Company  
4801 PGA Boulevard  
Palm Beach Gardens, Florida 33418  
Attn: Karen Geller, General Counsel  
Fax: (461) 630-6717

And to:

140 West Franklin LLC  
126 West Franklin Street  
Chapel Hill, North Carolina 27514  
Attn: Jon Keener, \_\_\_\_\_  
Fax: \_\_\_\_\_

And to:

Schell Bray Aycock Abel & Livingston PLLC  
100 Europa Drive, Suite 360  
Chapel Hill, NC 27517  
Attn: Holly H. Alderman, Esq.  
Fax: (919) 882-9495

4. This Agreement shall inure to the benefit of and be binding upon the parties, their successors in interest, heirs and assigns and any subsequent owner of the Premises or any portion thereof.

5. Should any action or proceeding be commenced to enforce any of the provisions of this Agreement, the prevailing party in such action shall be awarded, in addition to any other relief it may obtain, its reasonable costs and expenses, including, but not limited to, taxable costs, and reasonable attorneys' fees.

6. Each party hereto hereby represents and warrants that it has obtained all necessary consents to the execution, delivery, performance and recordation of this Agreement.

7. Ground Lessor agrees that nothing contained herein shall be construed as an assumption by Tenant (or its Lender) of any obligations of Landlord under the Ground Lease.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year first above written.

**GROUND LESSOR:**

**THE TOWN OF CHAPEL HILL,**  
a North Carolina municipal corporation

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF NORTH CAROLINA

COUNTY OF \_\_\_\_\_

I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
*Official Signature of Notary*

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

*(Official Seal)*

My commission expires: \_\_\_\_\_

[Official Seal]

**LANDLORD:**

**140 WEST FRANKLIN LLC,**  
a North Carolina limited liability company

By: Ram Realty II NR, LLC, a Delaware limited liability  
company, its sole member

By: Ram Realty Partners II, LP, a Delaware limited  
partnership, its sole member

By: Ram Realty Associates II, LLC, a  
Delaware limited liability company, its  
authorized general partner

By: \_\_\_\_\_  
Keith L. Cummings, its authorized  
manager

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I certify that the following person personally appeared before me this day, acknowledging to me  
that he or she signed the foregoing document: \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Official Signature of Notary*

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

*(Official Seal)*

My commission expires: \_\_\_\_\_

[Official Seal]



TENANT:

\_\_\_\_\_

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_

*Official Signature of Notary*

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

*(Official Seal)*

My commission expires: \_\_\_\_\_

[Official Seal]

**EXHIBIT A**

Attach legal description of ground leased site

EXHIBIT C

Prepared by and Return To:  
Glen B. Hardyman, Esq.  
K&L Gates, LLP  
The Hearst Tower  
214 N. Tryon Street, 47<sup>th</sup> Floor  
Charlotte, NC 28202

STATE OF NORTH CAROLINA  
COUNTY OF ORANGE

**FIRST AMENDMENT TO  
GROUND LEASE**

**THIS FIRST AMENDMENT TO GROUND LEASE** (this "First Amendment") is made and entered into as of the \_\_\_ day of \_\_\_\_\_, 200\_, between **THE TOWN OF CHAPEL HILL**, a North Carolina municipal corporation ("Landlord"), and **140 WEST FRANKLIN LLC**, a North Carolina limited liability company (together with its permitted successors and assigns, "Tenant").

WITNESSETH:

WHEREAS, Landlord and Tenant entered into that certain Ground Lease dated \_\_\_\_\_, 200\_ (the "Lease") for the lease by Tenant of that certain land condominium unit defined as the Building Unit in the Development Agreement (as hereinafter defined) and established pursuant to that certain Declaration of Condominium for the Lot 5 Land Condominium recorded in Book \_\_\_, Page \_\_\_ of the Orange County Register of Deeds Office (the "Declaration"), which Building Unit is located in The Town of Chapel Hill, Orange County, North Carolina, as more particularly described in the Lease (the "Leased Premises");

WHEREAS, Landlord has entered into that certain General Development Agreement with Tenant dated February 12, 2007, as amended pursuant to that certain First Amendment to General Development Agreement dated April 3, 2007, as further amended by that certain Second Amendment to General Development Agreement dated September 6, 2007, and as further amended by that certain Third Amendment to and Assignment of General Development Agreement dated December \_\_\_, 2008, governing the development of the Leased Premises and adjoining land owned by Landlord (the "Development Agreement").

WHEREAS, Landlord and Tenant desire to enter into this First Amendment for the purpose of amending the Lease to modify the definition of Leased Premises and certain other terms and provisions therein; and

WHEREAS, the defined terms used in this First Amendment, as indicated by the initial capitalization thereof, shall have the same meaning ascribed to such terms in the Lease, unless otherwise specifically defined herein;

NOW, THEREFORE, for and in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree to amend the Lease as follows:

1. Leased Premises. Pursuant to Section 5.9 of the Lease, the term "Leased Premises" as defined in Recital A of the Lease is hereby amended to include the Private Parking Unit, together with all appurtenant easements thereto, as such term is defined in the Declaration, as the same has been amended to subdivide the Parking Garage Unit, and as more fully described in Exhibit A hereto.

2. Improvements. The term "Improvements" as defined in Section 1.2.14 of the Lease is hereby amended to include the Private Parking Spaces and Excess Spaces together with any other related structures and improvements such as a controlled access gate constructed within the Private Parking Unit, as such terms are defined in the Development Agreement.

3. Ratification. The Lease, as amended by this First Amendment, shall remain in full force and effect and enforceable in accordance with its terms. As amended by this First Amendment, the terms and provisions of the Lease are hereby ratified and affirmed in all respects.

3. Due Authority. Landlord and Tenant each hereby represents and warrants to the other that it has the full right, power and authority to enter into and carry out the terms of this First Amendment.

5. Multiple Counterparts. This First Amendment may be executed in two or more counterparts and shall be deemed to have become effective when and only when one or more of such counterparts shall have been signed by or on behalf of each of the parties hereto (although it shall not be necessary that any single counterpart be signed by or on behalf of each of the parties hereto, and all such counterparts shall be deemed to constitute but one and the same instrument), and shall have been delivered by each of the parties to the other. Furthermore, the parties agree that (i) this First Amendment may be transmitted between them by facsimile machine, (ii) that this First Amendment may be executed by facsimile signatures, and (iii) that facsimile signatures shall have the effect of original signatures relative to this First Amendment.

[SIGNATURES BEGIN ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Landlord and Tenant have executed this First Amendment in multiple original counterparts as of the date hereof.

**Landlord:**

**THE TOWN OF CHAPEL HILL,**  
a North Carolina municipal corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Tenant:**

**140 WEST FRANKLIN LLC,**  
a North Carolina limited liability company

By: Ram Realty II NR, LLC, a Delaware  
limited liability company, its sole member

By: Ram Realty Partners II, LP, a Delaware  
limited partnership, its sole member

By: Ram Realty Associates II, LLC,  
a Delaware limited liability company,  
its authorized general partner

By: \_\_\_\_\_  
Keith L. Cummings, its authorized manager

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
*Official Signature of Notary*

*(Official Seal)*

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

My commission expires: \_\_\_\_\_

[Official Seal]

STATE OF  
COUNTY OF

I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Official Signature of Notary*

\_\_\_\_\_  
Notary's printed or typed name, Notary Public

*(Official Seal)*

My commission expires: \_\_\_\_\_

[Official Seal]

**EXHIBIT A (to Exhibit C – First Amendment to Ground Lease)**

Attach legal description of Private Parking Unit



## EXHIBIT D

### LEASE GUARANTY AGREEMENT

THIS LEASE GUARANTY AGREEMENT ("Guaranty" or "Agreement"), dated as of \_\_\_\_\_, 200\_ is made by RAM DEVELOPMENT COMPANY, a Florida corporation (the "Guarantor") in favor of the TOWN OF CHAPEL HILL, a North Carolina municipal corporation ("Town").

#### STATEMENT OF PURPOSE

Town has entered into that certain Ground Lease dated of even date herewith by and between the Town (also "Landlord") and 140 WEST FRANKLIN LLC, a North Carolina limited liability company ("Tenant"). Guarantor is an affiliate of and under common control with Tenant and is thereby a beneficiary, directly or indirectly, of Tenant's rights pursuant to the Ground Lease. As a condition of entering into the Ground Lease, Town has required this Guaranty from Guarantor with respect to the obligations created under the Ground Lease as more fully provided herein.

NOW, THEREFORE, in consideration of the Premises and the mutual agreements set forth herein, and in order to induce the Town to enter into the Ground Lease, Guarantor hereby agrees with the Town as follows:

SECTION 1. Definitions. Capitalized terms not otherwise defined in this Guaranty, including the preambles and recitals hereof, shall have the meanings assigned to them in the Ground Lease. In the event of a conflict between capitalized terms defined herein and in the Ground Lease, the Ground Lease shall control.

SECTION 2. Representations and Warranties of Guarantor. In order to induce the Town to enter into the Ground Lease, the Guarantor hereby represents and warrants to the Town that the Guarantor is a duly formed, validly existing Florida corporation, and has taken all corporate action necessary to execute, deliver and perform this Guaranty. This Guaranty has been duly executed and delivered by the Guarantor to the Town and this Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable in accordance with its terms, except as such enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium or similar state or federal debtor relief laws from time to time in effect which affect the enforcement of creditor's rights in general and the availability of equitable remedies. The execution, delivery and performance by the Guarantor of this Guaranty, will not, by the passage of time, the giving of notice, or otherwise, violate any material provision of any applicable law or any material contractual obligation binding on the Guarantor and will not result in the creation or imposition of any lien upon, or with respect to, any property or revenues of the Guarantor.

SECTION 3. Unconditional Recourse Guaranty.

(a) Guarantor hereby guarantees all of the payments to be made by Tenant under the Ground Lease, including without limitation, any payments characterized as rent

and all other sums, costs, expenses, charges, payments, indemnifications by Tenant to Landlord, and deposits, as well as all sums payable as damages upon a default under the Ground Lease. Guarantor hereby guarantees that each and all of the foregoing will be paid in full when due in accordance with the Ground Lease. Furthermore, Guarantor hereby guarantees that, in addition to paying all sums described herein and in the Ground Lease, Tenant will faithfully perform and observe each and every term, covenant, and condition of the Lease to be performed or observed by Tenant.

(b) This Guaranty is an unconditional, irrevocable and absolute guaranty of payment and performance. Guarantor's liability shall be primary and not derivative or secondary. If for any reason any provision of the Ground Lease shall not be completely and strictly performed or observed by Tenant as required thereby, or if any payment shall not be paid when due in accordance with the provisions of the Ground Lease, Guarantor agrees to promptly perform or observe, or cause the performance or observance of each such provision, and will immediately pay all such items to the person entitled thereto pursuant to the provisions of the Ground Lease, in all cases regardless of whether Landlord shall have taken any steps to enforce any rights against Tenant or any other person to compel any such performance or observance or to collect payment either pursuant to the provisions of the Ground Lease, or at law, or in equity, and regardless of any other condition or contingency. Guarantor also agrees to pay to Landlord the costs and expenses (including reasonable attorneys' fees) incurred by Landlord for collecting or attempting to collect any payment or otherwise enforcing the Ground Lease against Tenant or collecting under or enforcing this Guaranty. Landlord shall have the right to enforce this Guaranty regardless of the receipt by Landlord of a security deposit from Tenant or the enforcement of any remedies against such security or the release of such security.

SECTION 4. Waivers. Guarantor hereby waives notice of: a) the acceptance of this Guaranty; b) notice of any breach or non-performance of the Ground Lease by Tenant, or the failure to satisfy any obligations or liabilities contracted or incurred by Tenant; and, c) notice of execution and delivery of the Ground Lease. Additionally, Guarantor waives all suretyship defenses and consents to all courts of the State in which the Leased Premises is located having jurisdiction in which to bring any claim by Landlord. In addition to the waivers contained in Section 4, the Guarantor, to the extent permitted by law, waives and agrees that he shall not at any time insist upon, plead or in any manner whatever claim or take the benefit or advantage of, any appraisal, valuation, stay, extension, marshalling of assets or redemption laws, or exemption, whether now or at any time hereafter in force, which may delay, prevent or otherwise affect the performance by Guarantor of his obligations under, or the enforcement by Town of, this Guaranty. The Guarantor further hereby waives, to the extent permitted by applicable laws, diligence, presentment, demand, protest and notice (except as specifically required herein) of whatever kind or nature with respect to the Ground Lease and waives, to the extent permitted by applicable laws, the benefit of all provisions of law which are or might be in conflict with the terms of this Guaranty. The Guarantor represents, warrants and agrees that its obligations under this Guaranty are not and shall not be subject to any counterclaims, offsets or defenses of any kind against Town or Tenant whether now existing or which may arise in the future.

SECTION 5. Benefits of Guaranty. The provisions of this Guaranty are for the benefit of Town and its permitted successors, transferees and assigns, and nothing herein contained shall impair, as between Tenant and Landlord, the obligations of Tenant under the Ground Lease.

SECTION 6. Modification of Ground Lease. If the Town shall at any time or from time to time, with or without the consent of, or notice to, Guarantor:

- (a) change or extend the manner, place, time or terms of performance or payment of, or renew or alter all or any portion of, the Ground Lease;
- (b) take any action under or in respect of the Ground Lease in the exercise of any remedy, power or privilege contained therein or available to it at law, in equity or otherwise, or waive or refrain from exercising any such remedies, powers or privileges;
- (c) amend or modify, in any manner whatsoever, the Ground Lease;
- (d) extend or waive the time for performance by Guarantor, Tenant or any other person of, or compliance with, any term, covenant or agreement on its part to be performed or observed under the Ground Lease, or waive such performance or compliance or consent to a failure of, or departure from, such performance or compliance; or
- (e) consent to the assignment, subletting, or mortgaging, or the purported assignment, subletting, or mortgaging, of all or part of Tenant's interest in the Ground Lease or the Leased Premises whether or not permitted by the Ground Lease,

then Town shall incur no liability to Guarantor as a result thereof, and no such action shall impair or release the obligations of Guarantor under this Guaranty.

SECTION 7. Reinstatement. Guarantor agrees that, if any payment made by Tenant or any other person applied to Tenant's obligations under the Ground Lease is at any time annulled, set aside, rescinded, invalidated, declared to be fraudulent or preferential or otherwise required to be refunded or repaid or the proceeds of any collateral are required to be refunded by Town to Tenant, its estate, trustee, receiver or any other party, including, without limitation, the Guarantor, under any applicable law or equitable cause, then, to the extent of such payment or repayment, the Guarantor's liability hereunder (and any lien securing such liability) shall be and remain in full force and effect, as fully as if such payment had never been made, and, if prior thereto, this Guaranty shall have been canceled or surrendered (and if any lien or collateral securing such Guarantor's liability hereunder shall have been released or terminated by virtue of such cancellation or surrender), this Guaranty (and such lien) shall be reinstated in full force and effect, and such prior cancellation or surrender shall not diminish, release, discharge, impair or otherwise affect the obligations of Guarantor in respect of the amount of such payment (or any lien securing such obligation).

SECTION 8. Remedies. Upon the occurrence and during the continuance of any Event of Default under the Ground Lease, Town may enforce against Guarantor its obligations and liabilities hereunder and exercise such other rights and remedies as may be available to Town hereunder, under the Ground Lease or otherwise.

SECTION 9. No Subrogation. Notwithstanding any payment or payments by Guarantor hereunder, or any set-off or application of funds of Guarantor by Town, or the receipt of any amounts by Town with respect to the Ground Lease, Guarantor shall not be entitled to be subrogated to any of the rights of Town against Tenant or against any collateral security held by Town for the payment or performance of Tenant's obligations under the Ground Lease nor shall Guarantor seek any reimbursement from Tenant in respect of any performance made by Guarantor hereunder, until the performance owing to Town on account of the Ground Lease. If any amount shall be paid to Guarantor on account of such subrogation rights at any time when all of the obligations of Tenant under the Ground Lease shall not have been completed, such amount shall be held by Guarantor in trust for Town, segregated from other funds of Guarantor, and shall, forthwith upon receipt by Guarantor, be turned over to Town in the exact form received by Guarantor (duly endorsed by Guarantor to Town, if required) to be applied against the Ground Lease.

SECTION 10. Expenses. Guarantor agrees to fully indemnify and save Town harmless from any and all costs and expenses (including reasonable attorneys' fees, legal expenses and court costs) incurred by Town to enforce its rights under the Ground Lease or this Guaranty ("Expenses") and to pay said Expenses upon demand by the Town.

SECTION 11. Notices. All notices and communications hereunder shall be given to the address set forth herein for Guarantor and otherwise made in accordance with the Ground Lease.

SECTION 12. Successors and Assigns. This Agreement is for the benefit of Town and its permitted successors, transferees and assigns, and in the event of an assignment of the Ground Lease, the rights hereunder may be transferred therewith. This Agreement shall be binding on Guarantor and its heirs, personal representatives, successors and assigns; provided that Guarantor may not assign or transfer any of its rights or obligations hereunder without the prior written consent of Town.

SECTION 13. Amendments, Waivers and Consents. No term, covenant, agreement or condition of this Agreement may be amended or waived, nor may any consent be given, except in the manner set forth in the Ground Lease.

SECTION 14. Powers Coupled with an Interest. All authorizations and agencies herein contained are irrevocable and powers coupled with an interest.

SECTION 15. Governing Law. **THIS AGREEMENT SHALL BE GOVERNED BY, CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NORTH CAROLINA, WITHOUT REFERENCE TO THE CONFLICTS OR CHOICE OF LAW PRINCIPLES THEREOF.**

SECTION 16. Consent To Jurisdiction. GUARANTOR HEREBY IRREVOCABLY CONSENTS TO THE PERSONAL JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN ORANGE COUNTY, NORTH CAROLINA, IN ANY ACTION, CLAIM OR OTHER PROCEEDING ARISING OUT OF OR ANY DISPUTE IN CONNECTION WITH THIS GUARANTY, ANY RIGHTS OR OBLIGATIONS HEREUNDER, OR THE PERFORMANCE OF SUCH RIGHTS AND OBLIGATIONS. GUARANTOR HEREBY IRREVOCABLY CONSENTS TO THE SERVICE OF A SUMMONS AND COMPLAINT AND OTHER PROCESS IN ANY ACTION, CLAIM OR PROCEEDING BROUGHT BY TOWN IN CONNECTION WITH THIS GUARANTY, ANY RIGHTS OR OBLIGATIONS HEREUNDER, OR THE PERFORMANCE OF SUCH RIGHTS AND OBLIGATIONS, ON BEHALF OF ITSELF OR ITS PROPERTY. NOTHING IN THIS SECTION 18 SHALL AFFECT THE RIGHT OF TOWN TO SERVE LEGAL PROCESS IN ANY MANNER PERMITTED BY APPLICABLE LAW OR AFFECT THE RIGHT OF TOWN TO BRING ANY ACTION OR PROCEEDING AGAINST GUARANTOR IN THE COURTS OF ANY OTHER JURISDICTIONS.

SECTION 17. Waiver of Jury Trial. TO THE EXTENT PERMITTED BY LAW, TOWN AND GUARANTOR, BY THEIR ACCEPTANCE OF THIS AGREEMENT OR THE BENEFITS HEREOF, HEREBY IRREVOCABLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL WITH RESPECT TO ANY ACTION, CLAIM OR OTHER PROCEEDING ARISING OUT OF OR ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT, ANY RIGHTS OR OBLIGATIONS HEREUNDER, OR THE PERFORMANCE OF SUCH RIGHTS AND OBLIGATIONS.

SECTION 18. Severability. If any provision hereof is invalid and unenforceable in any jurisdiction, then, to the fullest extent permitted by law, (a) the other provisions hereof shall remain in full force and effect in such jurisdiction and shall be liberally construed in favor of Town in order to carry out the intentions of the parties hereto as nearly as may be possible; and (b) the invalidity or unenforceability of any provisions hereof in any jurisdiction shall not affect the validity or enforceability of such provision in any other jurisdiction.

SECTION 19. Headings. The various headings of this Guaranty are inserted for convenience only and shall not affect the meaning or interpretation of this Guaranty or any provisions hereof.

SECTION 20. Counterparts. This Guaranty may be executed by the parties hereto in several counterparts, each of which shall be deemed to be an original and all of which shall constitute together but one and the same agreement.

SECTION 21. Release Upon Assumption by 140 West Franklin Condominium Association, Inc. Notwithstanding anything to the contrary contained in this Guaranty, if all of the following events have occurred: (a) the Project has been Substantially Completed and at least seventy five percent (75%) of the residential leasehold condominium units created under the 140 West Franklin Condominium Declaration have been transferred by Tenant to a third party; (b) Tenant has conveyed, transferred and assigned to 140 West Franklin Condominium Association, Inc. any or all of its rights and obligations under the Ground Lease; and (c) 140 West Franklin Condominium Declaration, Inc. has agreed in writing to expressly assume all such obligations in a

manner reasonably acceptable to Landlord; then, in such event Guarantor shall be released from liability under this Agreement as to all Tenant obligations expressly assumed by 140 West Franklin Condominium Association, Inc. in the foregoing manner.

[Signature Page Follows]

IN WITNESS WHEREOF, each of the Guarantor has executed and delivered this Guaranty under seal as of the date first above written.

**RAM DEVELOPMENT COMPANY,**  
a Florida corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Fax: \_\_\_\_\_

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I certify that the following person appeared before me this day, acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: \_\_\_\_\_.

Date: \_\_\_\_\_

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

Name of Notary Printed: \_\_\_\_\_

My commission expires: \_\_\_\_\_

(Notary Seal)

