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Doc ID: 019315830060 Type: GEN  
Recorded: 11/30/2006 at 01:52:08 PM  
Fee Amt: \$302.00 Page 1 of 60  
Polk County Iowa  
TIMOTHY J. BRIEN RECORDER  
File# 2007-00048774

BK 11971 PG 107-166

DECLARATION OF COVENANTS CONDITIONS, RESTRICTIONS AND  
EASEMENTS ESTABLISHING AIR RIGHTS

Preparer Information:

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Return Document to:

Robert J. Douglas, Jr., Davis, Brown Law Firm, 4201 Westown Parkway, Suite 300,  
West Des Moines, Iowa 50266

Name of Taxpayer: Equitable, L.P.

Address of Taxpayer: 3535 Westown Parkway, Suite 103, West Des Moines, Iowa 50266

Name of Grantor: Equitable, L.P.

Address of Grantor: 3535 Westown Parkway, Suite 103, West Des Moines, Iowa 50266

Legal Description: Lots Seven (7) and Eight (8) in Block Twelve (12) in Fort Des Moines, now  
included in and forming a part of the City of Des Moines, Polk County, Iowa

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#1238925

DECLARATION OF COVENANTS CONDITIONS, RESTRICTIONS AND  
EASEMENTS ESTABLISHING AIR RIGHTS

THIS DECLARATION is made and entered into as of the 11 day of November, 2006, by Equitable, L.P., an Iowa limited partnership ("Declarant").

**RECITALS:**

A. The term used in the Recitals, if not otherwise defined in the Recitals, shall have the meanings set forth in Article I hereof.

B. Equitable, L.P. is the record legal titleholder of the Total Parcel situated in Des Moines, Polk County, Iowa, and legally described in Exhibit A.

C. Immediately after this Declaration is recorded in the office of the Recorder, the Declarant will file a Declaration of Submission for Horizontal Property Regime for the Equitable, a residential condominium project located on floors 8-19 of the Total Parcel, with the intention of selling all such units to third parties, with such parcel being hereinafter the "Residential Building", with the remaining floors consisting of the basement through floor 7 continuing to be rented for retail, commercial or office uses (the "Commercial Building"), however, the Declarant reserves the right to submit or withdraw additional floors between the Residential Building and the Commercial Building from time to time, or to use the Residential Building for commercial purposes until such time as Declarant can convert and sell such residential units.

D. Each of the Commercial Building and the Residential Building will be structurally and/or functionally dependent on the other and may depend upon the other, to some extent, for structural support, enclosure, ingress and egress, utility services, and certain other facilities and components necessary for the operation and use of the Commercial Building and the Residential Building.

E. Declarant desires by this Declaration to provide for the efficient operation of the Commercial Building and the Residential Building and to assure the harmonious relationship of the owners of each such Property by providing for, declaring and creating certain easements, covenants and restrictions benefiting and burdening the Commercial Building and the Residential Building.

NOW, THEREFORE, the Declarant hereby declares that the Total Property and any part thereof is and shall be owned, held, mortgaged, transferred, assigned, sold, conveyed and accepted subject to this Declaration. Declarant does hereby further declare that this Declaration and each of the provisions, easements, covenants, conditions, restrictions, burdens, uses, privileges and charges set forth herein or created hereunder shall exist at all times hereafter among, and be binding upon and inure, to the extent in or to any portion of, or interest or estate in, the Total Property, and each of the foregoing shall run with the real estate subjected to this Declaration.

## ARTICLE I. DEFINITIONS

For purposes of this Declaration, the following terms shall have the following meanings, unless the context clearly indicates to the contrary:

**1.1** "Architect" has the meaning set forth in Article XV hereof.

**1.1A** "Association" means the Equitable Building Residential Owner's Association, or any successor thereto which will manage the common areas for the Residential Building, wherever located.

**1.2** "Building" means all improvements, including, but not limited to, the footings, foundations, columns, piles, buildings, improvements, fixtures, equipment, machinery, Facilities, sidewalks, walkways, driveways, and landscaping now or hereafter located in, on, under, within, or upon the Total Parcel, including all alterations, rebuildings, replacements, and additions thereto.

**1.3** "Commercial Building" means the portion of the Building located within the Commercial Parcel.

**1.4** "Commercial Easement Facilities" means Facilities located in the Residential Building (A) primarily benefiting the Commercial Building or the Owner of the Commercial Property, or (B) necessary for the Owner of the Commercial Building to perform its obligations under Section 5.1 of this Declaration, but in either case excluding Facilities, the Maintenance for which the Owner of the Residential Building is expressly responsible under Sections 5.2 and 5.4 hereof.

**1.5** "Commercial Parcel" means that part of the Total Parcel legally described in Exhibit B hereto.

**1.6** "Creditor Owner," except where otherwise defined hereunder in a specific context, means an Owner to whom a payment of money or performance of any duties or obligations is owed under this Declaration by any other Owner who has failed to make such payment or to perform such duty or obligation as and when required hereunder.

**1.7** "Declarant" has the meaning set forth in the preamble hereof.

**1.8** "Declaration" means this Declaration of Covenants, Conditions, Restrictions, and Easements Establishing Air Rights, including all exhibits, appendices, amendments, and supplements thereto.

**1.9** "Defaulting Owner," except where otherwise defined hereunder in a specific context, means an Owner who has failed to make a payment of money owed under this Declaration to any other Owner or has failed to perform any of its duties or obligations as and when required under this Declaration.

**1.10** “Depository” has the meaning set forth in Article XVI hereof.

**1.11** “Easements” means all easements provided for, declared or created pursuant to or in accordance with the terms and provisions of this declaration.

**1.12** “Emergency Situation” means (a) a situation substantially impairing or imminently likely to substantially impair structural support or Facilities of the Building; or (b) a situation causing or imminently likely to cause bodily injury to persons or substantial physical damage to the Building; or (3) a situation causing or immediately likely to cause substantial economic loss to either the Owner of the Commercial Building, the Owner of the Residential Building or the tenants of either; or (d) a situation that materially interferes with the beneficial use by any Owner or tenant of its respective portion of the Building. The duration of an Emergency Situation shall be deemed to include the time reasonably necessary to remedy the Emergency Situation.

**1.13** “Facilities” means all components, and any replacements or substitutions therefore, wherever located in the Commercial Building or the Residential Building, of the chilled water, central air handling and fans, temperature control, domestic water, fire suppression, sanitary waste, disposal system storm water, electrical gas, security detector and alarm, satellite antennae, emergency power, telephone, elevator, lightning protection, kitchen waste, and any other systems forming a part of the Building and designated or utilized to furnish utility or any other services to any portion of the Building, including without limitation: annunciators, antennae, boxes, brackets, cabinets, cables, coils, computers, conduits, controls, control centers, cooling towers, couplers, devices, ducts, elevator cars, equipment, fans, fixtures, generators, hangers, heat traces, indicators, junctions, lines, machines, meters, motors, outlets, panels, pipes, pumps, radiators, risers, shafts, starters, switches, switchboards, tanks, transformers, valves, wiring and the like.

**1.14** “First Commercial Mortgage” means that existing mortgage filed for record in the Office of the Recorder of Polk County, Iowa on February 1, 2005 in Book 10920, Page 858, by and between Equitable, L.P. as Mortgagor and First Federal Bank as Mortgagee, as amended from time to time, and all amendments, supplements, and extensions thereto; and all subsequent first mortgage(s) or deed(s) of trust and all amendments, supplements, and extensions thereto, on the Commercial Building or any part thereof (including, without limitation, any first mortgage that encumbers the Commercial Building and other property), together with any other mortgages (and all amendments, supplements and extensions thereto) on the Commercial Building held by the holder of the first mortgage of the Commercial Building that secure a principal amount not to exceed one hundred percent (100%) of the fair market value of the Commercial Building as of the date of such mortgage(s) or deed(s) of trust are executed. If any portion of the Commercial Building is subjected to a condominium regime, the term “First Commercial Mortgage” shall not include a first mortgage or first deed of the trust on a condominium unit made by a unit owner other than the Owner of the Commercial Building.

**1.15** “First Mortgage” means the First Commercial Mortgage or the First Residential Mortgage, as the context requires. “First Mortgages” means the First Commercial Mortgage and the First Residential Mortgage.

**1.16** “First Residential Mortgage” means that existing mortgage filed for record in the Office of the Recorder of Polk County, Iowa on February 1, 2005 in Book 10920, Page 858, by and between Equitable, L.P. as Mortgagor and First Federal Bank as Mortgagee, as amended from time to time and the first mortgage(s) or deed(s) of trust, and all amendments, supplements and extensions thereto hereafter in effect, on the Residential Building or any part thereof (including, without limitation, any first mortgage that encumbers the Residential Building and other property), together with any other mortgages, and all amendments, supplements and extensions thereto, on the Residential Building held by the holder of the first mortgage on the Residential Building. When the Residential Building is subjected to a condominium regime, the term “First Residential Mortgage” does not include a first mortgage or first deed of trust on a condominium unit made by a unit owner, except for those units still owned by the Declarant or successor to the Declarant as the developer under the Declaration of Submission to Horizontal Property Regime for The Equitable.

**1.17** “Maintenance” means and includes operation, maintenance, repair, reconditioning, refurbishing, reconfiguration, inspection, testing, cleaning, painting, installation, and replacement when necessary or desirable of Facilities (except repair and restoration required by Section 9.2 and 9.3 hereof) and includes the right of access to and the right to remove from the Building portions of such Facilities for any of the above purposes, subject, however, to any limitations set forth elsewhere in this Declaration.

**1.18** “Nonmonetary Default Cure Period” shall mean a period of thirty (30) days following notice from a Creditor Owner to a Defaulting Owner of any default hereunder that cannot be cured by the payment of money; provided, however, that if such nonmonetary default cannot reasonably be cured within thirty (30) days following such notice, and the Defaulting Owner diligently commences and pursues the cure of such nonmonetary default, the Nonmonetary Default Cure Period shall mean the reasonable period following such notice necessary to diligently pursue such cure to completion; provided, further that the Nonmonetary Default Cure Period in the event of an Emergency Situation shall mean a reasonable period of time in light of the circumstances of the Emergency Situation following oral or written notice from the Creditor Owner to a Defaulting Owner or any of its agents or employees.

**1.19** “Residential Building” means the portion of the Building located within the Residential Parcel.

**1.20** “Residential Easement Facilities” means Facilities located in the Commercial Building (A) primarily benefiting the Residential Building or the Owner of the Residential Building, or (B) necessary for the Owner of the Residential Building to perform its obligations under Section 5.2 or Section 5.4 of this Declaration, but in either

case excluding Facilities, the maintenance for which the Owner of the Commercial Building is expressly responsible under Section 5.1 and 5.3 hereof.

**1.21** “Residential Parcel” means that part of the Total Parcel legally described in Exhibit C attached hereto.

**1.22** “Owner of the Commercial Building” means the person or persons or entity or entities whose estates or interests, individually or collectively, aggregate, at any point in time, the fee simple ownership of the Commercial Building.

**1.23** “Owner of the Residential Building” means the developer under the Declaration of Submission to Horizontal Property Regime for The Equitable until such time as the developer’s rights thereunder are terminated, at which time, the Owner shall become the The Equitable Building Residential Owners Association. In addition, such easement rights granted herein to the Owner of the Residential Building, and any proceeds from damage or condemnation, when referring to the Owner of the Residential Building shall include all owners of units in The Equitable, which is the horizontal property regime being created in the Residential Building.

**1.24** “Owner” means the Owner of the Commercial Building or the Owner of the Residential Building, as the context requires. “Owners” means the Owner of the Commercial Building and the Owner of the Residential Building. Wherever the word “owner appears herein and such word is not capitalized it shall mean any owner of any portion of the Total Property.

**1.25** “Prime Rate” means the prime rate of interest published as such by the Wall Street Journal as of the due date of the payment that the Defaulting Owner has failed to timely pay, or such similar rate of interest if the Wall Street Journal ceases to publish a prime rate of interest.

**1.26** “Recorder” means the Recorder of Polk County, Iowa.

**1.27** “Skywalk Agreement” means that certain Skywalk Agreement , entered into by and between the previous owner of the Total Parcel and the City of Des Moines and recorded August 10, 1983 in Book 5276, Page 298 of the Polk County, Iowa records, as modified and amended.

**1.28** “Total Parcel” means the parcel of real estate described in the Real Estate attached hereto (excluding the Building) as set forth in Exhibit A hereto.

**1.29** “Total Property” means the Total Parcel improved with the Building.

**1.30** All references to “Sections,” “Exhibits,” and “Appendices” shall refer to the Sections, Exhibits, and Appendices of this Declaration as originally executed.

1.31 The words “hereof,” “herein,” “hereto,” “hereby,” and “hereunder” refer to the entire Declaration.

## ARTICLE II. EASEMENTS BENEFITING THE RESIDENTIAL BUILDING

2.1 The following perpetual easements burdening the Commercial Building and benefiting the Residential Building are hereby declared and created.

- (A) A non-exclusive easement in and to all structural members, footings, caissons, foundations, columns, and beams and any other supporting components located in or constituting a part of the Commercial Building for the support (including lateral support) of (i) the Residential Building and (ii) any Facilities located in the Commercial Building with respect to which the Owner of the Residential Building is granted an easement under this Declaration.
- (B) A non-exclusive easement (i) for the use for their intended purposes of all Facilities at any time located in the Commercial Building and connected to or serving Facilities at any time located in the Residential Building (and any replacements thereof) that provide or shall be necessary to provide the Residential Building with any utilities or other services or which may otherwise be necessary to the operation of the Residential Building, and (ii) permitting the exercise of the rights granted to the Owner of the Residential Building pursuant to Section 5.7(A) hereof during any period in which said rights may be exercised.
- (C) An exclusive easement to maintain encroachments in the event and to the extent that, by reason of the original construction of the Building, any reconstruction thereof, minor surveying errors, or the subsequent settlement or shifting of any part of the Building, any part of the Residential Building encroaches or shall hereafter encroach upon any part of the Commercial Parcel. Such easement to maintain encroachments shall exist only as long as the encroaching portion of the Residential Building continues to exist. In no event shall an easement for any encroachment be created in favor of the Residential Building if such encroachment unreasonably interferes with the reasonable use and enjoyment of the Commercial Building by the Owner of the Commercial Building.
- (D) An exclusive easement for the Maintenance of Residential Easement Facilities, subject to the rights of the Owner of the Commercial Building granted pursuant to Section 5.7(A) hereof.
- (E) A non-exclusive easement for ingress and egress by persons, material, and equipment over, on, across, and through those sections of the stairways located, from time to time, in the Commercial Building.

- (F) A non-exclusive easement for pedestrian ingress and egress over, on, across, and through those sections of the skywalk corridors, skywalk bridges, passenger elevator system, corridors, entrance doors, and stairways located, from time to time, in the Commercial Building.
- (G) A non-exclusive easement for the use of, and ingress and egress by persons, material, and equipment over, on, across, and through and to the loading dock, service corridors, elevators, with the understanding that equipment, furniture, and materials; (i) are to be moved to and from the loading dock via the adjoining elevator, (ii) are not to be moved across the first or second floor corridors of the Commercial Building; and (iii) are only to be moved after normal business hours or on weekends but subject to such reasonable rules and regulations pertaining thereto as the owners may impose or modify by agreement from time to time after consultation with the Owner of the Residential Building.
- (H) A non-exclusive easement for the use of, and ingress and egress to and from, the stair pressurization fans, smoke evacuation fans, and makeup air located in the Commercial Building, including access thereto over, on, across, and through the Commercial Building.
- (I) A non-exclusive easement for ingress and egress by persons, material, and equipment over, on, across, and through the Commercial Building for purposes of access to the Building fire alarm system, control panels for the fire safety, and building automation system, and Building access card reader system.
- (J) A non-exclusive easement for ingress and egress by persons, material, and equipment over, on, across, and through the Commercial Building for purposes of access to the Building security system, including the control room and all monitors, systems, an emergency equipment stored therein or used in connection therewith.
- (K) A non-exclusive easement for ingress and egress by persons, material, and equipment over, on, across, and through the Commercial Building for purposes of access to the Building emergency power system, emergency generator, and automatic transfer system associated therewith, if any.
- (L) A non-exclusive easement for ingress and egress by persons, materials, and equipment over, on, across, and through the Commercial Building for purposes of access to the electrical meters located in the Commercial Building, if any.
- (M) A non-exclusive easement for the usage of all forms of conduit, standpipes and other common water lines, sewer lines, gas lines, cable lines, common



electrical supply lines, and water pumps located in the Commercial Building and that serve the Residential Building including, without limitation (1) the cable television lines located in the Commercial Building; and (2) the right to use and connect to storm sewer and sanitary sewer lines located in the Commercial Building.

- (N) Exclusive rights of access to the fascia of the Residential Building over, on, across, and through the air rights of the Commercial Parcel for purpose of cleaning, repairing, maintaining, replacing, restoring, and reconstructing the exteriors of the Residential Building.
- (O) A non-exclusive easement over, on, across, and through the Commercial Building to the extent reasonably necessary (i) to permit the maintenance, repair, replacement, restoration, or reconstruction of the Residential Building as required or permitted by this Declaration, or to the extent reasonably necessary to exercise the Easements set forth in this Section 2.1, (ii) during an Emergency Situation, or (iii) to construct and maintain substitute or additional support required by Article IV hereof.
- (P) A non-exclusive easement for ingress and egress by persons, material and equipment over, on, across and through the basement for purposes of access to the telephone, cable, water pipes, steam lines, gas lines and electrical rooms.
- (Q) A non-exclusive easement to the Residential Building Owner to locate appropriate mailboxes in the Commercial Building on the 6<sup>th</sup> floor and an ingress-egress easement for persons to have access to such mailboxes at all times for the delivery and pick-up of mail for the owners of Units in the Residential Building. The Residential Building Owner will be responsible for maintaining such mailboxes. If the Commercial Building Owner desires to relocate such mailboxes, such work and costs will be done at the cost of the Commercial Building Owner.
- (R) An exclusive easement for an area of approximately 75 feet by 75 feet in the basement of the Commercial Building which may be constructed to provide storage for the Owner of the Residential Building and its members. The Owner of the Residential Building shall be responsible for the construction, maintenance and security for the storage area.
- (S) A non-exclusive easement to the Owner of the Residential Building for access to and use of the exercise area currently located on the fifth floor of the Commercial Building of approximately 1,200 square feet. The cost of maintenance and operation of the exercise area and purchase of new equipment shall be allocated between the Commercial Building Owner paying 50% and the Residential Building Owner paying 50% of such costs.

- (T) An exclusive easement for ingress and egress by persons, material and equipment over, on, across and through the two most southerly elevators located in the Building and the elevator shafts located in the Commercial Building.

2.2 Each Easement created under this Article II that provides or requires, for its enjoyment, ingress and egress on, over, across, or through the Commercial Building shall be subject (except in an Emergency Situation) to such reasonable limitations as the Owner of the Commercial Building may, from time to time after consultation with the Owner of the Residential Building, impose with respect to the establishment of limited paths of ingress and egress and limited hours of the day or days of the week during which such Easements may be used to prevent any unreasonable interference with the use and operation of the Commercial Building and in order to assure that reasonable security of the Commercial Building or such other reasonable restrictions as may be necessary given the nature of the Easements in question; provided, however, that any such limitations shall not preclude or unreasonably restrict enjoyment or exercise of any such Easement.

2.3 Easements provided for, declared, or created under Section 2.1 shall be binding upon the Commercial Building and the Owner of the Commercial Building and, all of such Easements shall run in favor of and inure to the benefit of and be appurtenant to the Residential Building.

2.4 The Owner of the Commercial Building shall have the right, at its sole cost and expense, to relocate within its Property any Facilities and Easements which burden its Property and benefit the Residential Building, other than Easements declared or created under Sections 2.1(A) and 2.1(C), so long as such relocation does not have a material adverse effect of the Residential Building or the use of the Residential Building, and results in the provision of, and access to, the level of service related thereto that is equivalent to the level of service provided prior to such relocation.

### **ARTICLE III. EASEMENTS BENEFITING THE COMMERCIAL BUILDING**

3.1 The following perpetual easements burdening the Residential Building and benefiting the Commercial Building are hereby declared and created.

- (A) A non-exclusive easement in and to all structural members, footings, caissons, foundations, columns, and beams and any other supporting components located in or constituting a part of the Residential Building for the support (including lateral support) of (i) the Commercial Building and (ii) any Facilities located in the Residential Building with respect to which the Owner of the Commercial Building is granted an easement under this Declaration.

- (B) A non-exclusive easement (i) for the use for their intended purposes of all Facilities at any time located in the Residential Building and connected to or serving Facilities at any time located in the Commercial Building (and any replacements thereof) that provide or shall be necessary to provide the Commercial Building with any utilities or other services or that may otherwise be necessary to the operation of the Commercial Building and (ii) permitting the exercise of rights granted to the Owner of the Commercial Building pursuant to Section 5.7(A) hereof during any period in which said rights may be exercised.
- (C) An exclusive easement to maintain encroachments in the event and to the extent that, by reason of the original construction of the Building, any reconstruction thereof, minor surveying errors, or the subsequent settlement or shifting of any part of the Building, any part of the Commercial Building encroaches or shall hereafter encroach upon any part of the Residential Parcel. Such easement to maintain encroachments shall exist only as long as the encroaching portion of the Commercial Building continues to exist. In no event shall an easement for any encroachment be created in favor of the Commercial Building if such encroachment unreasonably interferes with the reasonable use and enjoyment of the Residential Building by the Owner of the Residential Building.
- (D) An exclusive easement for the Maintenance of Commercial Easement Facilities, subject to the rights of the Owners of the Residential Building granted pursuant to Section 5.7(A) hereof.
- (E) A non-exclusive easement for ingress and egress by persons, material and equipment over, on, across and through those sections of the stairways, and all of the elevators and the elevator shafts located, from time to time, in the Residential Building, excluding the two most southerly elevators which are for the exclusive use of the Residential Building.
- (F) A non-exclusive easement for use of the façade cleaning and repair platform and related equipment located on the roof of the Residential Building for the purpose of cleaning the exterior windows and façade of the Commercial Building, or any portion thereof, and maintaining, repairing and replacing the exterior of the Commercial Building (including façade, walls, windows, screens and the like).
- (G) A non-exclusive easement for the use of, and ingress and egress to, the roof of the Residential Building; a non-exclusive easement to erect satellite dishes on the roof of the Residential Building for the exclusive use of the Commercial Building in an area to be designated by the Owner of the Residential Building for such purpose but in no event more than 50% at any time of the space on the roof reasonably usable for satellite

dishes, which area shall meet the following criteria: (i) such area shall not be visible from adjacent buildings of less than nineteen (19) stories; (ii) such area shall be located in a portion of the roof that maximizes access to the existing satellites; and (iii) such area does not unreasonably interfere with other uses for the roof or other satellite dishes operated by the Owner of the Residential Building or residents of the Residential Building on the roof.

- (H) A non-exclusive easement for ingress and egress by persons, material and equipment over, on, across and through the Residential Building for purposes of access to and use of the elevator penthouse of the Residential Building.
- (I) A non-exclusive easement for the usage of all forms of conduit, standpipes, and other common waterlines, steam lines, sewer lines, cable lines, gas lines or common electrical supply lines, and water pumps located in the Residential Building.
- (J) A non-exclusive easement over, on, across and through the Residential Building to the extent reasonably necessary (i) to permit the maintenance, repair, replacement, restoration or reconstruction of the Commercial Building as required or permitted by this Declaration, or to the extent reasonably necessary to exercise the Easements set forth in this Section 3.1, (ii) during an Emergency Situation, or (iii) to construct and maintain substitute or additional structural support required by Article IV hereof.

**3.2** Each Easement created under this Article III that provides or requires, for its enjoyment, ingress and egress on, over, across or through the Residential Building, shall be subject (except in an Emergency Situation) to such reasonable limitations as the Owner of the Residential Building may, from time to time after consultation with the Owner of the Commercial Building, impose with respect to the establishment of limited paths of ingress and egress and limited hours of the day or days of the week during which such Easements may be used to prevent any unreasonable interference with the use and operation of the Residential Building and in order to assure the reasonable security of the Residential Building or such other reasonable restrictions as may be necessary given the nature of the Easements in question; provided, however, that any such limitations shall not preclude or unreasonably restrict enjoyment or exercise of any such Easement.

**3.3** Easements provided for, declared or created under Section 3.1 shall be binding upon the Residential Building and the Owner of the Residential Building, and all of such Easements shall run in favor of and inure to the benefit of and be appurtenant to the Commercial Building.

**3.4** The Owner of the Residential Building shall have the right, at its sole cost and expense, to relocate within its Property any Facilities and Easements which burden its Property and benefit the Commercial Building, other than Easements declared or created

under Sections 3.1(A), or 3.1(C) so long as such relocation does not have a material adverse effect on the Commercial Building or the use of the Commercial Building, and results in the provision of, and access to, the level of service related thereto that is equivalent to the level of service provided prior to such relocation.

**3.5** It is the express intent of the Owners that the cross-easements described in this Article III as well as Article II and as well as other rights and duties described herein shall not be construed to constitute executory contracts under the United States Bankruptcy Code and, in particular, 11 U.S.C. §365. The Owners have fully considered the respective burdens and benefits of all easements, rights, and duties described under this Declaration and hereby declare their respective benefits and burdens to be equivalent. The Owners further agree that the benefits of any easement, right or duty described herein shall not be severable from the burdens imposed on the easement, right or duty under this Declaration. The parties further agree that, should any court undertake to ascertain the intent of the Owners with respect to the ability of either Owner to reject the obligations of an easement, right or duty under 11 U.S.C. §365, it is the express intent of the Owners that neither Owner shall be able to reject the burdens of any easement, right or duty granted under this Declaration inasmuch as the benefits of each easement right or duty are inseparable from the burdens.

#### **ARTICLE IV. STRUCTURAL SUPPORT**

**4.1** No Owner shall take any action that would adversely affect the structural safety or integrity of the Building.

**4.2** If for any reason the structural support for any portion of the Building hereafter reduced below the support required to maintain the structural safety or integrity of the Building, the Architect shall review, at the request of any of the Owners, the extent of any such reduction and the need for or adequacy of any such substitute or additional structural support and the cost thereof. The Architect shall also estimate, if possible, the time reasonably necessary to provide adequate substitute or additional structural support.

**4.3** If Substitute or additional structural support is required in a portion of the Building in which the structural support shall have been reduced, then the Owner or Owners responsible for such reduction, if the responsible Owner or Owners can be determined, shall commence the construction of such substitute or additional support within a reasonable time under the circumstances, and having commenced such construction shall proceed diligently to cause the completion of such construction in accordance with plans and specifications prepared by or approved by the Architect and approved by the Owners and the holders of the First Mortgages. The responsible Owner or Owners shall pay all costs and expenses, including, without limitation, the Architect's and any other architectural fees, in connection with construction of the substitute or additional support. The Owners shall attempt in good faith to determine which Owner or Owners are responsible for such reduction, which determination shall be subject to the approval of (i) the holder of the First Commercial Mortgage (if required by such First Mortgage documents) in the event that the Owner of the Commercial Building is

determined to be responsible either alone or together with any other Owner, and/or (ii) the holder of the First Residential Mortgage (if required by such First Mortgage documents) in the event that the Owner of the Residential Building is determined to be responsible either alone or together with any other Owner. If such parties are unable, within thirty (30) days after such reduction is discovered, to agree which Owner or Owners are responsible for such reduction, the Owners shall request the advice of an Architect. If after receiving the Architect's advice, the Owners cannot agree which Owner or Owners are responsible for such reduction, then such determination shall be made by arbitration pursuant to Article XI hereof.

**4.4** In the event that the Owner or Owners determined responsible for the reduction in structural support fail to commence the construction of substitute or additional support within a reasonable time under the circumstances, or having commenced such construction fail to proceed diligently to its completion, any Creditor Owner shall have the right to complete the construction of such substitute or additional support at the expense of the Defaulting Owner, and all costs and expenses incurred by the Creditor Owner shall be due from the Defaulting Owner on demand.

**4.5** If delay in constructing substitute or additional support would endanger the structural safety or integrity of the Building, then, without regard to which Owner or Owners shall be determined responsible for the reduction, the Owner of the portion of the Building in which the reduction shall have occurred or is then occurring shall, upon not less than ten (10) days advance written notice to the other Owners (except that such advance written notice shall not be required in an Emergency Situation), provide substitute or additional structural support as and wherever may be required or the Owners shall together undertake to provide substitute or addition structural support; provided, however, the responsible Owner shall be liable for and pay all costs and expenses incurred as a result of any required substitute or additional support. If the responsible Owner or Owners cannot be determined, or if all Owners are responsible, or if the reduction in structural support results from a defect in the original construction or design of the Building, an act of God, or force majeure, then the Owners shall share the cost of providing substitute or additional structural support, including, without limitation, any fees of the Architect, in the manner agreed to by the Owners. If the Owners cannot agree, the Owners shall request the advice of an Architect. If after receiving the Architect's advice, the Owners cannot agree which Owner or Owners are responsible for such reduction, then such determination shall be made by arbitration pursuant to Article XI hereof.

#### **ARTICLE V. BUILDING SERVICES**

**5.1** The Owner of the Commercial Building, at its sole cost, shall furnish or cause to be furnished all service to the Residential Building when, as, and if required, in connection with operation of the Skywalk bridges serving the Building, including capital expenses incurred or to be incurred in connection with the skywalk bridge connecting the Building to the buildings locally known at the time of this Declaration as the Kalidescope at the Hub to the south and Two Ruan Center across Locust Street to the north and the

charges for electric service for the skywalk (after allocation to adjoining buildings, if any allowed in the applicable skywalk agreement) upon the terms and conditions set forth in the skywalk agreement.

**5.2** In addition, the Owner of the Commercial Building shall furnish or cause to be furnished the following services to the Owner of the Residential Building when, as and if required, however, the Owner of the Residential Building shall be responsible for the actual costs incurred to provide such service to the Residential Building and the Owner of the Commercial Building shall be responsible for the actual costs incurred to provide such services to the Commercial Building, and any costs for installation, repair or maintenance of shared services, unless agreed to specifically, will be shared 50% to the Residential Building and 50% to the Commercial Building:

- (A) Emergency Power. Emergency Power and electrical services, if any.
- (B) Fire Safety and Emergency Telephone Systems including control panels connected thereto. Maintenance of the Building's facilities that monitor the Building's fire alarm and emergency telephone systems.
- (C) Building Automation and Access Card Reader Systems. Maintenance of the Building automation system and the access card reader system.
- (D) Water Sewer System. Maintenance of the water and sewer systems for the Building.
- (E) Electric Service. Maintenance of the electrical service for the Building.
- (F) Exterior Lighting - Maintenance of all exterior light of the Building.
- (G) Loading Dock and Trash Removal. Maintenance of (i) the service area and loading dock and all roadways, ramps and other means of access thereto located within the Building and (ii) trash removal service for compacted trash.
- (H) Security. Provide security service for the loading dock, service entrance, and monitor certain portions of the Building and all stairwell alarms, if any.
- (I) Street Level Exterior Maintenance and Snow Removal. Unless such activities are clearly the responsibility of the City of Des Moines, snow removal and maintenance of the curb cuts, sidewalks, trees, tree lights, tree pits, stone containers, and other improvements on Sixth Avenue and Locust Street in surrounding the building, and, if necessary the alleys to the south and west of the Building.

- (J) Security Surveillance Equipment. Maintenance of the security surveillance cameras and miscellaneous security system equipment, if any.
- (K) Periodic Services. Testing of the fire sprinkler system, the fire detector system, and the smoke detectors in the Building.
- (A) Building Roof. Operation, maintenance, repair and replacement of the roof of the Building.

**5.3** The Owners of the Commercial Building shall furnish or cause to be furnished the following services to itself at its sole cost and expense, subject to the easements granted herein to the Owner of the Residential Building, for the benefit of the Commercial Building when, as, and if required:

- (A) Operation of Commercial Building. Except as otherwise specifically stated herein, operation, maintenance, repair, replacement and improvement of the Commercial Building, including portions thereof leased to tenants of the Owner of the Commercial Building, HVAC systems serving the Commercial Building.
- (B) Elevators. Operation, maintenance, repair and replacement of the elevators in the Building excluding the two most southerly elevators in the Building, which are to serve the Residential Building.

**5.4** The Owner of the Residential Building shall furnish or cause to be furnished the following services to itself at its sole cost and expense, subject to the easements granted herein to the Owner of the Commercial Building, for the benefit of the Residential Building when, as, and if required.

- (A) Elevators. Operation, maintenance, repair and replacement of the two most southerly elevators in the Building.
- (B) Operation of the Residential Building. Except as otherwise specifically stated herein, operation, maintenance, repair and replacement and improvement of the Residential Building, including portions thereof leased, conveyed or otherwise transferred to tenants of the Owner of the Residential Building, including the HVAC systems serving the Residential Building.

**5.5** Each Owner shall make a good-faith effort to operate its Facilities and furnish all services as required under this Article V in a manner that will provide each Owner with comfortable occupancy and enjoyment of its respective portion of the Building for its intended use as Class A commercial or Residential Building, but in no event shall an Owner be obligated to use more than reasonable diligence in performing the services required of such Owner under this Article V, or be liable for consequential damages for failure to perform hereunder or be liable for interruption or inadequacy of service, loss or damage to property or injury (including death) to any person for any reason, except that



the Owner obligated to furnish such service or maintain such Facility shall be liable to the other Owner for any direct damages arising from interruption or inadequacy of service, but not for any consequential damages, to the extent that such failure causes the other Owner to be in default as a landlord under any of its leases or in default under its First Mortgage or in default under the Skywalk Agreement. Each Owner obligated to furnish services hereunder reserves the right to curtail or halt the performance of any service hereunder at any reasonable time and for a reasonable period of time to the extent reasonably necessary to perform Maintenance or in an Emergency Situation.

**5.6** Payment for services rendered pursuant to Article V hereof and other charges and fees related to such services, including overhead and supervision fees, shall be paid monthly, based upon a billing from the Commercial Building Owner to the Owner of the Residential Building.

**5.7** (A) If any Owner shall fail to (i) perform the services required to be performed by it pursuant to this Article V except when such failure is caused by other Owner or by Unavoidable Delay (as defined in Article XII hereof), or (ii) perform its obligations under Section 9.1 hereof, and such failure shall continue for a period longer than the Nonmonetary Default Cure Period after written notice thereof to the Defaulting Owner from any other Owner; such other Owner shall have the right to perform the same until such time as the Defaulting Owner cures its failure to perform. Such notice shall not be required in an Emergency Situation.

(B) During any period in which any Creditor Owner is performing pursuant to this Section 5.7, the Defaulting Owner shall make payments to the Creditor Owner as provide in Paragraph 6 of Exhibit 5.6.

**5.8** If at any time a Defaulting Owner fails to pay to a Creditor Owner any sum of money payable to such Creditor Owner pursuant to the provisions of section 5.6 hereof within ten (10) days after receipt of written notice from such Creditor Owner demanding payment of said sum of money, then such Creditor Owner may charge the Defaulting Owner the following: (1) interest at the rate set forth in Section 10.4 as of the date of such written notice; plus (2) a late-payment service processing fee equal to the greater of: (a) five percent (5%) of the sum of money for which written notice has been previously given, or (b) Fifty Dollars (\$50.00) for each month in which any such amount remains unpaid, payable immediately without further notice or demand. Furthermore, the Creditor Owner shall have the right to set off any amount owed to it by Defaulting Owner (including penalty interest and fees provided in this Section 5.8) against any obligation whatsoever owed by the Creditor Owner to the Defaulting Owner. Nothing contained herein shall limit any right or remedy to which the Creditor Owner is entitled under law or in equity with respect to such nonpayment.

**5.9** Any Owner required to provide services under this Article V shall have the right, from time to time and after consultation with the other Owner, to reallocate between the Owners in a fair and reasonable manner the cost of any item of maintenance required to be provided by the Owner requesting such reallocation under this Article V if such cost is

not reasonably allocated among the Owners. Provided, however, that if any such reallocation has a material impact on any of the Owners, any such Owner shall have the right to submit the issue of the reasonableness of such reallocation to arbitration pursuant to Article XI hereof, which determination shall be final and binding on the Owners and the holders of the First Mortgages.

**5.10** An Owner obligated to perform Maintenance of Facilities shall, in replacing Facilities, replace such Facilities with Facilities substantially equivalent or better and providing substantially the same quality of service or better.

**5.11** If at any time the actual allocation of cost of Maintenance based on an Owner's usage recorded by meters cannot be determined because the meters or system for recording metered information is not installed or operative, then for such period when the usage data from meters is unavailable, the Owner performing such Maintenance shall make such reasonable determination of costs based on usage, using such experts or systems as such Owner may consider helpful to achieve an estimate of usage. Such Owner shall notify the other Owner in detail of its determination of estimated usage and the method for such determination at the time such Owner sends a statement as provided in Exhibit 5.6 or statement of net capitalized cost under Exhibit 5.6 relating to such Maintenance. If, within thirty (30) days after receipt of such notice, the Owner receiving such notice does not, in good faith, dispute that such method of estimating usage has been determined reasonably, such determination of usage shall be final and conclusive upon the parties; provided further, however, if any Owner receiving such notice, in good faith, disputes that the method of estimating usage has been determined reasonably, such Owner shall so notify the other Owners. If the Owners fail to agree concerning the method of estimating usage within thirty (30) days after receipt of the disputing Owner's notice, then the Owners shall submit the question to the Architect for its determination, which determination shall be final and binding on the Owners.

**5.12** In the event that a Defaulting Owner fails to make timely payment to a Creditor Owner more than three (3) times in any calendar year, the Creditor Owner may at its option require the Defaulting Owner to make a security deposit payment to the creditor Owner in an amount not less than two months' obligations owing by the Defaulting Owner to the Creditor Owner hereunder.

**5.13 (a)** The Owner of the Commercial Building shall have the right to provide services for the benefit of the Commercial Building that are otherwise provided by the Owner of the Residential Building pursuant to Section 5.2 hereof, and the Owner of the Commercial Building shall have the right to establish, construct, and operate Facilities in the Total Property necessary to provide such services for the Commercial Building, subject to the following conditions and limitations: (1) the Owner of the Commercial Building shall give not less than thirty (30) days' written notice to the Owner of the Residential Building of the intended date of commencement of the provision of such services for the benefit of the Commercial Building (the "Connection Date"); (2) the Owner of the Commercial Building shall give not less than three (3) days' written notice to the Owner of the Residential Building of the actual Connection Date if such date is

different from that described in Part (1) hereof; (3) the Owner of the Commercial Building shall have no right to provide any such service if such provision of services would materially interfere with the operation of the Residential Building, result in the violation of any building code or other law, regulation, or ordinance, or impair the ability of the Owner of the Residential Building to obtain any insurance required hereunder; and (4) The Owner of the Commercial Building shall have no right to furnish its own fire safety system as described in Section 5.2(B) hereof without the prior written approval of the governmental agencies having jurisdiction thereof. The Owner of the Residential Building shall grant such reasonable easements for the benefit of the Commercial Building necessary to support the provision of such services and the construction and operation of such Facilities, provided that such easements shall not unreasonably increase the burden on the Residential Building. The obligation of the Owner of the Commercial Building to pay the Owner of the Residential Building for any such services shall cease with respect to any services provided on or after the Connection Date.

(b) If the Owner of the Commercial Building elects to construct, establish and operate any separate Facilities as provided in Section 5.13(a), and by such action causes the Owner of the Residential Building to rewire or otherwise modify its Facilities in order to maintain the existing types or quality of service to the Residential Building, the Owner of the Commercial Building shall pay for such rewiring or other modification of the Facilities so affected.

(c) In the event that the Owner of the Residential Building chooses to separate any of its Facilities from those furnishing services to the Commercial Building, such separation of service shall be accomplished in the manner and upon the conditions set forth in Section 5.13(a) hereof, and the Owner of the Residential Building shall, at its expense, construct and establish separate Facilities for the benefit of and serving the Commercial Building.

**5.14** In the event that Defaulting Owner fails to make timely payment to a Creditor Owner of any amount owing under this Declaration for a period of three (3) consecutive months, the Creditor Owner shall have the right to terminate the provision of any service for which the Defaulting Owner fails to pay, subject to the following: (a) the Creditor Owner shall give the Defaulting Owner and the holder of the First Mortgage on the Defaulting Owner's portion of the Total Property thirty (30) days' prior written notice of its intent to terminate such service; (b) the Defaulting Owner and/or the holder of the first Mortgage on the Defaulting Owner's portion of the Total Property shall have the right to cure any such default, but only in full and not in part; and (c) the Creditor Owner shall not have the right to terminate any service that provides safety systems for the Building, that would endanger the safety of persons using the Building including, without limitation, the building automation system and the security system for the Building.

#### **ARTICLE VI. COMPLIANCE WITH LAWS; REMOVAL OF LIENS; INDEMNIFICATION**

**6.1** The owners shall each comply with all laws, codes, rules, orders, ordinances, regulations and requirements now or hereafter enacted or promulgated by the United States of America, State of Iowa, City of Des Moines, and any other governmental or quasi-governmental authority or agency now or hereafter having jurisdiction over the Total Parcel, the Building or any portion thereof, if noncompliance would subject the other Owners, or any of the holders of the First Mortgages to civil or criminal liability, or would jeopardize the full force or effect of any certificate of occupancy issued to such other Owners or for the Building itself or would jeopardize such other Owner's or Owners' right to occupy or utilize beneficially their respective portion or portions of the Total Property or any part thereof, or would result in the imposition of a lien against any of the property of the other Owners.

The Owners of the Commercial Building shall designate a person located in the Greater Des Moines, Iowa area who is hereby authorized by the Owners pursuant to this Section to receive on behalf of the Owners any notices or communications from governmental authorities concerning Code compliance, including notices with respect to Building Codes, Fire Codes, Zoning Ordinances or Life Safety Codes, as they may apply to the Residential Building and the Commercial Building. The person so designated shall be responsible for promptly notifying the Owners concerning any notices or communications from governmental authorities concerning Code compliance and the responsible Owner shall make the appropriate response to the governmental authority. Nothing under this Section shall be construed as creating or imposing any liability on the person so designated by the Owner of the Commercial Building to take any corrective action or create any duty on the part of the person so designated to defend any governmental action or to pay any penalty or fine or to assume any civil, criminal or other liability whatsoever. Compliance with applicable governmental code shall rest solely with the respective Owners and not with the person designated under the paragraph. The Owner of the Commercial Building is authorized and directed to notify governmental authorities concerning the person designated under this Section to receive governmental notices and communications.

The initial designee hereunder is:

Bob J. Knapp  
3535 Westown Parkway, Suite 103, West Des Moines, Iowa 50266  
Phone: 278-4600, Fax: 278-4644

The Owner of the Commercial Building may change such designee by giving written notice in accordance with Article XX hereof, to the Legal Department of the City of Des Moines, Iowa, with a copy to the Building Department of the City of Des Moines.

**6.2** The Owner of the Commercial Building shall be responsible at its expense to ensure that the Commercial Building, including all the lobbies and the second floor Commercial Building elevator lobby, the entrance doors to the Total Property, and all alterations thereto comply with Title III of the Americans with Disabilities Act of 1990 ("ADA"), and further that the operation of the Commercial Building, the Commercial

Easement Facilities, all alterations thereto required by the ADA by the nature or manner of the Owner of the Commercial Building's business operations, or any modifications to the Commercial Building required by the ADA on account of the employees or tenants of the Owner of the Commercial Building are in compliance with the ADA. The Owner of the Residential Building shall be responsible at its expense to ensure that the Residential Building, the Residential Easement Facilities, and all alterations thereto comply with the ADA, and further that its operation of the Residential Building, the Residential Easement Facilities, and all alterations thereto required by the ADA by the nature or manner of the Owner of the Residential Building's business operations, or any modification to the Residential Building required by the ADA on account of the employees or tenants of the Owner of the Residential Building area in compliance with the ADA.

- (A) The Owner of the Residential Building shall protect, defend, indemnify, and hold harmless the other Owners, their respective officers, directors, shareholders, employees and agents from the cost of compliance with the requirements of the ADA that are the responsibility of the Owner of the Residential Building as stated above, and from any damages, liabilities, charges, fines, penalties, and expenses (including, but not limited to, reasonable attorney's fees and court or administrative costs) that arise from noncompliance or claims of noncompliance with the requirements of the ADA that are the responsibility of the Owner of the Residential Building, as stated above.
- (B) The Owner of the Commercial Building shall protect, defend, indemnify, and hold harmless the other Owners, their respective officers, directors, shareholders, employees and agents from the cost of compliance with the requirements of the ADA that are the responsibility of the Owner of the Commercial Building, as stated above, and from any damages, liabilities, charges, fines, penalties and expenses (including, but not limited to, reasonable attorney's fees and court or administrative costs) that arise from noncompliance or claims of noncompliance with the requirements of the ADA that are the responsibility of the Owner of the Commercial Building, as stated above.

6.3 The Owners shall each comply with all rules, regulations and requirements of any insurance rating bureau having jurisdiction over the Total Property or any portion thereof and the requirements of any insurance policy effecting insurance coverage on any of the other Owner's portion of the Total Property, if noncompliance by it with respect to its portion of the Total Property or any portion thereof would (i) increase the premiums of any policy of insurance maintained by the other Owners or the premiums of any policy of insurance maintained by all Owners, or (ii) render any of the other Owner's portion of the Total Property uninsurable, or (iii) create a valid defense to any of the other Owner's rights to collect insurance proceeds under policies insuring such other Owner's portion of the Total Property; provided, however, that if such compliance is hereafter required solely because of the nature of the use, possession, or management of or activities in any of the other Owner's portion of the Total Property, such other Owner or Owners shall be

liable for the cost and expense of such compliance. If at any time any Owner so obligated to comply shall not proceed diligently with any such compliance and such failure to proceed shall adversely and materially affect any of the other Owners, then any Creditor Owner may give written notice to the Defaulting Owner specifying the respect or respects in which the cure of such noncompliance is not proceeding diligently and, if upon expiration of ten (10) days after the receipt of such notice, any such cure of the noncompliance is still not proceeding diligently, then each Creditor Owner may cause such compliance to occur by taking all appropriate steps to carry out the same. Each Creditor Owner shall be entitled to reimbursement upon demand from the Defaulting Owner for all costs and expenses incurred by such Creditor Owner in connection with causing any such compliance to occur.

**6.4** Each Owner shall remove, within thirty (30) days after the filing thereof, any mechanic's, materialmen's or any other similar lien on any other Owner's portion of the Total Property, or on its portion of the Total Property if the existence or foreclosure of such lien on its portion of the Total Property would adversely affect any Easement created hereunder or services to be furnished pursuant to Article V hereof, arising by reason of any work or materials ordered or any act taken, suffered or omitted by such Owner. In the event the Defaulting Owner fails to remove any such lien within such thirty (30) day period, each Creditor Owner may take such action as such Creditor Owner may deem necessary to remove such lien. Each Creditor Owner shall be entitled to reimbursement from the Defaulting Owner for all costs and expenses incurred by such Creditor Owner in removing or attempting to remove such lien. Notwithstanding the foregoing, the Defaulting Owner shall not be required to remove such lien so long as within said thirty (30) day period such lien cannot be foreclosed and the Defaulting Owner (A) shall in good faith diligently proceed to contest the same by appropriate proceedings and shall give written notice to each Creditor Owner of its intention to contest the validity or amount of such lien and (B) shall either: (i) deliver to the Clerk of the Iowa District Court for Polk County a surety bond from a responsible surety company, or other security allowed by law, acceptable to said Clerk of Court in the amount as then provided by the Iowa Mechanic's Lien law, Iowa Code Chapter 572 (2005), as from time to time amended, and all interest and penalties then accrued thereon or such greater amount as may reasonably be required to assure payment in full of the amount claimed plus all penalties, interest, and costs which may thereafter accrue by reason of such lien claim, or (ii) deliver to each Creditor Owner other security reasonably acceptable to such Creditor Owner (and to the holder of the First Commercial Mortgage if such Creditor Owner is the Owner of the Commercial Building, or to the holder of the First Residential Mortgage if such Creditor Owner is the Owner of the Residential Building).

**6.5** In General. (a) Unless the terms of this Declaration otherwise set forth a specific allocation of costs with respect to any Facility, each of the Owners (hereinafter in this Section 6.5, the "Indemnifying Owner") covenants and agrees, at its sole cost and expense to indemnify and hold harmless the other Owner (hereinafter in this Section 6.5, the "Indemnitee") from and against any and all claims against Indemnitee for losses, proceedings arising therefrom, by or on behalf of any person, firm, corporation, or

governmental or quasi-governmental authority, other than the Indemnatee, arising from the Indemnifying Owner's use, possession or management of the Indemnifying Owner's portion of the Total Property or activities therein or arising out of the Indemnifying Owner's use, exercise or enjoyment of any Easement, and from and against all costs, attorneys' fees, expenses, and liabilities incurred with respect to any such claim, action or proceeding arising therefrom. In case any action or proceeding is brought against the Indemnatee by reason of any such claim, Indemnifying Owner, upon notice from any such Indemnitees, covenants to resist or defend such action or proceeding with attorneys reasonably satisfactory to such Indemnatee. Any counsel for the insurance company providing insurance against such claim, action or proceeding shall be presumed reasonably satisfactory to Indemnatee.

(b) Environmental Matters. The Indemnifying Owner covenants and agrees, at its sole cost and expense, to indemnify and hold harmless the Indemnatee from and against any and all claims against Indemnatee for losses, liabilities, damages, judgments, costs, expenses, fines and penalties and any actions or proceedings arising therefrom, by or on behalf of any person, firm, corporation, or governmental or quasi-governmental authority, arising from the Handling or any Hazardous Materials of the Indemnifying Owner, as defined hereafter. For purposes hereof, Hazardous Material of the Indemnifying Owner shall mean any hazardous material as defined in Section 6.5(b)(ii) Handled about, above or beneath that portion of the Total Property owned by the Indemnifying Owner by or on behalf of the Indemnifying Owner, its tenants, lessees, their assignees, or their respective contractors, employees, agents or invitees, except that normal quantities of those Hazardous Materials customarily used in the conduct of general administrative, office and retail mall store activities (e.g. copier fluids and cleaning supplies) may be used and stored on the Total Property, but only in compliance with all applicable Environmental Laws, as defined in Section 6.5(b)(i).

For purposes of this Section 6.5(b), the following terms shall have the meanings set forth below:

(i) "Environmental Laws" shall mean and include all now and hereafter existing statutes, laws, ordinances, codes, regulations, rules, rulings, orders, decrees, directives, policies, and requirements by federal, state or local governmental authority regulating, relating to, or imposing liability or standards of conduct concerning public health and safety or the environment.

(ii) "Hazardous Materials" shall mean and include: (i) any material or substance: (1) that is defined or becomes defined as a hazardous substance, hazardous waste, infectious waste, chemical mixture or substance, or air pollutant under Environmental Laws; (2) containing petroleum, crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure; (3) containing polychlorinated biphenyl (PCB's); (4) containing asbestos; or (5) that is radioactive; or (ii) any other pollutant or contaminant or hazardous, toxic, flammable or dangerous chemical, waste, material or substance, as all such terms are used in their broadest sense, and defined,

regulated or become regulated by Environmental Laws, or which cause a nuisance upon or waste to any parcel of real estate described herein.

(iii) "Handle," "Handled," or "Handling" shall mean and include any installation, handling, generation, storage, treatment, use, disposal, discharge, release, manufacture, refinement, presences, migration, emission, abatement, removal, transportation or any other activity or any type in connection with or involving Hazardous Materials.

#### ARTICLE VII. REAL ESTATE TAXES

7.1 The Owners agree to file such documents with the Auditor of Polk County, Iowa (the "Auditor") and the Assessor of the City of Des Moines ("Assessor"), to obtain separate real estate tax bills for their respective portions of the Total Property, if such documents have not heretofore been filed. When separate real estate tax bills are received, the Owner of the Commercial Building shall pay the real estate taxes, special assessments, and any and all other taxes and assessments of every kind or nature levied upon the Commercial Building, and the Owner of the Residential Building shall pay the real estate taxes, special assessments, and any and all other taxes and assessments of every kind or nature levied upon the Residential Building. To the extent either Building is converted into condominiums, the condominium units in such Building will be separately taxed.

7.2 In the event that the Owners are unable to obtain separate real estate tax bills for their respective portions of the Total Property, or if there is a delay in obtaining separate real estate tax bills, the following shall apply.

- (A) At any time that the Commercial Building and the Residential Building are not separately assessed and taxed, each Owner shall pay its respective portion of such real estate taxes, special assessments, and any and all other taxes and assessments of every kind or nature levied upon or with respect to the Total Property. Initially, the Owner of the Commercial Building shall pay 43% of such taxes and the Owner of the Residential Building shall pay 57% of such taxes and assessments with respect to the Total Property. The Owners shall consult with the Assessor following January 1, in each odd-numbered year commencing in 2007 to determine the allocation of assessed Property and the Residential Building, and the foregoing allocation percentages shall be adjusted accordingly.
- (B) Upon receipt of the real estate tax bills for the Total Property, the Owner of the Commercial Building shall forward a copy of same to the Owner of the Residential Building, together with the Owner of the Commercial Building's calculation of their respective shares of such tax bills. The Owner of the Residential Building shall deliver to the Owner of the Commercial Building a check made payable to the Polk County Treasurer



for its allocable share, as calculated by the Owner of the Commercial Building, of the tax bills at least three (3) days before such installment would become delinquent. The Owner of the Commercial Building shall forward such checks with the Owner of the Commercial Building's share of the tax bills to the Polk County Treasurer and shall forward a copy of the receipt for same to the Owner of the Residential Building when it is received.

**7.3** If, prior to the time separate real estate tax bills are obtained, any Owner shall fail to pay any tax or other charge, or share thereof, which is due and which such Owner is obligated to pay pursuant to this Article VII, and if such unpaid tax or charge is a lien or encumbrance on the portion of the Total Property owned by any of the other Owners, or if any of the Total Property owned by any of the other owners or extinguish any Easement benefiting any of the other Owners by reason of such nonpayment, or if such unpaid tax or charge subjects any of the other Owners to personal liability for the same, then each Creditor Owner may, after ten (10) days' written notice to the Defaulting Owner, pay such tax or charge, or share thereof, together with any interest and penalties thereon, and the Defaulting Owner shall, upon demand, reimburse such Creditor Owner for the amount of such payment, including the amount of any interest or penalty amounts accrued thereon, plus interest as provided in Section 10.4 below.

#### **ARTICLE VIII. INSURANCE**

**8.1** The Owners shall procure and maintain the following insurance:

- (A) The Owners shall keep the Commercial Building, and the Residential Building jointly insured under a single insurance policy for no less than "all risk" or "special form" coverage on real property with endorsements for "Demolition and Increased Cost of Construction Coverage" and broad form named perils on personal property for the Agreed Value thereof, but, in any event, not less than the greater of the amounts required by the holders of the First Mortgages. Such coverage of the Building shall include earthquake and flood insurance and coverage for loss of rental income caused by business interruption or extra expense incurred to reduce such loss of income, in such amounts as may be carried by prudent owners of Class A commercial and high-rise residential buildings in the City of Des Moines, Iowa, or as may be required by the holder of the First Commercial Mortgage and the holder of the First Residential Mortgage, whichever is greater. Insurance carried hereunder shall also include insurance of Commercial and Residential Easement Facilities. The Owners shall obtain appropriate endorsements to prevent the insurance company from raising the claim or defense of co-insurance or other like defenses or like claims adverse to the Owners. The insurance company providing such insurance coverage shall allocate the cost of the premium for the insurance policy required hereunder among the Owner of the

Commercial and the Owner of the Residential Building, based upon the valuation information provided to the insurance company for premium setting purposes. The term "Agreed Value" shall mean the agreed replacement value of the Building (exclusive of cost of excavation, foundations and footings below the lowest basement floor) and shall be determined annually by agreement of the Owners, in consultation with the insurer, at least ten (10) days prior to the renewal date of the insurance policy described in this Section 8.1(A), subject to confirmation for the policy years evenly divisible by five (5) during the term of this Declaration, starting with the policy year commencing January 1, 2006, by an appraisal from an independent appraiser chosen by the Owners, the cost of such appraisal to be shared by the Owners proportionately based on the appraised replacement value of their respective portions of the Building. Such policy shall be endorsed with an agreed amount clause in accordance with this provision.

- (B) The Owners shall maintain comprehensive general liability insurance with broad form extensions covering claims for personal and bodily injury, death or property damage occurring in, on, within, upon or about (i) the Total Property, or as a result of operations thereon (including contractual liability covering obligations created by this Declaration including, but not limited to, those indemnity obligations contained herein), or (ii) any other portion of the Total Property as a result of the actions of the Owners or their respective lessees, agents, or employees. Such insurance shall be in such amounts as may be required by law and as from time to time shall be carried by prudent owners of Class A commercial or Residential Buildings (as the case may be) in the City of Des Moines, Iowa, but in all events with limits of the greater of (i) not less than \$1,000,000 combined single limit for personal and bodily injury or property damage with additional umbrella coverage of not less than \$5,000,000; or (ii) amounts reasonably required by the First Mortgages. The premium cost of the comprehensive general liability policy required hereunder shall be allocated among the Owner of the Commercial Building and the Owner of the Residential Building by the insurance company issuing the general liability policy hereunder or its agent. In the event the general liability insurer refuses to issue a single policy covering the general liability of all Owners or if all Owners cannot agree on the policy limits, or deductibles, of the liability insurance, or if the Owners disagree with said allocation of the premium cost of such general liability policy, each Owner shall obtain at its own cost and expense, identical policies of comprehensive general liability insurance from a single insurance company as provided in this Section 8.1(B) and in Section 8.2 hereof. If the Owners obtain separate liability policies hereunder, the policy obtained by any Owner shall be primary coverage as to claims for injury or damage resulting from the acts or failure to act of an Owner, with any insurance carried by the other Owners being excess coverage; and

- (C) The Owners shall insure the boiler and machinery risks, on a comprehensive, blanket basis covering all Building equipment, machinery and apparatus situated in the Building, consisting of, but not limited to, boilers, heating apparatus, field and unfilled pressure vessels, air conditioning equipment, miscellaneous electrical apparatus and their appurtenant equipment and piping and ducts on a repair or replacement basis for the Agreed Value thereof, and also providing coverage for loss of income caused by business interruption or extra expense incurred to reduce such loss of income or for loss of use arising from a failure of the Building equipment, machinery and apparatus, in such amounts as may be carried by prudent owners of Class A commercial and office buildings in the City of Des Moines, or as may be reasonably required by the holders of the First Mortgages, whichever is greater. Such insurance shall also include insurance of Easement Facilities. The premium cost of such boiler and machinery insurance policy shall be allocated 100% to the Owner of the Commercial Building and 0% to the Owner of the Residential Building.
- (D) Any other insurance required by the holders of the First Mortgages as provided in the First Mortgage documents.

**8.2** Insurance policies required by Section 8.1 hereof shall be purchased from an insurance company agreed upon by the Owners and authorized and licensed to transact business in the state of Iowa who shall hold a current Policyholder's Alphabetic and Financial Size Category Rating of not less than A-/VIII according to Best's Insurance Reports or a substantially equivalent rating from a nationally recognized rating service. Insurance policies required by Section 8.1 shall (a) be purchased from a single insurance company or group of companies designated by the Owners, and if covering the same risks for different Owners, shall contain the same terms and conditions of coverage and policy wording, and (b) provide for the adjustment of claims with the insurer and the payment of policy deductibles by the Owner with respect to claims that can be clearly identified as being against such Owner, otherwise adjustment of claims and the payment of policy deductibles shall be by the mutual agreement of the Owners and, if required by the terms of any First Mortgage, the holder of such First Mortgage. If the parties and the holder of any First Mortgage cannot agree to the adjustment of any claim, the matter shall be submitted to arbitration under Article XI hereof. With respect to any insurance coverage described in Section 8.1. hereof, the Owners shall agree on the form and content thereof prior to entering into any policy that is binding on the Owners.

**8.3** Each policy described in Section 8.1 hereof: (i) shall provide that the knowledge or acts or omissions of any insured party shall not invalidate the policy as against any other insured party or holders of any First Mortgages or otherwise adversely affect the rights of any other insured party or holders of any First Mortgages under such policy (ii) shall insure as named insureds and additional named insureds, as the case may be, the Owner of the Commercial Building and the Owner of the Residential Building together

with such affiliates or agents of such Owners as any of them may designate from time to time, all as their interests may appear and the holders of any First Mortgages as may be required by the provision of the First Mortgages; (iii) shall provide, except for general liability insurance described in Section 8.1(B), by endorsement or otherwise, that the insurance shall not be invalidated should any of the insureds under the policy waive in writing prior to a loss any or all rights of recovery against any party for loss occurring to the property insured under the policy, if such provisions or endorsements are available and impair the insured's ability to collect under the policy, or unreasonably increase the premiums for such policy, unless the party to be benefited by such endorsements or provision (other than the holders of the First Mortgages) pays such increase; (iv) shall provide, except for (a) insurance for loss of rental income or loss of income covered by business interruption or extra expense incurred to reduce such loss of income, and (b) liability insurance required by Section 8.1(B), that all losses payable thereunder, shall be paid to the Depository in accordance with the terms of Article XVI hereof; (v) shall provide for a minimum of thirty (30) days' advance written notice of cancellation, non-renewal, or material modification thereof to all insureds thereunder and to the holders of the First Mortgages if required under the First Mortgage loan documents; (vi) shall include a standard mortgagee endorsement or loss payable clause in favor of each of the holders of the First Mortgages in form satisfactory to it; and (vii) shall include waivers of subrogation consistent with the provisions of Section 8.7 hereof.

**8.4** Limits of liability or types of insurance specified in this Article VIII or carried by the Owners shall be reviewed by the Owners no less often than annually at least thirty (30) days before the expiration of each policy to determine whether such limits, deductible amounts, and types of insurance comply with the requirements of all applicable statutes, laws, ordinances, codes, rules, regulations, orders and requirements under the terms of the First Mortgages and whether on a risk management basis, additional types of insurance or endorsements against special risks should be carried or whether required coverages or endorsements should be deleted. Initially, deductible amounts for insurance required under Section 8.1(A), 8.1(B) and 8.1 (C) shall not exceed \$50,000, for all coverages except flood and earthquake for which the initial deductible amount shall not exceed \$100,000. Such limits shall be increased or decreased, deductible amounts increased or decreased, or types of insurance shall be modified, if justified, based upon said annual review, and upon any such increase, decrease or modification, the Owners shall, at any Owner's election, execute an instrument in recordable form evidencing such increase, decrease or modification, which any Owner may record with the Recorder as a supplement to this Declaration; provided that no agreement regarding a decrease in limits of liability, an increase in the deductible amounts to an amount not in excess of \$25,000.00 for all coverages except flood and earthquake, for which the maximum deductible amounts shall not exceed \$50,000.00, or elimination of any types of coverages shall be effective without the written consent of the Owners and the holders of the First Mortgages, if required under the First Mortgage loan documents.

**8.5** Copies of all insurance policies, original certificates of insurance evidencing such policies, or certified binders delineating all forms of coverage and endorsements required

hereunder shall be delivered to each Owner and to the holders of the First Mortgages at the time of the conveyances and at least thirty (30) days prior to the expiration date of any such expiring insurance policy and the inception of any such renewal policies.

**8.6** Should an Owner fail to provide and maintain any policy of insurance required under this Article VIII or pay its share of the premiums or other costs for any joint policies, then the other Owners may purchase such policy and the costs thereof (or the Defaulting Owner's share of such costs) shall be due from the Defaulting Owner within ten (10) days after the Creditor Owners' written demand therefore.

**8.7** Without limiting any release or waiver or liability or recovery contained elsewhere in this Declaration, each of the Owners for itself and for each party claiming under, by or through such Owner, hereby waives all claims for recovery from the other Owners and their respective tenants for any loss or damage to any of its property insured (or required hereunder to be insured) under valid and collectible insurance policies to the extent of any recovery collectible (or which would have been collectible had such insurance required hereunder been obtained) under such insurance policies plus any deductible amounts.

**8.8** The parties may agree to amounts and forms of insurance coverage, to an allocation of premium costs, or to any other matters arising under this Article VIII that are contrary to the terms hereof without amending the declaration and without such contrary agreement being construed as a deemed amendment to the Declaration; provided that no such agreement shall be binding upon any successor Owner(s) unless expressly assumed in writing by such successor.

#### **ARTICLE IX. MAINTENANCE AND REPAIR; DAMAGE TO THE BUILDING**

**9.0** Except as expressly provided in Sections 5.1 and 5.2 hereof relating to Maintenance of certain Facilities and areas of the Building or hereinafter in this Article IX in the event of fire or other casualty, and without limiting or diminishing each Owner's obligations under Article IV, each Owner shall, at its sole cost and expense, keep its respective interest in the Building, its Easement Facilities and fixtures, equipment, and appurtenances therein (including, without limitation, its portion of the Building façade and its kitchen waste traps), in good and safe order and condition, and shall make all repairs or replacements, necessary to keep the same in safe, clean attractive and Class A order and condition, however the necessity or desirability thereof may arise, and whether or not necessitated by wear, tear, obsolescence, defects, or otherwise, and each Owner further agrees that it shall not suffer or commit, and shall use all reasonable precaution to prevent waste to such property. All repairs and replacements to the property of one Owner shall be compatible with the property of the other Owner, and if any dispute arises as to the compatibility of any such repair or replacement, such dispute shall be submitted to the Architect in the manner provided in Section 15.2 hereof. If any repair or replacement results in a modification of the Plans, the Owners shall certify such modification by executing a document (which does not need to be recorded to be

effective against the Owners), or by obtaining a signed certificate from the Architect of such modification of the Plans.

**9.1** If the Building is damaged by fire or other casualty and if such damage occurs in, on, under, within upon or about (a) the Commercial Building only, or (b) the Residential Building only, then any such damage shall be repaired and restored by the Owner or Owners of the portion of the Building in which any such damage occurs in as timely a manner as practicable under the circumstances, and each such Owner shall, in accordance with the provisions of Article XVII hereof, be entitled to withdraw any insurance proceeds held by the depository by reason of any such damage, for application to the cost and expense for the repair and restoration of any such damage. Such portion of the Building shall be rebuilt as nearly as commercially practicable to the Building as constructed prior to the damage unless prohibited by law or unless the Owners otherwise agree, subject to the approval of the holders of the First Mortgages, if required by the First Mortgage documents. If at the time any Owner so obligated to repair and restore such damage that adversely and materially affects an Easement in favor of any other Owner or services to be furnished any other Owner under Article V hereof, then (i) each Creditor Owner may give written notice to the Defaulting Owner specifying the respect or respects in which such repair or restoration is not proceeding diligently and, if, upon expiration of ten (10) days after the receipt of such notice, any such repair or restoration and may take all appropriate steps to carry out the same. The Creditor Owner in so performing such repair and restoration shall, in accordance with Article XVII hereof, be entitled to withdraw any insurance proceeds and any other monies held by the depository as a result of any such damage, for application to the cost and expense of any such repair or restoration and shall also be entitled to reimbursement upon demand from the Defaulting Owner for all costs and expenses incurred by the Creditor Owner in excess of said insurance proceeds.

**9.2** If the Building is damaged by fire or other casualty and if the provisions of Section 9.1 are not applicable because of the nature of the damage is such that it does not fall within any of the categories set forth in Section 9.1, then the repair or restoration of such damage shall be the joint responsibility of the Owners, subject to Section 9.1 hereof. Said repair and restoration shall be commenced and pursued to completion in as timely a manner as practicable and shall be performed on behalf of the Owners by a reputable contractor or contractors experienced in the construction of high-rise structures similar to the Building, and such contractor or contractors shall be jointly selected by the Owners. In the event the Owners fail to agree upon the selection of a contractor or contractors, the Owners shall request the advice of the Architect. If after receiving the Architect's advice, the Owners cannot agree on a contractor or contractors, then the selection of a contractor or contractors shall be made by arbitration pursuant to Article XI hereof. The plans and specifications for such repair and restoration shall be prepared by the Architect, unless the Owners otherwise agree, subject to the approval of the holders of the First Mortgages if required by the First Mortgage documents, in accordance with instructions given by the Owners. Such plans and specifications shall provide for the building to be rebuilt as nearly as commercially practicable to the Building as constructed prior to the damage unless prohibited by law or unless the Owners otherwise agree, subject to the approval of

the holders of the First Mortgages, if required by the First Mortgage documents. The Architect shall furnish to each of the Owners and each of the holders of the First Mortgages a set of the plans and specifications that it has prepared or caused to be prepared. Unless the Owners otherwise agree, all contractors shall work under the supervision of the Architect, and the Architect is hereby authorized and directed to instruct the Depository, from time to time, but only with the prior approval of the Owner in whose portion of the Building such repair and restoration is being performed, and the holder of the First Commercial Mortgage if the Commercial Building or any of the Commercial Easement Facilities are involved or the holder of the First Residential Mortgage if the Residential Building or any of the Residential Easement Facilities are involved, as such repair and restoration progresses, to disburse in accordance with Article XVII hereof, the insurance proceeds held by the Depository and any other monies deposited with the Depository pursuant to Section 9.4 hereof for application against the cost and expense of any such repair and restoration.

**9.4** If the cost and expense of performing any repair and restoration provided for in Section 9.3 hereof shall exceed the amount of available insurance proceeds, if any, paid by reason of the damage, then such excess cost and expense (or the entire amount of such cost and expense, if there are no applicable insurance proceeds) shall be borne by the Owners in proportion to the cost and expense of repairing to their former condition their respective portions of the Building. In the event that the cost and expense of performing any repair or restoration of any Facilities shall exceed the amount of available insurance proceeds, if any, paid by reason of such damage to the Facilities, then such expense (or the entire amount of such cost and expense, if there are no applicable insurance proceeds) shall be borne by the Owners in the same manner as set forth in Exhibits 5.1(A) and 5.2(A)-(L) for the allocation of Net Capitalized Cost of Replacement with respect to the Facilities so damaged or destroyed, if such Facility is covered by Exhibit 5.1(A) or Exhibits 5.2(A)-(L); otherwise, it shall be borne by the Owners in proportion to the cost and expense of repairing to their former condition their portions of the Building. Provided, however, that to the extent such excess cost and expense results from the failure of any Owner to maintain the amount of insurance required under Section 8.1 hereof, such Owner shall bear such portion of such excess cost and expense.

**9.5** In any instance of repair or restoration pursuant to Sections 9.1, 9.2 or 9.3 hereof, any Owner may require that an estimate of the cost or expense of performing such repair or restoration be made by a reputable independent professional construction cost-estimating firm, except if a construction contract providing for the performance of such repair and restoration for a stipulated sum therefore has been executed. If said estimate or stipulated sum, or if the actual amount incurred in performing repair or restoration, exceeds the amount of insurance proceeds, if any, paid or payable by reason of the damage (plus any applicable deductible), then any Owner, or any of the holders of the First Mortgages, may at any time give notice to the other Owners demanding that each Owner deposit with the Depository the amount of such excess cost and expense attributable to each Owner pursuant to this Article IX. In lieu of depositing its share of such excess amount based upon said estimate or stipulated sum, or actual cost and expense of performing such repair or restoration, any Owner may deliver to the

Depository security for payment of its share reasonably acceptable to the other Owners, the holders of the First Mortgages and the Depository. Such security may be in the form of, but shall not be limited to, an irrevocable and unconditional letter of credit in favor of the Depository in the face amount of the share owed or an irrevocable loan commitment, satisfactory to the other Owners and the holders of the First Mortgages, issued by a responsible lending institution, to disburse an amount equal to such Owner's share of such excess amount to the Depository to pay the cost and expense of any such repair or restoration as the work progresses in proportion to such Owner's share of the cost and expense of any such repair or restoration. If the amount of the security required is based on an estimate of the cost and expense of repair and restoration, then the amount of security required to be deposited or available shall be readjusted upward or downward as the work progresses based on actual cost and expense of the work. If any Owner shall fail to pay, or, as the case may be, deposit, such Owner's share of the cost and expense (or estimated cost and expense) of performing any repair or restoration in accordance with this Section 9.4, or fails to deliver the security provided for herein with ten (10) days after receipt of any other Owner's written demand therefore, then each Creditor Owner may pay the Defaulting Owner's share and the Defaulting Owner, shall, upon written demand, reimburse such Creditor Owner for such payment and such Creditor Owner's reasonable costs and expenses incurred in connection with such payment plus interest at the rate set forth in Section 10.4 hereof.

**9.6** Upon completion of the repair and restoration of any damage to the Building, any remaining insurance proceeds paid by reason of such damage shall be refunded to each Owner in proportion to the ratio of insurance proceeds attributed to such Owner's portion of the Building by the insurer to the total insurance proceeds made available by the insurer for the repair and restoration. The rights of the Owner of the Commercial Building to payment of excess insurance proceeds, if any, shall be subject to the rights of the holder of the First Commercial Mortgage under the First Commercial Mortgage with respect to any such excess insurance proceeds; the rights of the Owner of the Residential Building to payment of excess insurance proceeds, if any, shall be subject to the rights of the holder of the First Residential Mortgage under the First Residential Mortgage with respect to any such excess insurance proceeds.

**9.7** In the event that the Owners mutually agree to not rebuild the Building after a casualty to condemnation or mutually agree to tear down the Building, then upon the occurrence of such event the Owner of the Commercial Building shall, without further action, be the owner of the entire real estate, or so much thereof as is not taken by eminent domain, and the lien of the First Commercial Mortgage shall be spread to encumber such additional property. The Owner of the Commercial Building shall bear all costs for demolition of such Building, and reconstruction of the skywalk corridors therein as required by the Skywalk Agreement, provided the Owner of the Commercial Building shall be entitled to all insurance proceeds that the Owner of the Residential Building is entitled to receive as a result of any such casualty that are specifically payable under any applicable insurance policy for the costs of such demolition. The Owners shall cooperate to execute any documents reasonably necessary to evidence this transfer of title and insurance proceeds, and if the Owner of the Residential Building fails to execute any such documents within ten (10) business days after request to do so by the Owner of the



Commercial Building, the Owner of the Commercial Building shall have the power of attorney on behalf of the Owner of the Residential Building, which power of attorney shall be coupled with an interest in real estate and shall be irrevocable, to execute and deliver such documents on behalf of the Owner of the Residential Building. Further, the Owner of the Commercial Building shall cooperate with the holder of the First Commercial Mortgage to spread the lien thereof as hereinabove provided.

**9.8** For purposes of this Article IX, architects' and engineers' fees, attorneys' fees, consultants' fees, title insurance premiums, and other similar costs and expenses relating to repair or restoration shall be included in the costs and expenses of any such repair or restoration.

#### **ARTICLE X. LIENS, DEBTS, INTEREST AND REMEDIES**

**10.1** If at any time, any Owner fails within the time period set forth for payment or if no time period is set forth, then within 10 days after notice or demand to such Owner to pay to any other Owner any sum of money due any other Owner as Creditor Owner, under or pursuant to the provisions of this Declaration, then in addition to any other rights or remedies each Creditor Owner may have such Creditor Owner shall have a contractual lien against the Defaulting Owner's interest in the Total Property and a contractual lien against any insurance proceeds payable to Defaulting Owner, which the contractual lien shall arise immediately upon the recording of a notice by the Creditor Owner with the Recorder and may be enforced by a proceeding in equity to foreclose such contractual lien in like manner as a mortgage of real property in the State of Iowa, or by any other remedy available by statute or at law or in equity, provided, however, that the Creditor Owner shall not have any right to record any such notice without first giving 10 days written notice to the holder of the applicable First Mortgage, and the Creditor Owner shall have no right to foreclose such lien without first giving an additional 10 days written notice to the holder of the applicable First Mortgage. Such contractual lien shall continue in full force and effect until such sum of money and any accrued interest thereon shall have been paid in full. The contractual lien provided for in this Section 10.1 shall (i) be subject and subordinate to the lien, operation and effect of any First Mortgage on the Defaulting Owner's interest in the Total Property at the time of the recording of the notice of contractual lien for all amounts (whenever advanced or accrued) secured by said mortgage, trust deed, or other encumbrance, and (ii) be subject to termination and defeat as provided in Section 10.2 below.

**10.2** No conveyance or other divestiture of title shall in any way affect, diminish or defeat any lien arising pursuant to this Article X other than a divestiture resulting from a foreclosure of a mortgage lien that is superior to the contractual lien arising pursuant to this Article X, which foreclosure, if done in accordance with applicable law, shall automatically terminate and defeat any such lien.

**10.3** The holder of a First Mortgage on all or any portion of the Commercial Building or the Residential Building shall have the right to an assignment of any contractual lien

affecting the property that is security for its First Mortgage upon payment of the amount secured by such contractual lien and shall in the event of said payment or satisfaction be subrogated to such other lien and any additional security held by the holder thereof. Such holder of a First Mortgage may at any time give to the holder of the contractual lien a written notice of its election to pay such amount. On a date not less than 10 and not more than 30 days after such notice of election, the holder of a First Mortgage shall pay the full amount of such contractual lien, and the holder of the contractual lien shall deliver to the holder of the First Mortgage an instrument in recordable form assigning the contractual lien together with the debt secured thereby.

**10.4** Interest shall accrue on sums owed by a Defaulting Owner to a Creditor Owner and shall be payable from the date any such sum first became due hereunder until paid in full, at a rate per annum equal to the lesser of: (a) the floating rate which is equal to four percent (4%) in excess of the Prime Rate, or (b) the then maximum lawful rate of interest in Iowa applicable to the capacity of the Defaulting Owner and the nature of the debt. In the event a prime rate, reference rate or corporate base rate is not announced, and no maximum lawful rate applies, then interest shall accrue at the annual rate of twelve percent (12%).

**10.5** Subject to the limitations set forth in Article XIV hereof, the rights and remedies of an Owner provided for in this Article X or elsewhere in this Declaration are cumulative and not intended to be exclusive of any other remedies to which such Owner may be entitled at law or in equity or by statute. Any Owner may enforce by a proceeding in equity for mandatory injunction, any other Owner's obligation to execute or record any document that such other Owner is required to execute under or pursuant to this Declaration or the exercise of such Owner of any right or remedy to which it is entitled hereunder.

**10.6** Each claim of any Owner arising under this Declaration shall be separate and distinct, and no defense, set-off, offset or counterclaim arising against the enforcement of any lien or other claim of any Owner shall thereby be or become a defense, set-off, offset or counterclaim against the enforcement of any other lien or claim.

**10.7** Actions to enforce any right, claim or contractual lien under this Declaration shall be commenced within three (3) years immediately following the date the cause of action accrued, or such other shorter period as may be provided by law or statute; provided, however, that if prior to expiration of the period in which such action must be commenced, any holder of a First Mortgage is diligently proceeding to foreclose the First Mortgage, then such period in which an action by the Owner of the portion of the Total Property encumbered by such First Mortgage must be commenced shall be further extended for such additional time as may reasonably be necessary in order for the holder of such First Mortgage to obtain possession of such portion of the Total Property.

**10.8** A Defaulting Owner shall pay the reasonable attorneys' fees and court costs paid or incurred by a Creditor Owner in successfully enforcing its rights against the Defaulting Owner under this Article.

## ARTICLE XI. ARBITRATION

**11.1** The following matters shall be submitted for arbitration to the American Arbitration Association (the "AAA") pursuant and subject to the provisions of this Article XI, except as otherwise specifically provided herein.

- (A) All disputes, claims, or controversies arising under this Declaration involving an amount not exceeding \$100,00 (in 2006 equivalent Dollars, as defined in Section 11.6 below) that otherwise shall not be resolved within 60 days after same have arisen; and
- (B) All other matters that are required under the provisions of this Declaration to be submitted for, or determined by, arbitration.

Any such dispute, claim, controversy or matter is referred to herein as a "Matter." Arbitration of any Matter shall be initiated by any Owner making a written demand therefore by giving written notice thereof to the other Owners and by filing a copy of such demand with the AAA. The AAA shall have jurisdiction upon the giving of such notice and the filing of such demand. Any such arbitration shall be held in Des Moines, Iowa, and shall be conducted and completed in an expeditious manner and without delay. The holders of the First Mortgages shall be party to any arbitration of a Matter involving an item that requires the consent or approval of the holders of the First Mortgages hereunder; provided, that the holders of the First Mortgages shall not have any right to participate in any arbitration proceeding concerning the selection of an Arbitrator.

**11.2** Unless otherwise agreed to in writing by the parties to the arbitration within 20 days after the notice demanding arbitration has been given, the parties shall jointly designate one arbitrator to resolve the Matter. If the parties fail to designate the arbitrator within such time period, an arbitrator shall be appointed in accordance with the procedures set forth in the applicable AAA rules; provided, however, that in any event such arbitrator shall be experienced as to the design, construction, and/or operation as the Matter requires, of high-rise, multi-use structures similar to the Building. Except when contrary to the provisions set forth in this Declaration, the rules of the AAA for commercial arbitration shall apply to the arbitration of any Matter. During the 20 day time period referenced above, the parties may agree in writing to any additional deletions, or changes to the applicable arbitration rules.

**11.3** The arbitrator shall commence hearings within sixty (60) days of selection unless the Owners agree upon an expedited or delayed schedule of hearings. Prior to the hearings, any owner may send out requests to compel document production from the other Owners. Disputes concerning the scope of document production and enforcement of the document requests shall be subject to agreement by such Owners or may be ordered by the arbitrator to the extent reasonable. The arbitrator may obtain independent legal counsel or other professional consultants to aid in resolution of legal or other questions presented in the course of arbitration to the extent reasonably necessary to the

fair resolution of the consequences of the Matter. The arbitrator in rendering a decision may base such decision only on substantial evidence of the arbitration proceeding as a whole and shall not modify or amend the provisions of this Declaration. Subject to the other terms hereof, if any Owner fails or refuses to appear at and participate in an arbitration hearing after due notice, the arbitrator may hear and determine the Matter upon evidence produced by the appearing Owners. The arbitration costs shall be borne equally by each Owner, except that each Owner shall be responsible for its own expenses.

**11.4** Unless otherwise agreed in writing, the Owners shall continue to perform all obligations and make all payments due under this declaration in accordance with this Declaration during the course of any arbitration constituted or conducted under the provisions of this Article XI. The obligation of the Owners to continue performance and make payments despite the existence of an arbitration hereunder shall be enforceable by any party to the Matter by application to any court of competent jurisdiction for an injunctive order requiring the immediate performance of such obligations as provided in the preceding sentence until such time as any matter is resolved as provided in this Article XI.

**11.5** With respect to any Matter subject to arbitration under this Article XI, it is agreed that the arbitration provisions of this Article XI shall be the sole remedy of the Owners under this Declaration. Notwithstanding any other provisions of this Declaration, the foregoing agreement to arbitrate shall be specifically enforceable under prevailing arbitration law. The foregoing agreement to arbitrate shall not constitute any agreement or consent to arbitration of any dispute, claim, controversy or matter not described in this Article XI, or with any person not named or described herein, provided that any arbitration proceeding initiated under the terms of this Article XI may, at the request of any party, be joined or consolidated with other arbitration proceedings involving additional parties if the Matter and the subject of such other proceedings arise out of common or interrelated factual occurrences. Any award of the arbitrator shall be final and binding upon the Owners and the holders of all mortgages affected by the arbitration proceeding and judgment thereon shall be entered by any court having jurisdiction.

**11.6** For purposes of this Article XI, "2006 Equivalent Dollars" means the equivalent purchasing power at any time of the value of One Dollar (\$1.00) in calendar year 2006. During calendar year 2006, the "2006" equivalent dollars" of any amount means the nominal amount thereof. For years commencing after December 31, 2006, the 2006 Equivalent Dollars of any amount shall be determined by multiplying said amount by one (1) plus a fraction, the numerator of which is the difference between (x) the monthly Consumer Price Index (as hereinafter defined) last published prior to the date of such determination and (y) the Consumer Price Index for December 2006, and the denominator of which is the Consumer Price Index for December, 2006. As used herein, the term "Consumer Price Index" shall mean the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W) (1982-84=100), U.S. City Average for "All Items" for the applicable month published by the Bureau of Labor Statistics of the United States Department of Labor. If the Index shall be converted to a different standard reference base or otherwise revised, any computation of the percentage increase in the Index shall be made with the use of such conversion factor, formula or table for converting the Index

as may be published by the Bureau of Labor Statistics or, if said Bureau shall not publish the same, then with the use of such conversion factor, formula or table as may be published by Prentice-Hall, Inc., or failing such publication, by any other nationally recognized publisher of similar statistical information as may be selected by the Association.

#### **ARTICLE XII. UNAVOIDABLE DELAYS**

The Owners shall diligently perform their respective obligations set forth herein. No Owner shall be deemed to be in default in the performance of any obligation created under or pursuant to this Declaration, other than an obligation requiring the payment of a sum of money, if and so long as non-performance of such obligation shall be directly caused by fire or other casualty, national emergence, governmental or municipal law, restrictions, orders, or proclamations, enemy action, civil commotion, strikes, lockouts, inability to obtain labor or materials, war or national defense pre-emptions, acts of God, energy shortages, or similar causes beyond reasonable control of such Owner (“Unavoidable Delay”), and the time limit for such performance shall be extended for a period equal to the period of any such Unavoidable Delay; provided, however, that the Owner unable to perform (the “Non-Performing Owner”) shall notify the other Owners in writing of the existence and nature of any Unavoidable Delay within Ten (10) days after the onset of any written request of any of the other Owners, keep the other Owners fully informed, in writing, of all further developments concerning any such Unavoidable Delay and its nonperformance.

#### **ARTICLE XIII. CONDEMNATION**

**13.1** In the event of a taking or the exercise of the power of eminent domain or deed in lieu of and under threat of condemnation of all or any part of the Total Property by any competent authority for any public or quasi-public use, the award, damages, or just compensation (the “Award”) resulting from any such taking shall be allocated and disbursed, and any repair and restoration of the Building shall be performed, in accordance with the requirements of this Article XIII.

**13.2** All awards resulting from the taking of all or any part of the Total Property, other than damages resulting from a taking of the temporary use of space as hereinafter described, shall be paid to the Depositary and disbursed by the Depositary as hereinafter provided. In the event of a taking of a temporary use of any space not including Commercial or Residential Easements Facilities, or affecting services described in Sections 5.1 or 5.2 hereof, each of the Owner of the Commercial Building and the Owner of the Residential Building shall be entitled to receive directly from the taking authority any Award resulting from such temporary taking within its respective portion of the Total Property according to the law then applicable.

**13.3** In the event of a taking (other than temporary taking) of a part of the Commercial Building only or the Residential Building only (not including any Easement Facilities of

any other portion of the Total Property or affecting services described in Section 5.1 or 5.2 hereof, except those having minimal or incidental effect), then, subject to the provisions of Section 13.6 hereof, the Owner or Owners of the portion of the Total Property in which the taking occurred shall repair and restore the remainder of its portion of the Building to form an architectural and functional whole. Such repair and restoration shall be commenced and pursued to completion in as timely a manner as practicable under the circumstances and shall be at the sole cost and expense of the Owner or Owners of the portion of the Total Property in which the taking occurred. Such Owner or Owners shall be entitled to withdraw any Award paid to the Depository by reason of such taking for application to the cost of said repair and restoration in accordance with the provisions of Article XVII hereof and to retain any excess not required for such repair and restoration; provided, however, that the right of the Owner of the Commercial Building to receive such Award shall be subject to the rights of the holder of the First Commercial Mortgage under the First Commercial Mortgage with respect to any such Award, and the right of the Owner of the Residential Building to receive such Award shall be subject to the rights of the holder of the First Residential Mortgage under the First Residential Mortgage with respect to any such Award.

**13.4** In the event of the taking other than (a) a temporary taking described in Section 13.2 hereof, (b) a taking described in Section 13.3. hereof, or (c) a taking of all or substantially all of the Total Property, then, subject to the provisions of section 13.6 hereof, the Owners shall jointly cooperate to repair and restore the remainder of the Building in accordance with plans and specifications jointly approved by the Owners and the holders of the First Mortgages, Such repair and restoration shall be commences and pursued to completion in as timely a manner as practicable under the circumstances and shall be performed on behalf of the Owners by a reputable contractor or contractors experienced in the construction of high-rise structures similar to the Building jointly selected by the Owners. In the event the Owners fail to agree upon the selection of a contractor or contractors, the Owners shall request the advice of the Architect. If after receiving the Architect's advice, the Owners cannot agree on a contractor or contractors, then the selection of a contractor or contractors shall be made by arbitration pursuant to Article XI hereof. The plans and specifications for such repair and restoration shall be prepared by the Architect, unless the Owners shall otherwise agree, all subject to the approval of the holders of the First Mortgages. Such plans and specification shall provide for repair and restoration of the remainder of the Building to form an architectural and functional whole with such changes in the Building as shall be required by reason of such taking. If as a result of such taking, any Easement or covenants under this Declaration are extinguished or materially impaired, then changes shall be made to provide for easements of access, ingress, and egress and use of Facilities and for furnishing of Building services comparable, to the extent commercially practicable, to Easements created under Article II and III hereof and for the furnishing of services under Article V hereof. The Architect shall furnish to each of the Owners and each of the Owners shall furnish to the holder of the First Mortgage encumbering their respective properties a set of such plans and specifications for their approval. Unless the Owners otherwise agree, the contractor or contractors shall work under the supervision of the Architect, and the Architect is hereby authorized and directed to instruct the Depository

to pay funds held in the Depository, from time to time, but only with the prior approval of the Owner in whose portion of the Total Property such repair and restoration is being performed and the holder of the First Commercial Mortgage if the Commercial Building or any of the Commercial Easement Facilities are involved and the holder of the First Residential Mortgage if the Residential Building or any of the Residential Easement Facilities are involved.

**13.5** The Award for any taking described in Section 13.4 shall first be used to pay for the repair and restoration (including any demolition, repair or restoration under Section 13.6 hereof) of the affected part of the Total Property. Any excess of the Award over the cost of repair and restoration shall then be allocated to each Owner in the same ratio as the apportionment of the Award to parties with an interest in such Owner's portion of the Total Property in any judicial or administrative proceedings in connection with the taking, bears to the apportionment of the Award to parties with an interest in the Owners' portions of the Total Property; provided, however, that the right of the Owner of the Commercial Building to receive any such excess shall be subject to the rights of the holder of the First Commercial Mortgage under the First Commercial Mortgage with respect to any such excess and the right of the Owner of the Residential Building to receive any such excess shall be subject to the rights of the holder of the First Residential Mortgage under the First Residential Mortgage with respect to any such excess.

**13.6** If as a result of a taking (other than a temporary taking or a taking described in Section 13.7 hereof), (a) the Owner of the Commercial Building reasonably determines subject to the consent of the holder of the First Commercial Mortgage, that the Commercial Building no longer can be operated on an economically feasible basis, then the Owner of the Commercial Building shall not be obligated to repair or restore the Commercial Building as may be required by Sections 13.3 and 13.4 hereof, or (b) the Owner of the Residential Building reasonably determines, subject to the consent of the holder of the First Residential Mortgage, that the Residential Building no longer can be operated on an economically feasible basis, then the Owner of the Residential Building shall not be obligated to repair, or restore the Residential Buildings as may be required by Sections 13.3. and 13.4 hereof. However in such case, the Owner of the Commercial Building or the Owner of the Residential Building, as the case may be, shall, at its expense, demolish, repair, or restore the Commercial Building or the Residential Building, as the case may be, to the extent, if any, as may be necessary to provide essential services or structural support for the other portions of the Total Property, but only if any of the other Owners request that it perform such demolition, repair, or restoration to which the provisions of Paragraph 13.4 hereof are applicable. Also, the Owner electing not to restore its property shall be obligated to repair or rebuild all skywalk corridors in compliance with the Skywalk Agreement.

**13.7** In the event of a taking of all or substantially all of the Total Property, the Award for such taking, shall be allocated to the Owner of the Commercial Building and the Owner of the Residential Building in the same ratio as the apportionment of the Award to parties with an interest in such Owner's portions of the Total Property in any judicial or administrative proceedings in connection with the taking and paid to such Owners in

accordance with said apportionment; provided, however, that the right of the Owner of the Commercial Building to receive any Award and payment shall be subject to the rights of the holder of the First Commercial Mortgage under the First Commercial Mortgage with respect to any such award and payment, and the right of the Owner of the Residential Building to receive any Award and payment shall be subject to the rights of the holder of the First Residential Mortgage under the First Residential Mortgage with respect to any such Award and payment.

#### **ARTICLE XIV. LIMITATION OF LIABILITY**

Notwithstanding anything in this Declaration to the contrary, no judgment or decree enforcing obligations under the Declaration against any Owner of any portion of the Total Property shall be subject to execution on, or be a lien on any assets of, such Owner other than that Owner's portion, estate, or interest in the Total Property or insurance or condemnation proceeds relating thereto.

#### **ARTICLE XV. ARCHITECT**

15.1 The architectural firm of G.E. Wattier is hereby appointed as the Architect under, pursuant, and subject to the terms and provisions of this Declaration (the "Architect"); provided, however, that the Architect shall be entitled to retain, at the Owners' cost as provided herein, a firm of engineers to consult on any engineering matters that arise under this Declaration. Any Owner may cause any Architect to be replaced by a reputable Architect experienced in the design and operation of high-rise structures similar to the Building if such Owner demonstrates to the other Owners that such then-serving Architect has failed to perform its duties hereunder diligently or competently. In such event, the Owner desiring replacement of the Architect shall serve notice upon the other Owners requesting the removal of the then-serving Architect, which notice shall set forth with specificity the respect or respects in which such Architect shall have failed to perform diligently or competently. If, in the opinion of any Owner receiving such notice, the Owner desiring to replace the Architect is not entitled to require the appointment of a new Architect pursuant to this Section 15.1, the Owner receiving such notice and objecting to the appointment of a new Architect shall notify the Owners of its objection in writing within fifteen (15) days after receipt of such notice from the Owner desiring to replace the Architect. If, within ten (10) days after receipt by the Owner desiring to replace the Architect of such objection, the Owners do not resolve their differences, then the dispute shall be submitted to arbitration pursuant to Article XI hereof. The Architect sought to be replaced may give evidence or otherwise participate in the arbitration proceeding, but said proceeding shall not be binding upon the Architect for any purpose other than the purpose of determining whether said Architect shall continue to serve hereunder. Any architect acting hereunder shall have the right to resign at any time upon no less than ninety (90) days' prior written notice to the Owners. In the event that any Owner sells or conveys all of its respective interest in the Total Property to an unaffiliated third-party, the successor Owner shall have the right to review the existing arrangement with the Architect, and the Owners shall then confirm the existing arrangement with the Architect or mutually agree to any changes in such arrangement.



Notwithstanding anything in this Section 15.1 to the contrary, the Owners may mutually agree to replace the Architect at any time.

**15.2** In any instance when the Architect serving pursuant to Section 15.1 hereof is authorized by this Declaration to advise the Owners concerning any dispute or matter, any Owner involved in such dispute or matter may submit the same to the Architect. The Architect shall, except in an Emergency Situation, afford each Owner involved in any dispute or matter, and any attorney or other representative designated by such Owner, an opportunity to furnish information or data or to present such party's views. The Architect shall not be liable for any advice given by it hereunder, or for any other action taken by it hereunder, in good faith and in the absence of negligence.

**15.3** If any new Architect is appointed hereunder, and if the Architect being replaced is then engaged in the resolution of any dispute or matter theretofore submitted hereunder, or if the Architect being replaced is then engaged in the preparation of any plans and specifications or in the supervision of any work required hereunder or pursuant hereto, and if the Architect being replaced has not been removed by reason of any failure to perform diligently or competently any services hereunder, then, if the Owners so choose, the Architect being replaced shall continue to act as Architect with respect, and only with respect, to such pending dispute or matter or the completion of plans and specifications or supervision of any such work.

**15.4** The Architect shall be paid a reasonable fee for any services rendered hereunder and shall be reimbursed for reasonable and necessary expenses incurred in connection therewith (including engineering fees authorized under Section 15.1), and each Owner shall each pay its equitable share of such fees. In this regard, in any instance when the Architect shall, in accordance with any of the provisions of this Declaration, tender services in connection with the preparation of plans and specifications or the supervision of repair, restoration, or demolition of the Building or any part thereof, the fees and expenses of the Architect shall be considered as costs and expenses of said repair, restoration, or demolition, as the case may be, and shall be paid in the same manner as other costs and expenses of repair, restoration, and demolition under the provisions of this Declaration pursuant to which the Architect is performing such services. If any Owner shall fail to pay its allocable share of any fees or expenses of the Architect within ten (10) days after receipt of any invoice therefore from the Architect, then any of the other Owners may pay the same and the Defaulting Owner shall, within ten (10) days after written demand, reimburse such Creditor Owner for any such payment, with interest thereon as herein provided.

#### **ARTICLE XVI. DEPOSITARY**

**16.1** A depositary (the "Depositary") shall be appointed in the manner hereinafter provided to receive from the payor or payee thereof insurance proceeds and condemnation awards, to disburse such monies, and to act otherwise in accordance with the terms and provisions of this Declaration. The Depositary appointed hereunder shall be the holder of the First Commercial Mortgage, or if no such holder of a First

Commercial Mortgage then exists, or if such holder of the First Commercial Mortgage is not permitted by law to act as Depositary, or is unwilling to act, then the Depositary shall be the holder of the First Commercial Mortgage, or if no such holder of a First Commercial Mortgage then exists, or if such holder of the First Mortgage is not permitted by law to act as Depositary or is unwilling so to act, then the Depositary shall be appointed by the Owner of the Commercial Building and the Owner of the Residential Building with the consent of the holder of the First Commercial Mortgage and the holder of the First Commercial Mortgage and shall be one of the then five (5) largest commercial banks (measured in terms of assets) with principal offices in Des Moines, Iowa. The depositary shall be entitled to receive from each of the Owners its allocable share (based on their respective shares of the interests damage or taken) of the Depositary's reasonable fees and expenses for acting as Depositary, and may retain said fees and expenses, free of trust, from monies held by it. Any Depositary appointed to act hereunder shall execute an agreement with the Owners accepting said appointment and setting forth the terms and provisions of this Article XVI, and such agreement shall establish standards of conduct for the Depositary as customarily reflected in similar depositary relationships in the Des Moines business community.

**16.2** The Depositary shall not be liable or accountable for any action taken or disbursement made in good faith by the Depositary, with such exceptions as the parties may agree, consistent with the standards of conduct for the Depositary as customarily reflected in similar relationships in the Des Moines business community. The Depositary's reliance upon advice of independent competent counsel shall be conclusive evidence of good faith, but shall not be the only manner in which good faith may be shown. The depositary shall have no affirmative obligation to prosecute a determination of the amount of, or to effect the collection of, any insurance proceeds or condemnation award or awards unless the Depositary shall be been given express written authorization from the Owners; provided that if only one or two Owners claim said insurance proceeds or condemnation award or awards, then said Owner or Owners alone may authorize the Depositary to so proceed; provided further, however, that if the Commercial Building or the Commercial Easement Facilities are in any way affected by the disbursement of any such insurance proceeds or condemnation award or awards, then the consent of the holder of the First Commercial Mortgage shall be required, and if the Residential Building or the Residential Easement Facilities are in any way affected by the disbursement of any such insurance proceeds or condemnation award or awards, then the consent of the holder of the First Commercial Mortgage shall be required.

**16.3** The Depositary shall have no obligation to pay interest on any monies held by it unless the Depositary shall have given an express written undertaking to do so or, unless the Owners have requested, and the holders of the First Mortgages have concurred, in connection with a specified deposit of funds with the Depositary, that the Depositary undertake to do so. However, if the monies on deposit are not held in an interest bearing account pursuant to an agreement among the Depositary and the Owners, then the Depositary, within thirty (30) days after request from any Owner given to the Depositary and to the other Owners, shall purchase with such monies, to the extent feasible, negotiable United States Government securities maturing within one (1) year from the

date of purchase thereof, except insofar as it would, in the good faith judgment of the Depositary, be impracticable to invest in such securities by reason of any disbursement of such monies which the Depositary expects to make shortly thereafter, and the Depositary shall hold such securities in trust in accordance with the terms and provisions of this Declaration. Any interest paid or received by the Depositary on monies or securities held in trust, and any gain on the redemption or sale of any securities, shall be added to the monies or securities so held in trust by the Depositary. Unless the Depositary shall have undertaken to pay interest thereon, monies received by the Depositary pursuant to any of the provisions of this Declaration shall not be commingled with the Depositary's own funds and shall be held by the Depositary in trust for the uses and purposes herein provided.

**16.4** In further consideration of the services rendered by Depositary, the Owner jointly and severally agree to indemnify and hold harmless the Depositary from any and all claims, loss, damage, liability or expense of any kind whatsoever (including, but not limited to, reasonable attorneys' fees and expenses) incurred by Depositary by reason of its appointment hereunder, with such exceptions as the parties may agree, consistent with the standards of conduct for the Depositary as customarily reflected in similar relationships in the Des Moines business community and in all events of actions not taken in good faith by the Depositary.

**16.5** The Depositary may resign by serving sixty (60) days' written notice on the Owners. Within sixty (60) days after receipt of such notice, the Owner of the Commercial Building and the Owner of the Residential Building, with the consent of the holder of the First Commercial Mortgage and the holder of the First Residential Mortgage, shall appoint a substitute who qualifies under Section 16.1 hereof, and the Depositary shall transfer to such substitute all funds, together with copies of all records, held by it as Depositary, at which time its duties as Depositary shall cease. If the Owner of the Commercial Building and the Owner of the Residential Building shall fail to appoint a substitute within said sixty (60) days, then the Depositary may deposit such funds with either a court of competent jurisdiction or with a commercial bank in Des Moines, Iowa, which qualifies under Section 16.1 hereof.

#### **ARTICLE XVII. DISBURSEMENT OF FUNDS BY DEPOSITARY**

**17.1** (A) Each request by the Architect acting pursuant to the provisions of this Declaration for disbursement of insurance proceeds, any condemnation award, or other funds for application to the cost or repair, restoration, or demolition ( the "Work") shall be accompanied by a certificate of the Architect, dated not more than ten (10) days prior to the date of the request for any such disbursement, setting forth the following:

- (i) that the sum requested has either (a) been paid by or on behalf of the Owner of the Commercial Building, or the Owner of the Residential Building (the certificate shall specify the amount paid by each respective Owner); or (b) is justly due to contractors, subcontractors, materialmen, engineers, architects or other persons

(whose names and addresses shall be stated) who have rendered or furnished certain services or materials for the Work; such certificate shall also give a brief description of such services and materials and the principal subdivisions or categories thereof, the respective amounts so paid or due to each of said persons in respect thereof and shall state the progress of the Work up to the date of said certificate and any other information required by the mechanics' lien law of the State of Iowa;

- (ii) the sum requested, plus all sums previously disbursed, do not exceed the cost of the Work actually in place up to the date of such certificate plus the cost of materials supplied and actually stored on site (which materials shall be adequately insured against fire, theft, and other casualties for the benefit of the Owners and the holders of the First Mortgage);
- (iii) that no part of the cost of the services and material described in the certificate has been previously paid or is the basis of any other previous or pending request for funds;
- (iv) that the cost to complete the unfinished Work will not exceed the funds of security therefore held by the Depositary after payment of the then current request; and
- (v) that all of the Work so far completed is proper and of the quality and class at least equal to the original Work and as nearly as commercially practicable to the improvements existing immediately prior to the casualty or condemnation (unless prohibited by law or unless the Owners agrees otherwise) and is in accordance with the approved plans and specifications, and is in compliance with the other requirements of this Declaration.

(B) Upon compliance with the provisions of Section 17.1, and upon receipt of contractors' and subcontractors' sworn statements or affidavits customarily required in Polk County, Iowa, on projects of similar scope, accompanied by partial or final waivers or releases of lien, as appropriate, the Depositary shall, out of the monies so held by the Depositary, pay or cause to be paid to the Owners, contractors, subcontractors, materialmen, engineers, architects, and other persons named in the Architect's certificate and contractors' and subcontractors' sworn statements, the respective amounts stated in said certificate and statements due them. Notwithstanding the foregoing, any of the Owners, or any of the holders of the First Mortgages or the Depositary may require that disbursements be made through the usual form of construction escrow then in use in Des Moines, Iowa, with such changes as may be required to conform to the requirements or provisions of this Declaration. The Depositary may rely conclusively, with respect to the information contain therein, on any certificate furnished by the

Architect to the Depository in accordance with the provisions of Section 17.1 hereof and shall not be liable or accountable for any disbursement of funds made by it in reliance upon such certification or authorization.

17.2 No contractor, subcontractor, materialman, engineer, architect, or any other persons whatsoever, other than the Owners and the holders of the First Mortgages, shall have any interest in or right to or lien upon any funds held by the Depository. The Owners, by joint written instructions with the holders of the First Mortgages, may at any time provide for a different disposition of funds than that provided for in this Declaration, without the necessity of obtaining the consent of any contractor, subcontractor, materialman, engineer, architect, or any other person whatsoever. If at any time the Owners, together with the holders of the First Mortgages, shall jointly instruct the Depository in writing with regard to the disbursement of any funds held by the Depository, then the Depository shall disburse such funds in accordance with said instructions and the Depository shall have no liability to anyone by reason of having so disbursed said funds in accordance with said instructions.

#### ARTICLE XVIII. ESTOPPEL CERTIFICATES

18.1 Each of the Owners shall, from time to time, within ten (10) days after receipt of written request from any of the other Owners or from any holder of a First Mortgage, execute, acknowledge, and deliver to such other Owner, or to any existing or prospective purchaser or mortgage designated by such other Owner, a certificate ("Estoppel Certificate") stating:

- (A) that the terms and provisions of this Declaration are unmodified and are in full force and effect, or, if modified, identifying and such modifications;
- (B) whether there is any existing default hereunder by any of the other Owners and, if so, specifying the nature and extent thereof;
- (C) whether there are any sums [other than those arising out of the normal course of operation of the Building within the previous forty-five (45) days] that the Owner executing such Estoppel Certificate is entitled to receive or demand from any of the other Owners, and if there is any such sum, specifying the nature and amount thereof;
- (D) whether the Owner executing the Estoppel Certificate has performed or is performing work other than services pursuant to Article V hereof, the cost of which such Owner is or will be entitled to charge in whole or in part to any of the other Owners under the provisions hereof, but has not yet charged to any such other Owner or Owners, and if there be any such work, specifying the nature and extent thereof;

- (E) the nature and extent of any set-offs, claims, counterclaims, or defenses then being asserted, or otherwise known by the Owner against the enforcement of any other Owner's obligations hereunder;
- (F) the total amount of all liens being asserted by the Owner executing the Estoppel Certificate under the provisions of this Declaration, describing the applicable provision or provisions and the details of any such lien claim;
- (G) whether the Owner executing the Estoppel Certificate has requested that a matter be submitted to arbitration, which matter has not been discharged, released, or otherwise resolved, and if so, a copy of any such notice or notices shall be delivered with the Estoppel Certificate;
- (H) whether there has been any request for or recommendation of reallocation of costs pursuant to Section 5.9 hereof that has not been included in any modification referred to in clause (a) above, and if so, setting forth any such request or recommendation;
- (I) the nature of any arbitration proceeding or finding under Article XI made within the ninety (90) days preceding the date of such Estoppel Certificate;
- (J) the current addresses to which notices given to the Owner executing such Estoppel Certification are required to be delivered under Article XX hereof, and
- (K) such other matters as may be reasonably requested.

#### **ARTICLE XIX. ALTERATIONS; ZONING**

**19.1** (A) Except as otherwise expressly required or permitted in Articles IV, V, IX and XIII hereof, any Owner (hereinafter in this Article XIX, "Altering Owner") may, at any time, at such Altering Owner's sole cost and expense, make additions, improvements, or alterations (hereinafter in this Article XIX, the "Alterations") to the part of the Building within such Altering Owner's portion of the Building, provided that such Alternation comply with the provisions of this Section 19.1 and the other provisions of this Article XIX.

(B) No Alternations shall be made without the prior written consent of the other Owners if such Alternations will:

- (i) unreasonably diminish the benefits afforded to such other Owners by any Easement or unreasonably interrupt such other Owners' use or enjoyment of any Easement;

- (ii) degrade or diminish services to the other Owners under Article V hereof;
- (iii) increase the costs or expense for which any such Owner is or would be responsible pursuant to Article V hereof;
- (iv) alter the façade of the Building;
- (v) increase the dimensions of the Building beyond the dimensions of the Building existing as of the date of this Declarations, or
- (vi) consist of drilling, coring, chipping, chopping, or otherwise making any opening of hole into any primary structural concrete element, including floor slabs and beams or vertical column elements, which would violate the provisions of Section 4.1 hereof.

No Alternations shall be made by the Owner of the Residential Building without the consent of the Owner of the Commercial Building if such Alternations will:

- (vii) affect Commercial Easement Facilities other than minimally or incidentally, or
- (viii) necessitate the erection of additional columns, bearing walls, or other structures upon or within the Commercial Building for the support of the Residential Building.

No Alternations shall be made by the Owner of the Commercial Building without the consent of the Owner of the Residential Building if such Alternations will:

- (ix) affect Residential Easement Facilities other than minimally or incidentally;
- (x) necessitate the creation of additional columns, bearing walls, or other structures upon or within the Residential Building for the support of the Commercial Building.

The prior written consent of the holders of the First Mortgages shall also be required with respect to any Alterations described in (i) through (x) above, if such consent is required under the First Mortgage loan documents.

- (C) If at any time the Altering Owner proposes to make any Alterations that require or could possibly require the consent of the other Owners or the holders of the First Mortgages, then before commencing or proceeding with such Alterations, the Altering Owner shall deliver to the other Owners and the holders of the First Mortgages (if required) a copy of the plans and specifications showing the proposed Alterations and a reference to this Section 19.1. If such other Owners and the holders of the First Mortgages (if required) consent to such Alterations or state that their consents are not required, the Altering Owner may proceed to make its Alterations substantially in accordance with said plans and specifications. The Owners or holders of the First Mortgages whose consent is requested shall make a good faith effort to respond to the Altering Owner within thirty (30) days after its receipt of said plans and specifications from the Altering Owner showing proposed Alterations. If the Altering Owner has not requested the other Owners', or the holders' of First Mortgages, consent to the proposed Alterations, and if, in the good faith opinion of any of the other Owners, or any of the holders of the First Mortgages, the Altering Owner has violated or will violate the provisions of Section 19.1 (A) or (B), then such Owner or holder of the First Mortgages (the "Objecting Party") believing a violation exists shall notify the Altering Owner and holders of the First Mortgages of its opinion that the Alterations or proposed Alterations violate or will violate the provisions of Section 19.1 (A) or (B) hereof, and shall specify the respect or respects in which its provisions are or will be violated. If an Objecting Party in good faith asserts violation of Section 19.1 (A) or (B), then the Altering Owner shall not commence with the Alterations or proceed with the Alterations, if already commenced, until the matter has been resolved. In addition to any other legal or equitable rights or remedies to which the Objecting Party may be entitled by reason of an Altering Owner's violation or likely violation of the provisions of this Section 19.1, and notwithstanding the limitations contained in Sections 11.1(A) and (B) hereof, the Objecting Party shall be entitled to seek and obtain injunctive relief to enjoin any such violation.
- (D) If any matter arises among any of the Owners with respect to whether any Alterations or proposed Alterations violate the provisions of Section 19.1 (A) or (B), then any Owner may submit such matter to the Architect for its determination as to whether the Alterations or proposed Alterations violate the provisions of Section 19.1 (A) or (B) hereof, which determination shall be final and binding on the Owners and holders or the First Mortgages.
- (E) The Owners, in making Alterations, shall (i) perform all work in first-class workmanlike manner and in accordance with good construction practices; (ii) comply with all applicable federal, state, local and other governmental and quasi-governmental laws, statutes, ordinances, codes, rules,



regulations and orders, including, without limitation, the City of Des Moines Building Code; and (iii) comply with all of the applicable provisions of this Declaration and the applicable First Mortgage. Each Owner shall, to the extent reasonably practicable, make Alterations within its portion of the Building in such a manner as to minimize any noise, vibration, particulates, and dust infiltration or other disturbance that would disturb an occupant or occupants of the other portions of the Building.

19.2 None of the Owners shall make any Alterations, allow any use of or undertake any other action relating to their respective portions of the Total Property that would violate the provisions of (i) the zoning ordinances applicable to the Total Parcel, as said ordinances may be amended from time to time, or (ii) any health codes, building codes, fire codes, or environmental and life safety regulations.

19.3 Applications for building permits to make Alterations that comply with the provisions of this Article XIX shall be filed and processed by the Altering Owner without the joinder of the other Owners in such application, unless the City of Des Moines, or other government agency having jurisdiction thereof requires joinder of the other Owners. If joinder by the other Owners not making Alterations is so required, said Owners shall cooperate in executing such applications or other instruments as may be necessary to obtain the building permit; provided, however, the Altering Owner shall indemnify and hold harmless the other Owners from and against any and all loss, liability, claims, judgments, costs, and expenses arising out of the other Owners' execution of the application, permit or other instrument. If any Owner fails to execute said application or instruments when required hereunder to do so, each of the other Owners is hereby irrevocably appointed attorney-in-fact of such Owner (such power of attorney being coupled with an interest) to execute said application or instruments on behalf of such Owner.

19.4 No Owner may require any other Owner to undertake any alterations or additions to such other Owner's portion of the Building, and no mechanic's materialmen's or similar lien that attaches to the interest of the Owner who contracts for such work shall attach to the other Owner's interest in and to the Building. An Owner performing any work required or provided for under this Declaration shall include in any construction contract a provision to the effect that the contractor either (i) recognizes the separate ownership of the Residential Building and Commercial Building and agrees that any lien rights which the contractor or subcontractor have under the mechanic's lien laws of the State of Iowa shall only be enforceable against the portion of the Total Property owned by the Altering Owner; or (ii) agrees that no lien or claim may be filed or maintained by such contractor or any subcontractors and agrees to comply with the provisions of the mechanic's lien law of the State of Iowa in connection with giving notice of such "no lien" provision.

19.5 (A) The Commercial Parcel and Residential Parcel are now and shall continue to be combined and treated as one zoning lot for the purposes of complying with the zoning ordinance applicable to the Total Property.

(B) Applications for amendments and variations from the zoning ordinance applicable to the Total Property that do not change the permitted use thereof, may be filed and processed solely by the Owner or Owners of the portions of the Total Property directly affected by such application and shall not be required the joinders of the other Owners of Owners.

(C) Each Owner shall execute such applications or other instruments as may be necessary to obtain any zoning variation or amendment conforming with the provisions of this Section 19.5; provided, however, the Owner requesting such zoning variation or amendment shall indemnify and hold harmless the other Owners from and against any and all loss, liability, claims, judgments, costs and expenses arising out of the other Owners' execution of such applications and other instruments. If any Owner fails to execute said applications or instruments when required hereunder to do so, the Owner requesting such zoning variation or amendment is hereby irrevocably appointed attorney-in-fact of such Owner (such power of attorney being coupled with and interest) to execute said application or instruments on behalf of such Owner.

19.6 Any Owner may change the name of its portion of the Building without the consent of the other Owner. Any Owner shall have the right at its sole cost to install, change, or modify any sign located in its portion of the building, subject to compliance with all applicable ordinances and the prior receipt of all permits or approvals required in connection therewith.

**ARTICLE XX. NOTICES**

20.1 All notices, demands, elections, or other communications required, permitted or desired to be served hereunder shall be in writing and shall be delivered by facsimile, in person, or mailed as certified or registered mail, postage prepaid, return receipt requested, addressed as below stated:

TO THE OWNER OF THE  
COMMERCIAL BUILDING:

Equitable, L.P.  
Attn: General Partner  
608 Locust Street  
Des Moines, IA 50309

AND TO:

The holder of record of each mortgage

encumbering the Commercial Building or any part thereof at the address set forth in such mortgage.

TO THE OWNER OF THE RESIDENTIAL BUILDING:

Equitable Building Residential  
Condominium Owner's Association, Inc.  
608 Locust Street  
Des Moines, Iowa 50309

AND TO:  
any part

The holder of record of each mortgage encumbering the Residential Building or thereof at the address set forth in such mortgage

No notice, demand, election, or other communication required to be served hereunder shall be effective against any person otherwise entitled to such notice, demand, election, or other communication unless the same was given in accordance with the provisions of this Article XX.

20.2 Any notice, demand, election or other communication delivered as aforesaid shall be deemed received if (i) by hand delivery upon receipt of a signed acknowledgement of receipt, or (ii) by facsimile upon facsimile acknowledgement of receipt, or (iii) by certified mail upon the earlier of three (3) business days after deposit in the United States mail, or upon actual receipt. Addresses for service of notice may be changed by written notice served as hereinabove provided at least ten (10) days prior to the effective date of any such change. Nothing herein contained, however, shall be construed to preclude service of any notice, demand, election or other communication in the same manner that service of a summons or legal process may be made.

20.3 Any Owner shall give notice to the other Owners of any change in: (i) the legal or equitable titleholder to its portion of the Total Property; (ii) the controlling ownership interest of any entity that comprises such Owner; or (iii) the holder of a First Mortgage thereon.

**ARTICLE XXI. GENERAL**

21.1 In fulfilling obligations and exercising rights under this Declaration, the Owners shall cooperate with each other to promote the efficient operation of their respective portions of the Total Property and the harmonious relationship among them and to protect the value of their respective portions, estates, and interests in the Total Property. To that end, each Owner shall share information that it possesses relating to matters that are the subject of this Declaration, except such information as such Owner may reasonably deem confidential or that may be the subject of litigation and that such Owner is prohibited from revealing pursuant to court order. From time to time after the date hereof each

Owner shall furnish, execute, and acknowledge, without charge (except where elsewhere provided herein): (i) such other instruments, documents, materials, and information as any other Owner may reasonably request in order to confirm to such requesting Owner the benefits contemplated hereby, but only so long as any such request does not restrict or abridge the benefits granted the other Owners hereunder; (ii) such grants of easements to and agreements with utility companies as any other Owners hereto may reasonably request in order to enable such utility company to furnish utility services as required by any Owner, provided that the holders of the First Mortgages have first consented in writing to such easements; and (iii) such consents to platting as may be necessary to comply with state law or city subdivision ordinances.

**21.2** The illegality, invalidity, or unenforceability of any covenant, restriction, condition, limitation, or any other provision of this Declaration shall not impair or affect in any manner the validity, enforceability, or effect of the other provisions of this Declaration.

**21.3** The headings of Articles in this Declaration are for convenience of reference only and shall not in any way limit or define the content, substance, or effect of the Articles.

**21.4** This Declaration may be amended or terminated only by an instrument signed by the then Owner of the Commercial Building and the then Owner of the Residential Building, and consents thereto executed by the holder of record of each mortgage encumbering the Commercial Building or any part thereof or the Residential Building or any part thereof. Any amendment to or termination of this Declaration shall be recorded with the Recorder.

**21.5** Except for the perpetual Easements provided for under this Declaration and except for the provisions of Section 19.5 (A) hereof providing for one zoning lot, which provisions shall be perpetual, the covenants, conditions, and restrictions contained in this Declaration shall be enforceable by the Owners and their respective successors and assigns for a term of twenty (20) years from the date this Declaration is recorded, after which time said covenants, conditions, and restrictions shall be automatically extended without further act or deed of the Owners, except as may be required by law, for successive periods of twenty (20) years, subject to amendment or termination as hereinabove set forth in Section 21.4. The Owners, or any one of the Owner, are hereby authorized to take such action as shall be necessary to prevent the lapse of this Declaration under Iowa Code §614.24 (2005), as amended from time to time. The Owners hereby appoint each other as their irrevocable attorney-in-fact to act on behalf of the Owners in filing a claim to preserve this Declaration under Iowa Code §614.24(2006), et. seq.

**21.6** The provisions of this Declaration shall be construed to the end that the Equitable Building shall remain a Class A office and commercial building and residential condominium. The uses of the Building shall be similar to and compatible with the uses of other Class A office and commercial properties in the City of Des Moines, Iowa. Without limiting the generality of the foregoing, the Owners specifically further agree

that with respect to any tenant space located in whole or in part in the Commercial Building, no Owner, tenant, or person shall own, operate or maintain any of the following uses:

- (i) Massage parlors, adult book stores, peep shows, establishments offering topless and/or bottomless entertainment, and/or any sex-related activities;
- (ii) Betting parlors, gambling casinos, or gambling-type establishments; or
- (iii) Any Adult Entertainment Business as that term is presently defined by Section 2A-3 of the Municipal Code of the City of Des Moines or as said Section might hereafter be amended.

21.7 Easements created hereunder shall not be presumed abandoned by non-use or the occurrence of damage or destruction of a portion of the Building subject to an Easement unless the Owner benefited by such Easement states in writing its intention to abandon the Easement; provided, however, that if the benefited Owner is the Owner of the Commercial Building, then the Consent of the holder of the First Commercial Mortgage shall also be required with respect to any such abandonment; and if the benefited Owner is the Owner of the Residential Building, then the consent of the holder of the First Residential Mortgage shall also be required with respect to any such abandonment.

21.8 Except as otherwise specifically set forth herein, all the easements, rights, covenants, agreements, reservations, restrictions, and conditions herein contained touch and concern the real estate and shall run with the real estate and shall inure to the benefit of and be binding upon the Owners, and each subsequent holder of any interest in any portion of the Total Property and their grantees, mortgages, heirs, successors, personal representatives, and assigns with the same full force and effect for all purposes as though set forth at length in each and every conveyance of the Total Property or any part thereof. Reference in the respective deeds of conveyance, or in any mortgage or other evidence of obligation, to the easements and covenants to the respective grantees or mortgagees of such parcels shall be treated as fully and completely as though said easements and covenants were fully recited and set forth in their entirety in any such documents.

21.9 This Declaration and all other instruments in connection herewith, have been negotiated, executed, and delivered in the City of Des Moines, Iowa. This Declaration and said other instruments shall, in all respects, be governed, construed, applied, and enforced in accordance with the laws of the State of Iowa, including without limitation, matters affecting title to all real estate described herein. Any action brought to enforce or interpret this Declaration shall be brought in the court of appropriate jurisdiction in Polk County, Iowa. Should any provision of this Declaration require judicial interpretation, it is agreed that the court interpreting or considering same shall not apply the presumption that the terms hereof shall be more strictly construed against a party by reason of the rule of conclusion that a document should be construed more strictly against the party who

itself or through its agent prepared the same. It is agreed and stipulated that all parties hereto have participated equally in the preparation of this Declaration and that legal counsel was consulted by each party before the execution of this Agreement.

**21.10** This Declaration is not intended to give or confer any benefits, rights, privileges, claims, actions, or remedies to any person or entity as a third party beneficiary (except the holders of the First Mortgages) under any statutes, laws, codes, ordinances, rules, regulations, orders, decrees, or otherwise.

**21.11** Each provision of the Recitals to his Declaration and each Exhibit and Appendix attached hereto is hereby incorporated in this Declaration and is an integral part hereof.

**21.12** No provision of this Declaration shall be deemed to have been waived by any party hereto unless such waiver be in writing signed by the party making such waiver. The failure of any party subject hereto to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this Declaration, shall not be deemed a waiver thereof or prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation.

**21.13** If and to the extent that any of the covenants, easements, or other provisions of this Declaration would otherwise be unlawful or void for violation of (a) the rule against perpetuities, (b) the rule restricting restraints on alienation, or (c) any other applicable statute or common law rule analogous thereto or otherwise imposing limitations upon the time during which such covenants, easements, or other provisions may be valid, then the provision in question shall continue and endure only until the expiration of a period of twenty-one (21) years after death of the last to survive of the class of persons consisting of all of the lawful descendants of Bob J. Knapp, living at the date of this Declaration.

**21.14** If it becomes clear that additional easements among the portions of the Total Property are necessary or desirable to effectuate the purposes of this Declaration, provided said proposed additional easements will not materially interfere with the use and occupancy of any portion of the Building, materially affect access to, or operation of, any portion of the Building, or materially increase the operating costs of, or create any additional expense for, any of the Owners, and subject to the reasonable consent of the holders of the First Mortgages, there is hereby reserved to the Owners the right to determine, create, and grant such additional easements as are necessary. In the event any such new easements are created, this Declaration and the Exhibits hereto shall be amended by designing and describing said easements and such amended Declaration shall be signed by Declarant, the Owners, and the holders of the First Mortgages, if necessary, to effectuate the grant or creation of such additional easements, and shall be recorded with the Recorder and shall have the same force, effect and priority as if such new easements were originally contained herein.

**21.15** All consents and approvals of any of the Owners or any of the holders of the First Mortgages shall not be unreasonably withheld or delayed. Any disapproval of or failure

to consent to any matter hereunder shall be in writing and shall state in reasonable detail the reason or reasons therefore.

**21.16** Notwithstanding any ownership directly or indirectly, in all or any portion of the Commercial Building or Residential Building in one person or entity, it is the intent and understanding that all such properties and estates shall remain separate and distinct from each other and shall not be merged into such other estates and properties by reason of such common ownership. A merger of any of such estates and properties can only be effected by a written instrument signed by the then owner of such estates and properties and by each mortgage of such estates and properties and recorded in the Office of the Recorder.

**21.17** Each holder of a First Mortgage is given the right, but not the obligation, to act on behalf of the Owner whose interest is mortgaged to it, to cure defaults of such Owner within any applicable cure period set forth herein, and each Owner agrees to accept performance by such holder of a First Mortgage.

**21.18** Declarant may execute and record a memorandum or short form of this Declaration XX through XXI, the Table of Contents, and the Appendices of the Declaration, and such other provisions as Declarant and the Owners shall agree. Any Owner may, at its sole cost and expense, record the entire Declaration at the request of any purchaser or lender, or in connection with the enforcement of any provision of this Declaration.

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IN WITNESS WHEREOF, Declarant has executed this Declaration this 29<sup>th</sup> day of November, 2006.

The Equitable, L.P., an Iowa limited partnership,

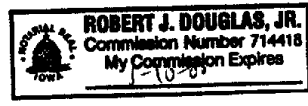
By: Equitable GP, L.L.C., General Partner

By: [Signature]  
Bob J. Knapp, Sole Member

STATE OF IOWA        )  
                                  ) SS:  
COUNTY OF POLK    )

Subscribed and sworn before me a notary public this 29<sup>th</sup> day of November, 2006 by Bob J. Knapp, as the sole member of Equitable GP, L.L.C., the general partner of Equitable, L.P.

[Signature]  
Notary Public in the State of Iowa

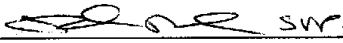




MORTGAGEE'S STATEMENT

First Federal Bank, hereby consents to the recording of this Declaration of Submission to Horizontal Regime of The Equitable, a Condominium, and subordinates the lien of its Mortgage, recorded February 1, 2005, in Book 10920 at Page 858, in the real property records of Polk County, Iowa, to said Declaration and the effect thereof.

First Federal Bank

By:   
Dave Ringgenberg, Executive ~~Sr.~~  
Vice President

The foregoing instrument was acknowledged before me this 29<sup>th</sup> day of November, 2006, by Dave Ringgenberg as Executive Vice President of First Federal Bank.

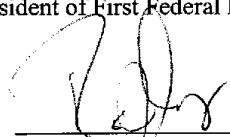
  
Notary Public



Exhibit A

Legal Description of the Real Estate

Lots Seven (7) and Eight (8) in Block Twelve (12) in Fort Des Moines, now included in and forming a part of the City of Des Moines, Polk County, Iowa

Exhibit B

Legal Description of the Commercial Parcel

Lots Seven (7) and Eight (8) in Block Twelve (12) in Fort Des Moines, now included in and forming a part of the City of Des Moines, Polk County, Iowa excluding the property beginning at elevation of 125 feet and 8.5 inches and above (City of Des Moines Datum) on Lots Seven (7) and Eight (8) in Block Twelve (12) in Fort Des Moines, now included in and forming a part of the City of Des Moines, Polk County, Iowa

Exhibit C

Legal Description of the Residential Parcel

Elevation of 125 feet and 8.5 inches and above (City of Des Moines Datum) on Lots Seven (7) and Eight (8) in Block Twelve (12) in Fort Des Moines, now included in and forming a part of the City of Des Moines, Polk County, Iowa