



MISC 2016077859



SEP 20 2016 16:47 P 10

Fee amount: 64.00  
FB: 20-24385  
COMP: SB

Received - DIANE L. BATTIATO  
Register of Deeds, Douglas County, NE  
09/20/2016 16:47:55.00



2016077859

(The above space for use of Register of Deeds.)

WHEN RECORDED TO BE RETURNED TO:

Jon E. Blumenthal  
Baird Holm LLP  
1500 Woodmen Tower  
1700 Farnam Street  
Omaha, NE 68102-2068

**ASSIGNMENT OF LEASES AND RENTS  
(Construction Loan)**

**THIS ASSIGNMENT OF LEASES AND RENTS** (this "Assignment") is made as of September 15, 2016, by **Mayberry 51, LLC**, a Nebraska limited liability company ("Borrower"), whose address for purposes of this Assignment is 2566 Leavenworth Street, Suite 200, Omaha, Nebraska 68105 to **U.S. Bank National Association**, a national banking association ("Bank"), whose address for purposes of this Assignment is 8800 West Center Road, Omaha, Nebraska 68124.

**1. ASSIGNMENT.**

In consideration of Bank's agreement to issue the Loan, as described below, and for other valuable consideration, receipt and adequacy of which is acknowledged by Borrower, Borrower grants and assigns to Bank:

- (a) all of Borrower's right, title and interest in, to and under and with respect to any and all existing or future leases, licenses and other agreements of any kind (collectively "Agreements") relating to the use or occupancy of any of the property described in Exhibit A (the "Property"); and
- (b) all rents (or payments in lieu of rents), payments and liabilities at any time payable under any and all of the Agreements, any and all security deposits received or to be received by Borrower pursuant to any and all Agreements and all rights and benefits accrued or to accrue to Borrower under any and all of the Agreements (the "Collateral"). The Agreements and Collateral are hereinafter collectively referred to as the "Leases".

2. **OBLIGATION SECURED.**

Borrower makes the foregoing grant and assignment to Bank for the purpose of securing:

- (a) payment to Bank of all indebtedness evidenced by and arising under Borrower's Promissory Note dated as of September 15, 2016, in the original principal amount of **Nineteen Million Eight Hundred Forty-Three Thousand and No/100 Dollars (\$19,843,000.00)** (the "Construction Note") and Promissory Note dated as of September 15, 2016, in the original principal amount of **Two Million Seven Hundred Forty Thousand and No/100 Dollars (\$2,740,000.00)**, to be funded in accordance with the terms and conditions of that certain Loan Agreement between Borrower and Bank dated as of the date hereof (the "TIF Note"; the Construction Note and TIF Note are herein individually and collectively, the "Note"), payable to Bank or its order, and dated as of the date of this Assignment as the same may be amended, extended, renewed or modified from time to time; and
- (b) the payment of all indebtedness and the performance of all obligations of Borrower to Bank now existing or arising after the date of this Assignment in connection with the loan evidenced by the Note (the "Loan"), including without limitation, all indebtedness and obligations secured by or arising under the Construction Security Agreement/Deed of Trust with Assignment of Rents and Security Agreement (hereinafter "Security Instrument") on the Property dated as of the date hereof and securing the Note, and all of the other documents evidencing or securing the Loan (collectively the "Loan Documents"), as all of the same may be amended, extended, renewed or modified from time to time; and
- (c) the payment of all indebtedness and the performance of all obligations, which recite that they are secured by this Assignment, of Borrower to Bank now existing or arising after the date of this Assignment under this Assignment, as the same may be amended, extended, renewed or modified from time to time.

3. **INTERPRETATION.**

It is the intention of Borrower that this Assignment shall constitute a present and absolute Assignment to Bank. However, so long as there shall exist no default by Borrower in the payment of any sum due to Bank under the Loan Documents, or in the performance of any obligation, covenant or agreement contained in this Assignment, the Loan Documents or the Leases, as the same are to be performed by Borrower, Borrower shall have the right to collect at the time of, but not more than thirty (30) days prior to, the date provided for payment, all rents, income and profits arising under the Leases and to retain and use the same.

4. **COVENANTS.**

Borrower covenants and agrees as follows:

- (a) to perform all of the covenants, representations and agreements of the lessor, and not to violate any of the warranties of the lessor, under the Leases, subject in each case to the notice and cure provisions of the Leases; not to suffer or permit any release, abatement or reduction of liability of any of the lessees; not to create any right or excuse for any of the lessees to withhold

payment of rent or fail to comply with any other liability under any of the Leases or to otherwise cease performance of any of lessee's obligations under the Leases; and

- (b) not to collect any of the rent, income or other liabilities arising or accruing under the Leases more than three (3) months in advance of the time when the same become due; and
- (e) not to discount any future accruing rents or other liabilities in connection with any of the Leases; and
- (f) not to execute any other assignment of any of the Leases, any interest in any of the Leases or any of the rents or payments due or to become due in connection with the Leases; and
- (g) to enforce, or secure the performance by the lessees of, the covenants, representations, warranties and agreements contained in the Leases, and to enforce and secure all remedies available to Borrower against the lessees, in case of default under any of the Leases by the lessees; and
- (h) not to subordinate, or agree or consent to subordinate, any of the Leases to any security instrument or other encumbrance without Bank's prior written consent, not unreasonably withheld; and provided further, that any such subordination or agreement or consent to subordinate without such consent shall be null and void as against Bank; and to deliver to Bank, from time to time, upon Bank's request, an executed counterpart of each and every Lease; and to execute and record such additional assignments, in form and substance acceptable to Bank, as Bank may reasonably request, covering any and all of the Leases, and to pay all costs reasonably and actually incurred in connection with the preparation, execution and recording of all such assignments; and
- (i) not to exercise any right of election, whether specifically set forth in any of the Leases or otherwise, which would in any way diminish any obligation or liability of any of the lessees or which would have the effect of shortening the stated term of any of the Leases; and at Borrower's sole cost, to prosecute and defend any legal action, arbitration or other controversy relating to any of the Leases or to Borrower's interest in any of the Leases and to pay all costs and expenses (including without limitation, attorneys' fees and court costs) reasonably and actually incurred by Bank in connection with any such action, arbitration or controversy; and
- (j) to lease all portions of the Property which, from time to time, are not subject to a Lease at rentals not less than the market rent for such Leases as reasonably determined by Borrower.

**5. DEFAULTS AND REMEDIES.**

- (a) **DEFINITION.**  
"Default" shall mean a default in payment of any of the indebtedness secured by this Assignment or the Loan

Documents, after giving effect to any express curative provisions set forth herein or therein or a default in the performance of any obligation, covenant or agreement of Borrower contained in this Assignment or any of the Loan Documents or any of the Leases after giving effect to any express curative provisions set forth herein or therein.

(b) **LOAN DOCUMENTS.**

A Default under this Assignment shall be a default under each and every one of the Loan Documents.

(c) **REMEDIES.**

In addition to any and all remedies contained in the other Loan Documents, in the event of a Default, Bank shall, and without regard to the adequacy of the security for the indebtedness and obligations secured by this Assignment and by the Loan Documents, either in person or by its agent, and with or without bringing any action or proceeding or obtaining a receiver appointed by a court, and without notice to or demand on Borrower, and without releasing Borrower from any obligations under this Assignment, have the following rights and remedies, each of which shall be exercisable in Bank's sole discretion:

- (i) to receive directly from the lessees under the Leases all rents, income, liabilities and other amounts arising or accruing under the Leases or from the Property and to so continue until Borrower is otherwise notified by Bank; and
- (ii) to collect, sue for, settle, compromise and give acquittances for all of the rents and other payments that may become due under the Leases and avail Bank of and pursue all remedies for the enforcement of the Leases and Borrower's rights in and under the Leases as Borrower might have pursued but for this Assignment, all at Borrower's sole cost and expense; and
- (iii) to take possession of the Property, and to have, hold, manage, lease and operate the same on such terms and for such period of time as Bank may deem proper and, either with or without taking possession of the Property in its own name, make, from time to time, all alterations, renovations, repairs or replacements thereto or thereof as may seem proper to Bank in each case, subject at all times to the Leases.

Nothing set forth in this section shall be deemed to limit or otherwise alter the rights of Bank at law or in equity in the event of a Default, nor shall Bank be obligated to exercise any of its rights in this section.

(d) **NOTICE.**

Lessees under the Leases are hereby irrevocably authorized and notified by Borrower to rely upon and comply with (and shall be fully protected in so doing) any notice or demand by Bank for the payment to Bank of any rental or other sums which may be, or

hereafter become, due under the Leases, or for the performance of any of such lessees' undertakings under the Leases, and such lessees shall have no right or duty to inquire as to whether any Default has actually occurred or is then existing.

(e) **PROCEEDS.**

Bank shall have the right to apply all such rents, income and profits received from the lessees under the Leases to the payment of any of the following in such amounts and in such order as Bank shall deem appropriate in Bank's sole discretion:

(i) the indebtedness secured by this Assignment and by the Loan Documents, together with all reasonable costs and attorneys' fees of Bank actually incurred in attempting to enforce Bank's rights hereunder or thereunder, in such order or priority as Bank, in Bank's sole discretion, may determine, any statute, law, custom or use to the contrary notwithstanding; and

(ii) all reasonable and necessary expenses of managing the Property actually incurred, including without limitation, the salaries, fees and wages of a managing agent and such other employees or independent contractors as Bank may deem reasonable and necessary or desirable, and all reasonable and necessary expenses of operating and maintaining the Property actually incurred, including without limitation, all taxes, charges, claims, assessments, water rents, sewer rents, any other liens, premiums for all insurance which Bank may deem reasonable and necessary the cost of all alterations, renovations, repairs or replacements required by the Leases, and all reasonable and necessary expenses actually incurred incident to taking and retaining possession of the Property.

(f) **RELATIONSHIP.**

Nothing contained in this Assignment shall be construed as constituting Bank as trustee or "mortgagee in possession".

6. **EXCULPATION.**

Bank shall not directly or indirectly be liable to Borrower or any other person as a consequence of the exercise of the powers granted to Bank in this Assignment, or as a result of Bank's exercise of Bank's rights in the event of a Default, and no such liability shall be asserted or enforced against Bank, all such liability being expressly waived and released by Borrower, and Borrower indemnifies Bank and holds Bank harmless from and against all such liability, other than liability resulting from Bank's gross negligence of willful misconduct.

Bank shall not be obligated to perform or discharge any obligation, duty, or liability of Borrower under the Leases, or by reason of this Assignment. Except for liability, loss, damage, cost, expenses, claims or demands resulting from Bank's gross negligence or willful misconduct, Borrower hereby indemnifies and holds Bank harmless from and against any and all liability, loss, damage, cost or expense (including attorneys' fees) which Bank might incur or suffer under the Leases or by reason of this Assignment, and of and from any and all claims and demands whatsoever which may be asserted against

Bank by reason of any alleged obligation or undertaking on Bank's part to perform or discharge any of the terms, covenants or agreements contained in any of the Leases.

Bank shall not be liable for any loss sustained by Borrower or any third party resulting from Bank's failure to lease the Property after a Default or from any other act or omission of Bank in managing the Property after Default unless such failure results from Bank's gross negligence or willful misconduct. Should Bank incur or suffer any liability, loss, damage, cost or expense (including attorneys' fees) under the Leases or by reason of this Assignment, or in the defense of any such claims or demands, the amount of such liability, loss, damage, cost, expense, and attorneys' fees, shall be secured by this Assignment and the Loan Documents, and Borrower shall pay the same to Bank upon demand by Bank. Upon failure of Borrower to so pay Bank, Bank may, at Bank's option, declare all sums secured by this Assignment and the Loan Documents immediately due and payable and exercise any other remedy available at law or in equity.

It is further understood that this Assignment shall not operate to place responsibility for the control, care, management or repair of the Property upon Bank, nor for the carrying out of any of the terms and conditions of the Leases; nor shall it operate to make Bank responsible or liable for any waste committed on the Property by the lessees or any other parties, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death of any lessee, licensee, employee, invitee or other person, except for those matters arising or occurring subsequent to Bank taking actual possession and control of the Property.

7. **FORECLOSURE.**

Upon issuance of a deed or deeds pursuant to any judicial or non-judicial foreclosure of the Security Instrument, all right, title and interest of Borrower in and to the Leases shall, by virtue of this Assignment, vest in and become the absolute property of the grantee or grantees of such deed or deeds without any further act or assignment by Borrower. Borrower hereby irrevocably appoints Bank, and its successors and assigns, as its attorney in fact, to execute all instruments of assignment or further assurance in favor of such grantee or grantees of such deed or deeds, as may be necessary or desirable for such purpose.

Nothing contained in this Assignment shall prevent Bank from terminating any subordinate Lease through such foreclosure, subject to any written agreement now or hereafter made by Bank in Bank's discretion to recognize the rights of any lessee if such lessee is not in default under its Lease.

8. **LOAN DOCUMENTS.**

This Assignment is supplementary to, and not in substitution or derogation of, any of the provisions of the other Loan Documents. To the extent that this Assignment is inconsistent with the provisions of the other Loan Documents, such other Loan Documents shall control; and in particular, to the extent that this Assignment is inconsistent with the terms of the Security Instrument, the Security Instrument shall control. Bank may enforce any of the provisions of this Assignment prior to, simultaneously with, or subsequent to any of the rights or remedies under the other Loan Documents.

9. **NOTICES.**

All notices and other communications to be given under this Assignment must be in writing to be effective and shall be deemed served only upon deposit in the United States Postal Service, certified mail, postage prepaid, addressed to the parties at the addresses appearing in the introductory paragraph of this Assignment. Such addresses may be changed by notice given in the same manner.

10. **ATTORNEYS' FEES.**  
If any legal action or proceeding is brought by either Borrower or Bank in order to enforce or construe a provision of this Assignment, the unsuccessful party in such action or proceeding, whether such action or proceeding is settled or prosecuted to final judgment, shall pay all of the attorneys' fees and costs incurred by the prevailing party. If Borrower shall become subject to any case or proceeding under the Bankruptcy Reform Act, as amended or recodified from time to time, Borrower shall pay to Bank on demand all reasonable and necessary attorneys' fees, costs and expenses which Bank may incur in order to obtain relief from any provision of the Act which delays or otherwise impairs Bank's exercise of any right or remedy under this Assignment or any of the Loan Documents, or in order to obtain adequate protection for any of Bank's rights or collateral.
11. **HEIRS, SUCCESSORS AND ASSIGNS.**  
Subject to the limitations elsewhere contained in this Assignment, the terms of this Assignment shall be binding upon and inure to the benefit of the heirs, successors and assigns of Borrower and Bank, including without limitation, any subsequent owner of the Property. There shall be no third party beneficiaries of this Assignment.
12. **TIME.**  
Time is of the essence of each term of this Assignment.
13. **HEADINGS.**  
All headings appearing in this Assignment are for convenience only and shall be disregarded in construing the substantive provisions of this Assignment.
14. **LAW.**  
This Assignment shall be governed by and construed in accordance with the Laws of the State in which the Property is located, except to the extent that Federal laws or the rules and regulations of the Office of Comptroller, or its successor, preempt the laws of the State in which the Property is located, in which case Bank shall be entitled to such Federal rights and remedies without regard to conflicting limitation imposed by State law.
15. **SEVERABILITY.**  
In the event any one of the provisions contained in this Assignment shall for any reason be held to be invalid, illegal or unenforceable in any respect under applicable law, such invalidity, illegality or unenforceability, at the option of Bank, shall not effect any other provision of this Assignment, but this Assignment shall be construed as if such invalid, illegal or unenforceable provision has never been contained herein.
16. **WAIVER.**  
Nothing contained in this Assignment, and no act done or omitted by Bank pursuant to the powers and rights granted Bank, shall be deemed to be a waiver by Bank of its rights and remedies under the other Loan Documents; and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Bank under the terms of the other Loan Documents. The rights and remedies of Bank under this Assignment are cumulative, and no exercise of any right or remedy shall preclude the exercise of any other right or remedy or the later exercise of the same right or remedy. Waivers and approvals under this Assignment must be in writing to be effective; and, unless expressly stated, waivers and approvals shall apply only to the specific circumstances addressed. No waiver under this Assignment shall operate under any of the other Loan Documents.

17. **SATISFACTION.**  
Upon payment in full of all indebtedness secured by this Assignment, this Assignment shall terminate and be of no further effect; but the affidavit of any officer of Bank showing that any part of said indebtedness remains unpaid shall be evidence of the validity, effectiveness and continuing force of this Assignment; and any person may, and is hereby authorized to rely upon any such affidavit.
18. **INTEREST.**  
In the event Bank expends funds on behalf of Borrower in exercising any of Bank's rights or remedies under this Assignment, such sums, including attorneys' fees, shall be secured by this Assignment and the other Loan Documents, and any such sums shall bear interest at THREE PERCENT (3.00%) per annum above the Interest Rate until reimbursed by Borrower to Bank.
19. **OTHER SECURITY.**  
Bank may take or release other security for the payment of the indebtedness secured by this Assignment, and Bank may release any party primarily or secondarily liable for the payment of any such indebtedness and may apply any other security held by Bank to the satisfaction of such indebtedness without prejudice to any of Bank's rights under this Assignment.
20. **DEFINITION.**  
The terms "lessor" and "lessors" as used in this Assignment shall include all landlords, licensors and other parties in a similar position with respect to the Leases. The term "lessee" and "lessees" shall include any tenants and licensees and any other parties in a similar position, and shall also include any guarantors or other obligors of the Leases. Any capitalized term not herein defined shall be defined as in the Loan Agreement
21. **ESTOPPEL CERTIFICATE.**  
Within sixty (60) days after written request by Bank, Borrower shall deliver, in recordable form, to Bank and to any party designated by Bank, estoppel certificates relating to such factual matters as may be reasonably requested by Bank executed by Borrower (estoppel certificate form to be provided to Borrower by Bank).
- Borrower's failure to deliver any such certificate in time shall be conclusive upon Borrower that: (i) this Assignment is in full force and effect, without modification, (ii) there are no uncured defaults in Borrower's performance under this Assignment, and (iii) Borrower has no right of offset, counterclaim or deduction under this Assignment.
22. **PLURAL BORROWER'S, OTHER OBLIGORS.**  
All persons and entities identified by the designation "Borrower", including without limitation, all general partners or joint venturers (if any) of Borrower, are jointly and individually bound to perform each and every obligation of Borrower under this Assignment and are jointly and individually liable to Bank for such performance.
23. **INCORPORATION.**  
Exhibit A, as attached to this Assignment, is incorporated into and made a part of this Agreement.




IN WITNESS WHEREOF, Borrower has executed and delivered this Security Instrument as of the date and year first above written.

**BORROWER:**

**Mayberry 51, LLC**, a Nebraska limited liability company

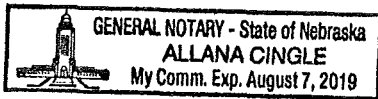
By: Bluestone Development, LLC, a Nebraska limited liability company, Manager

By:   
Christian Christensen, President

STATE OF NEBRASKA            )  
  ) ss.  
COUNTY OF DOUGLAS        )

The foregoing instrument was acknowledged before me this 16 day of September, 2016, by Christian Christensen, President of Bluestone Development, LLC, as Manager of **Mayberry 51, LLC**, a **Nebraska limited liability company**, on behalf of the company.

  
Notary Public



**EXHIBIT "A"**

(LEGAL DESCRIPTION)

Lot 1, in MAYBERRY PLACE, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska.