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Article

The Use of Land Trusts and Business Trusts in Real Estate Transactions

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I. Land Trusts: Definition and Uses

Common law trusts have been used for centuries to preserve and protect title to property and to minimize taxes on property. Florida, Hawaii, Illinois, Indiana, North Dakota, and Virginia have statutes that permit forms of land trusts, while states such as California and Kansas have permitted the creation of land trusts through court decisions. The majority of states does not recognize, or permit the use of, land trusts. Land trusts are unique because the duties and powers of the trustee are limited, but they are still considered to be trusts and generally are governed by the principles that are applicable to all other trusts.

An Illinois land trust, which is truly a unique legal entity, is a creature of common law (going back to railroad acquisitions of property in the 1850s) with an overlay of statutory approval. For example, a non-standard provision of Article 9 (enacted into law in Illinois in 2001) of the Illinois Uniform Commercial Code ("UCC"), 810 ILCS 5/9-314, provides that a security interest in the beneficial interests in an Illinois land trust may be perfected by control of the collateral pursuant

to 810 ILCS 5/9-107.1 (which control is accomplished by serving a Notice of Collateral Assignment on the land trustee and obtaining a written receipt from the land trustee). Section 810 ILCS 5/9-312 provides that perfection of a security interest in the beneficial interest in a land trust *may* be perfected by filing, but this is no longer necessary to perfect a security interest in a collateral assignment of a beneficial interest in a land trust. Although under 810 ILCS 5/9-312 the filing of a UCC-1 financing statement is not required to perfect the lender's security interest it still may be a good idea, as a precautionary matter, to file a UCC-1 financing statement as well as obtain perfection by control as described above. Pursuant to 810 ILCS 5/9-306.1, the local law of the State of Illinois governs perfection, the effect of perfection or nonperfection, and the priority of a collateral assignment of, or other security interest in, a beneficial interest in an Illinois land trust. This section implements the important interest of this State in matters associated with the administration of Illinois land trusts created for the principal purpose of owning an interest in Illinois land and the regulation of restrictions on the transfer of beneficial interests in, and of the power of appointments under, such trusts.

Since a beneficial interest in an Illinois land trust is personal property, the conveyance (or transfer) of it for security purposes is usually effected by means of an assignment of beneficial interest ("ABI"). (A sample ABI is attached hereto as **Appendix A**). Under the original version of Article 9 in Illinois, a secured party was "automatically" perfected when it was granted a security interest in the beneficial interest in a land trust. As a result, a UCC-1 financing statement usually was not filed by the secured party. As noted above, 810 ILCS 5/9-314 now allows perfection by control.

In addition, the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 *et. seq.*, provides a definition of "Land Trust" at 735 ILCS 5/15-1205 (see the excerpt below from the *BA Mortg. & International Realty Corp. v. American Nat'l Bank & Trust Co.* case, *infra*); 735 ILCS 5/15-1106 (a)(3) provides that any collateral ABI may be foreclosed under the provisions of the IMFL; and 735 ILCS 5/15-1106(b) provides that a secured party, as defined in Article 9 of the UCC, may elect to enforce its security interest in a foreclosure under the IMFL if the interest was created by a collateral assignment of a beneficial interest in a land trust. *See generally* Eric T. Freyhogle, *Land Trusts and the Decline of Mortgage Law*, 1988 U. ILL. L. REV. 67 (1988) (discussing the application of the IMFL to land trusts).

In Illinois, a land trust is a legal arrangement in which the trustee holds legal and equitable title to real property, but all managerial, decisional, and operational powers over the trust assets remain under the control of the trust beneficiaries. The trustee takes action when directed to do so by the beneficiaries. The primary purpose of a land trust is to hold title to real property, not to operate a business or commercial activity for profit. As a result, a land trust does not conduct a business activity capable of being reorganized under Chapter 11 of the Bankruptcy Code ("Code") (see discussion below on bankruptcy issues).

Large banks in Illinois historically acted as trustees under Illinois land trusts, but very few do so currently. (A title company in Illinois has set up a land-trust company to perform this specific function as successor trustee to many banks that formerly acted as land trustees.) The trustee will not hold title to an Illinois land trust for property that is out-of-state. Title companies have no problem insuring title to property held in a land trust in those states where that form of ownership is permitted. A limited liability company, or any other form of business entity, may be the beneficiary of a land trust.

The use of land trusts in Illinois is not as common as it once was. Many people mistakenly believe that a land trust protects them in some way from creditors, judgments, taxes, etc. None of

that is true. They also make a sometimes poor substitute for a will or living trust, since the trustee will insist on every "i" being dotted and every "t" being crossed before the property can be dealt with. Also, the trust rarely deals with the possible contingencies in the detail that a will or trust does. Land trusts have some legitimate purposes, but not as many as most people think.

For a definition of an Illinois land trust (as codified by the IMFL), see the following statement by the court in *BA Mortg. & International Realty Corp. v. American Nat'l Bank & Trust Co.*, 706 F. Supp. 1364 (D. Ill. 1989):

[Plaintiffs] are the beneficiaries of what was originally a phenomenon unique to Illinois law: the land trust. Rev. Stat. ch. 110, para. 15-1205 has codified, for purposes of the new Illinois Mortgage Foreclosure Law, the case law development of that concept:

"Land trust" means any trust arrangement under which the legal and equitable title to real estate is held by a trustee, the interest of the beneficiary of the trust is personal property and the beneficiary or any person designated in writing by the beneficiary has (i) the exclusive power to direct or control the trustee in dealing with the title to the trust property, (ii) the exclusive control of the management, operation, renting and selling of the trust property and (iii) the exclusive right to the earnings, avails and proceeds of the trust property.

Id. at 1369-70.

See also *Robinson v. Chicago Nat'l Bank*, 176 N.E.2d 659 (Ill. App. Ct. 1961), where the court stated as follows:

The land trust is a device by which the real estate is conveyed to a trustee under an arrangement reserving to the beneficiaries the full management and control of the property. The trustee executes deeds, mortgages or otherwise deals with the property at the written direction of the beneficiaries. The arrangement is created by two instruments. The deed in trust conveys the realty to the trustee. Contemporaneously with the deed in trust a trust agreement is executed. The pertinent provisions of the trust agreement are summarized as follows: While legal title to the real estate is held by the trustee, the beneficiaries retain "the power of direction" to deal with the title, to manage and control the property, to receive proceeds from sales or mortgages and all rentals and avails on the property. The trustee agrees to deal with the *res* of the trust only upon the written direction of the beneficiaries or the persons named as having power of direction ... The trustee is not required to "inquire into the propriety of any direction" received from the authorized persons. The trustee has no duties in respect to management or control of the property or to pay taxes, insurance or to be responsible for litigation. The only specified duties upon the trustee are to "execute deeds or otherwise deal with the property upon the direction of the beneficiary or other named authorized persons." Another duty of the trustee is to sell at public auction any property remaining in the trust twenty years from the date of the agreement. The beneficiaries agree to indemnify the trustee for any expenses or outlays incurred by the trustee on account of holding legal title, including cases in which the trustee is a party to any litigation. The agreement forbids its recordation in the Recorder's Office or elsewhere and forbids the trustee to disclose the name of any beneficiary. The Illinois courts have construed the land trust as an active trust and therefore not affected by the Statute of Uses.

Id. at 58.

See generally, *The Land Trust*, Young Lawyers Network, probate & property, January/February 2007, at p. 6, which contains the following summary of the creation of a land trust and its advantages:

Often, trustee action is limited to the conveyance of the property when the trust terminates. Land

trusts are unique because the duties and powers of the trustee are so limited, but it is still considered a trust and generally governed by the principles that are otherwise applicable to all other trusts.

The land trust is created through two documents - a deed into land trust and the trust agreement. The deed into land trust typically establishes the rights and responsibilities of the trustee. It usually states that the beneficiary's interest is a personal property interest and that the beneficiary does not hold title of any kind to the real property. The land trust usually provides that the beneficial interest holders are able to direct the trustee in all matters of title and management of the real estate.

The land trust has attained its popularity and wide use because of the practical elements that the beneficial interest provides:

- the interests of the beneficiaries will not be disclosed without order of court;
- the interests are not subject to partition;
- the beneficial interest is personal property and, therefore, avoids ancillary probate requirements;
- transferability of beneficial interest is simple
- the beneficial interest can be used as collateral; and testamentary dispositions can be set out within the trust agreement, thereby avoiding probate.

II. Proper Party in Land Trust Litigation

In litigation involving a land trust, the issue often arises as to who is the proper party for liability purposes; the land trustee or the beneficiary(ies). This in turn will depend on the rights, duties and obligations set forth in the trust agreement, as well as the degree of control of the trust assets exercised by the land trustee or the beneficiaries. For example, in *Wachta v. First Federal Savings and Loan Association of Waukegan*, 103 Ill.App. 3d 174 (2d Dist. 1981), which typifies the judicial treatment of the land trust vehicle for litigation purposes, the court stated as follows:

The owner of the beneficial interest in a land trust is accorded four basic powers: (1) to possess, manage and physically control the real estate; (2) to receive all income generated by the property; (3) to direct the trustee in dealing with title to the real estate; and (4) to receive the proceeds of any sale of the property made pursuant to the power of direction.

That in turn leads to the means of determining the proper party litigant in a land trust situation (*Just Pants v. Bank of Ravenswood*, 136 Ill. App. 3d 543, 547, 483 N.E.2d 331, 335, 91 Ill. Dec. 49 (1st Dist. 1985) (citations omitted)):

In an action involving a land trust, the question of whether the beneficiary or the trustee is the proper party depends on the nature of the action in light of the rights and duties established by the

trust agreement. . . . The beneficiary in a land trust is the proper party to litigation involving his rights and liabilities of management, control, use and possession of the property.

Id. at 176 (citations omitted).

See also, with respect to liability issues, *Newey v. Newey*, 215 Ill. App. 3d 993, 1002-1003 (Ill. App. Ct. 1991):

The issue of a trustee as agent of the beneficiary of the trust was discussed in *Just Pants v. Bank of Ravenswood* (1985), 136 Ill. App. 3d 543, 547, 483 N.E.2d 331, 335, and *Kessler, Merci, & Lochner, Inc. v. Pioneer Bank & Trust Co.* (1981), 101 Ill. App. 3d 502, 505-06, 428 N.E.2d 608, 611. Under *Just Pants* and *Kessler*, where the beneficiary has full management power and control, the trustee acting at the direction of the beneficiary will be deemed his agent for the purpose of liability in contract or in tort arising from such acts or omissions. However, unlike the nature of the agency discussed in *Just Pants* and *Kessler*, the issue here is not whether the trustees were the agents of the defendant beneficiary for the purpose of imposing upon him vicarious liability for acts or omissions in connection with the operation and management of the trust property, but rather whether the trustees were the agents of the beneficiary for service of process. The mere fact that a trustee may be deemed to act for the beneficiary in connection with the operation of the trust property will not suffice to render the trustee an agent of the beneficiary for service of summons. This point was persuasively made in *Robinson v. Chicago National Bank* (1961), 32 Ill. App. 2d 55, 176 N.E.2d 659.

In a recent Indiana case, *Freidline v. Thomalla*, 852 N.E.2d 17 (Ind. Ct. App. 2006), the court reached a similar conclusion (see the Wachta and Newey cases, *supra*) regarding the liability of a land trust beneficiary. The Indiana appellate court held that while title to the trust corpus was transferred to a land trust that owed a judgment debt, it appeared that a garnishee (the beneficiary of the land trust) retained true ownership of the property. Accordingly, the court found that the garnishee possessed nonexempt property and obligations subject to proceedings supplemental to execution pursuant to the applicable Indiana statute. The court affirmed the ruling of the trial court, which held that Freidline, as the beneficiary of the land trust, was personally responsible for the debt owed by the land trust to the third-party judgment holder. The trust corpus of the land trust consisted of a single office building and Freidline was listed as the sole beneficiary. The judgment creditor filed a garnishment action against Freidline, as beneficiary under the land trust, to enforce its unpaid judgment against the land trust. Freidline admitted to collecting the rents and profits from the trust corpus and including this information on his personal income tax returns. He also paid the utility bills for the building and made the mortgage payments. According to the court, "while the title to the trust corpus was transferred to the Land Trust, it appeared that Freidline retained absolute control of the management of the trust corpus and received all the proceeds from it." *Id.* at 21.

III. Eligibility of Trusts for Relief Under the Code

As a general matter, trusts are not eligible for relief under the Code. The definition of a "corporation" in § 101 (9)(A) of the Code includes, at § 101 (9)(A), a "business trust." But the Code does not further define a business trust. Furthermore, under § 303(a) of the Code, only a "person" may be an involuntary debtor under Chapter 7 or Chapter 11, and the definition of "person" under § 101 (41) does not include a business trust.

A true passive land trust is not a business trust eligible for relief under the Code. Bankruptcy cases have defined what constitutes a business trust, and these cases indicate that each situation should be examined individually and a determination made that the trust is actively conducting

business of some kind in order to qualify as a debtor under the Code. Bankruptcy cases customarily consider the following factors, among others, in determining whether or not a trust is eligible to file a bankruptcy petition: whether the trust conducts business; whether its purpose is to generate profits; whether it has the attributes of a corporation; and whether the beneficial interests in the trust are transferable.

In *Shawmut Bank Connecticut v. First Fidelity Bank (In re Secured Equip. Trust of Eastern Air Lines, Inc.)*, 38 F.3d 86 (2d Cir. 1994), the Second Circuit Court of Appeals held that a trust created to facilitate aircraft financing for Eastern Airlines did not qualify as a business trust under § 101(9)(A)(v) of the Code and, therefore, could not be a debtor. The trust had entered into a "Secured Equipment Indenture and Lease Agreement" with Eastern Airlines as the lessee. The trust then sold \$500 million in trust certificates to investors, and used the proceeds to purchase a portion of Eastern Airlines' fleet of aircraft. The aircraft were then leased back to Eastern Airlines in exchange for rental payments equaling the amount of the principal, premium, and interest on the certificates. Under the lease agreement, Eastern Airlines was entitled to a return of any rental payments exceeding the amounts owed the certificate holders under the trust indenture. The lease agreement also stated that, upon full payment of the lease obligations, title to the leased aircraft would be reconveyed to Eastern Airlines. The court found "no dispute that [the lease transaction] was a secured financing." *Id.* at 87. After Eastern Airlines filed a Chapter 11 bankruptcy petition, holders of a portion of the trust certificates filed an involuntary Chapter 11 petition against the trust. The court, noting that it was deciding an issue of first impression, held that the trust was not a business trust within the meaning of the Code because it was not created to generate a profit or transact business, but rather existed solely to preserve and protect the security interest of the certificate holders in the assets of the trust (*i.e.*, the aircraft collateral) and to facilitate the secured financing transaction sought by Eastern Airlines. In a strong dissent, Judge Kearse, believing that the trust qualified as a business trust under New York law, argued that the certificate holders "expected to earn a profitable return on their investment," and that "this trust is not a typical trust for the simple preservation of assets," and should, therefore, be deemed a business trust within the meaning of § 101(9)(A)(v) of the Code. *Id.* at 91-92.

In *In re Sung Soo Rim Irrevocable Intervivos Trust*, 177 B.R. 673, 675-76 (Bankr. C.D. Cal. 1995), the bankruptcy court held that the voluntary Chapter 11 bankruptcy petition filed by the trust, the only asset of which was a multi-unit retail project that was transferred to the trust shortly before an imminent foreclosure of the project, must be dismissed because (1) the trust did not qualify as a business trust under California law, (2) it did not conduct any business as that term is commonly understood, (3) it was controlled exclusively by the trustee, and (4) it had been created solely for the benefit of family members. Judge Fenning explicitly rejected the reasoning of the Second Circuit in *Shawmut*, *supra*.

In *In re Gonic Realty*, 50 B.R. 710 (Bankr. N.H. 1985), the bankruptcy court held that a trust could be a debtor under Chapter 11. The court found that the trust in question undertook many operations relating to the property that constituted business activity, and that the trust was, therefore, engaged in more than just the ownership of real estate. As a result, this case appears to be distinguishable from Illinois and Florida cases (cited and discussed below) that have held that a true passive land trust is not a business trust eligible for relief under the Code.

See also *In re G-2 Realty Trust*, 6 B.R. 549, 554 (Bankr. D. Mass. 1980) (dismissing the debtor's bankruptcy petition as a bad faith filing where the debtor transformed itself from a nominee trust to a business trust solely to meet the Code's eligibility requirements); *In re Mohan Kutty Trust*, 134 B.R. 987, 989 (Bankr. M.D. Fla. 1991) (examining whether the trust at issue was created in compliance with state law); *In re Eagle Trust*, 1998 WL 635845 (E.D. Pa., Sept. 16, 1998), at *5 (not reported in F.Supp. 2d) (finding that the trust in question was not a business trust because it

did not possess any of the common attributes of a business trust, and was not established for the purpose of carrying on a commercial activity or business); *In re St. Augustine Trust*, 109 B.R. 494, 495-96 (Bankr. M.D. Fla. 1990) (finding that trust was family trust intended for personal needs, use, and benefit of family members rather than any business purpose, and was therefore ineligible for relief under the Code); *In re Morgantown Trust No. 1*, 177 B.R. 673, 676 (Bankr. C.D. Cal. 1995) (although not dispositive, characterization under state law is a significant factor in determining whether a trust is eligible to be a debtor under the Code); *Brady-Morris v. Schilling (In re Kenneth Allen Knight Trust)*, 303 F.3d 671, 673-75 (6 th Cir. Sept. 13, 2002) (ruling that federal, not state law, applied in determining that a trust, which owned a house and a holding company that owned four subsidiary corporations, was a business trust whose primary purpose was to transact business that benefited its creator); *Dayton Title Agency, Inc. v. White Family Cos. (In re Dayton Title Agency, Inc.)*, 292 B.R. 857, 878 (Bankr. S.D. Ohio 2003) ("a business trust must not only hold and disburse funds, but also be used to provide a profit to or increase in the assets of investors").

IV. Eligibility of Land Trusts for Relief Under the Code

Several Illinois cases have analyzed the applicability of the Code to land trusts, and have held that a land trust may not be a debtor under the Code. See *In re Dolton Lodge Trust No. 35188*, 22 B.R. 918, 923 (Bankr. N.D. Ill. 1982); *In re Old Second Nat'l Bank*, 7 B.R. 37, 38 (Bankr. N.D. Ill. 1980); *In re North Shore Nat'l Bank of Chicago, Land Trust No. 362*, 17 B.R. 867, 869-70 (Bankr. N.D. Ill. 1982); *In re Citizen Bank & Trust Co. of Park Ridge*, 8 B.R. 812, 815 (Bankr. N.D. Ill. 1981).

Bankruptcy courts in Florida also have held that a land trust may not be a debtor under the Code. See *In re Treasure Island Land Trust*, 2 B.R. 332, 336 (N.D. Fla. 1980); *In re Cohen*, 4 B.R. 201, 208 (N.D. Fla. 1980) (also ruling that trustee of a trust that is found not to be a business entity eligible for filing for bankruptcy relief cannot file for bankruptcy as the trustee, even if the trustee is a "person" as defined in the Code). The Florida cases used reasoning similar to the Illinois bankruptcy courts, generally finding that where the trust was created solely to preserve and protect the trust assets for the beneficiary and not to actively manage a going-concern business, it would not be deemed to be a business trust eligible for protection under the Code. See *In re Dolton Lodge Trust No. 35188* and *In re Old Second Nat'l Bank, supra*. But see *In re Metro Palms I Trust*, 153 B.R. 922, 923-24 (Bankr. M.D. Fla. 1993) (holding that a trust, the sole business activity of which consisted of leasing and managing its only asset, a commercial office building, was not created to preserve the trust res for the beneficiaries and was, therefore, not a land trust, but a business trust eligible for relief under Chapter 11); *In re Star Trust*, 237 B.R. 827, 832 (Bankr. M.D. Fla. 1999) ("It appears that the trusts were created not simply to hold and conserve the properties for the beneficiary, but to develop and maintain the properties, to rent and manage the properties, and ultimately to retain or dispose of the properties at a profit. The Court concludes that the trusts qualify as business trusts for relief under Chapter 11").

V. Nominee and Statutory Trusts

Because of the availability of income tax deductions for investors and the simplicity of documentation in Massachusetts, the use of a nominee trust is common in connection with the ownership, development, and financing of commercial real estate. In *In re Medallion Realty Trust*, 103 B.R. 8, 10-13 (Bankr. D. Mass. 1989), the Massachusetts bankruptcy court, after observing that "the decisions are sharply, and perhaps hopelessly divided on the issue of the meaning of a 'business trust,'" held that the trust in question was created for the purpose of transacting business and was, therefore, eligible for Chapter 11 relief. The court found that the

traditional Massachusetts business trust (under which the trust's day-to-day operations are run by directors elected by the certificate holder), as well as a nominee trust (under which the beneficiaries are investors in a business enterprise), are both eligible for treatment as a business trust under the Code. *But see In re Eastmare Dev. Corp.*, 150 B.R. 495, 497-98 (Bankr. D. Mass. 1993) ("recent Massachusetts decisions teach that nominee trusts are ineligible debtors [under the Code]"); *In re Medallion Trust, supra*, 103 B.R. at 12 ("it is not the nominee trust itself that engages in business; it is the principals who engage in business activities, using the device of a nominee trust and the assistance of their trustee-agent. The relationship of the beneficiaries may be a partnership, corporation, co-tenancy or other entity. Viewed in this way, the nominee trust itself is not doing business and thus is not a business trust eligible to be a debtor because at any moment the beneficiaries may direct the trustee to alter or terminate the very business activities they are directing the trustee to perform on their behalf").

Delaware has had in effect since October 1, 1988, the Delaware Statutory Trust Act (formerly known as the "Delaware Business Trust Act"), 12 del. c. § 3801 *et seq.* ("DST Act"), which expressly recognizes the Delaware statutory trust ("DST") as an alternative form of entity. A DST has been used in the place of a common law trust in many forms of structured financing transactions. The certainty of using an entity that is governed by statutory law rather than the common law is an obvious advantage. The principal purpose of the DST Act is to modernize the common law and provide certainty by codifying Delaware law with respect to the use of trusts in business transactions. A DST provides flexibility similar to a limited liability company, i.e., it permits the trust agreement to establish whatever rights and obligations of the trustees, the beneficial owners and other persons as may be considered desirable (including voting rights). It also may provide rights to any other person, including a person who is not a party to the trust agreement. It further has advantages as a "bankruptcy-remote entity." The DST Act states that the statutory trust is a separate legal entity, and that no creditor of a beneficial owner has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the statutory trust. In addition, the DST Act states that no beneficial owner has any interest in specific statutory trust property and may not terminate or revoke the trust except in accordance with the trust agreement. Thus, creditors of and other interested persons in the DST have greater protection from the possibility of a partition of trust property or the premature termination of the DST upon the insolvency or bankruptcy of a beneficial owner than in the case of an ordinary common law trust. A DST may merge or consolidate with, or convert into, any other corporation, limited partnership, or limited liability company pursuant to statutory procedures contained in the DST Act. There is no Delaware franchise tax on DSTs formed under the DST Act. The trust will be taxed for income tax purposes as a corporation, a partnership, or a trust or otherwise as elected by the parties in accordance with the Internal Revenue Code. The DST Act provides that at least one trustee must be a Delaware resident, although this requirement can be satisfied by engaging a trust company with its principal place of business in Delaware.*

The following should be kept in mind by title insurers with respect to insuring DST transactions:

1. The DST is treated as a separate and distinct legal entity, and unlike the situation with some other types of trusts, the DST would sign title documents in the following manner:

XYZ Trust, a Delaware statutory trust, by _____, Trustee

2. If the governing instrument of a DST so provides, a "Manager" could be designated to execute

documents on behalf of the DST.

3. Every DST must have at least one trustee, i.e., a DST certificate of trust filed with the Secretary of State must state the name of the DST and the name and business address of at least one of the trustees.

4. A DST is not required to execute its governing instrument. (A DST is bound by its governing instrument whether or not the statutory trust executes the governing instrument.)

5. There may be, within the DST (as set forth in the governing instrument), separately designated series of trustees, beneficial owners or beneficial interests having separate rights, powers or duties with respect to specified property or obligations of the DST.

* Much of the foregoing information regarding the DST Act and Delaware statutory trusts was supplied to the author by the Richards, Layton & Finger law firm, Wilmington, Delaware.

APPENDIX A

COLLATERAL ASSIGNMENT OF BENEFICIAL INTEREST

THIS ASSIGNMENT is made this day of , 20 , by , a ("**Beneficiary**"), for the benefit of , a ("**Lender**").

RECITALS:

A. Beneficiary owns one hundred percent (100%) of the beneficial interest and one hundred percent (100%) of the power of direction in, to and under that certain Trust Agreement made by and between ("**Land Trustee**") and Beneficiary dated , and known as Trust No. (the "**Trust Agreement**").

B. Simultaneously with the execution of this Assignment, Beneficiary has directed Land Trustee, to execute and deliver to Lender that certain Multifamily Note (in which Beneficiary has joined as Co-Maker) (the "**Note**") and that certain Multifamily Mortgage, Assignment of Rents and Security Agreement (the "**Security Instrument**").

C. To induce Lender to make the loan evidenced by the Note, and as additional security for the performance of Land Trustee's and Beneficiary's obligations in connection with the Note, Beneficiary has agreed to collaterally assign to Lender all of Beneficiary's right, title, and interest in, to and under the Trust Agreement and certain other property as more fully set forth herein. This Assignment, the Security Instrument, the Beneficiary's Undertaking (the "**Undertaking**"), the Combined Security Agreement and Assignment of Rents and Leases executed by Beneficiary, and all other documents related thereto shall be referred to hereinafter collectively as the "**Loan Documents**".

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Beneficiary hereby grants to Lender a security interest in, sells, assigns, transfers, sets over, pledges, and delivers unto Lender and to Lender's successors and assigns the following collateral (the "**Collateral**"), whether now owned or hereafter acquired:

(A) all of the right, title and interest of Beneficiary in, to and under

(i) the Trust Agreement,

(ii) the property referred to or described in the Trust Agreement or otherwise owned by Land Trustee pursuant to the Trust Agreement (the "**Property**"),

(iii) any and all proceeds or avails of the Property or any part thereof, including without limitation, all proceeds and avails from rentals, mortgages, sales, conveyances or other dispositions or realizations of any kind or character of or from such Property or any part thereof; and

(B) the right to manage, direct and control the Property and the acts and doings of Land Trustee with respect to the Property to the full extent to which Beneficiary is entitled pursuant to the terms of the Trust Agreement.

Beneficiary further covenants and represents as follows:

1. Title to Collateral

Except for the security interest of Lender, Beneficiary is the owner of all of the Collateral, free from any lien, security interest, encumbrance or other right, title or interest of any other individual or entity. Beneficiary shall defend the Collateral against all claims and demands of all persons at any time claiming the Collateral or any interest in the Collateral adverse to Lender.

There is no financing statement now on file in any public office which refers to, describes, or includes the Collateral. So long as any Indebtedness, as that term is defined in the Security Instrument, remains unpaid or unperformed, Beneficiary will not make any further assignment or pledge of the Collateral in whole or in part and will not execute or file any financing statement or statements describing or attempting to describe the Collateral.

2. Security

This Assignment is made and given as security for: (a) payment in full of all principal, interest, and other charges now or hereafter payable under the Note and/or the Loan Documents; (b) performance of all of the obligations imposed upon the Land Trustee and the Beneficiary pursuant to the Security Instrument and other Loan Documents; (c) performance by Beneficiary of all of Beneficiary's obligations pursuant to the Undertaking; and (d) payment in full of all expenses and charges, including attorneys' fees and expenses paid or incurred by Lender in realizing or protecting the Collateral or the obligations secured by this Assignment.

All funds advanced by Lender for any purpose authorized by the Note or the Loan Documents, or for the protection of the Property, the Collateral, the Supplemental Collateral (as defined in the Combined Security Agreement and Assignment of Rents) or the lien of Lender, and all expenses paid or incurred in connection therewith, including attorneys' fees, shall be additional Indebtedness secured by the security interest created in this Assignment and become immediately due and payable without notice and with interest at the applicable rate specified in the Note upon a default by Land Trustee or Beneficiary in the performance of their obligations under the Note or the other Loan Documents.

Beneficiary agrees to deliver to Lender such confirmatory instruments as Lender may reasonably request to evidence and perfect such security interest, which may include appropriate financing statements under the Uniform Commercial Code as well as any extensions, renewals and amendments which Lender may require.

3. Restrictions on Transfer of Collateral[NO RIGHT TO TRANSFER]

(a) The occurrence of any of the following events shall constitute a default under this Assignment:

(1) if Beneficiary is a limited partnership, a Transfer, as that term is defined in the Security Instrument, of (A) any general partnership interest, or (B) limited partnership interests in Beneficiary that would cause the Initial Owners, as that term is defined in the Security Instrument, of Beneficiary to own less than 51% of all limited partnership interests in

Beneficiary;

(2) if Beneficiary is a general partnership or a joint venture, a Transfer of any general partnership or joint venture interest in Beneficiary;

(3) if Beneficiary is a limited liability company, a Transfer of (A) any membership interest in Beneficiary which would cause the Initial Owners to own less than 51% of all the membership interests in Beneficiary, or (B) any membership or other interest of a manager in Beneficiary;

(4) if Beneficiary is a corporation, (A) the Transfer of any voting stock in Beneficiary which would cause the Initial Owners to own less than 51% of any class of voting stock in Beneficiary or (B) if the outstanding voting stock in Beneficiary is held by 100 or more shareholders, one or more transfers by a single transferor within a 12-month period affecting an aggregate of 5% or more of that stock; and

(5) a Transfer of any interest in a Controlling Entity, as that term is defined in the Security Instrument, which, if such Controlling Entity were Beneficiary, would result in an Event of Default under any of Sections 3(a)(1) through (4) above.

Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default in order to exercise any of its remedies with respect to a default under this Section 3.

(b) The occurrence of any of the following events shall not constitute a default under this Assignment, notwithstanding any provision of Section 3(a) to the contrary:

(1) a Transfer to which Lender has consented;

(2) a Transfer that occurs by devise, descent, or by operation of law upon the death of a natural person;

(3) the grant of a leasehold interest in an individual dwelling unit for a term of two years or less not containing an option to purchase; and

(4) a Transfer of obsolete or worn out Personalty or Fixtures, as those terms are defined in the Security Instrument, that are contemporaneously replaced by items of equal or better function and quality, which are free of liens, encumbrances and security interests other than those created by

the Loan Documents or consented to by Lender.

(c) Lender may consent, in its discretion, to a Transfer that would otherwise violate this Section 3 if, prior to the Transfer, Beneficiary has satisfied each of the following requirements:

(1) the submission to Lender of all information required by Lender to make the determination required by this Section 3(c);

(2) the Collateral and the transferee meet all of the eligibility, credit, management and other standards (including but not limited to any standards with respect to previous relationships between Lender and the transferee and the organization of the transferee) customarily applied by Lender to the approval of borrowers and collateral in connection with the origination or purchase of similar mortgages on multifamily properties;

(3) the absence of any default under this Assignment or any Event of Default, as that term is defined in the Security Instrument;

(4) the execution of an assumption agreement that is acceptable to Lender and that, among other things, requires the transferee to perform all obligations of Beneficiary set forth in the Note, this Assignment and any other Loan Documents, and may require that the transferee comply with any provisions of this Assignment or any other Loan Document which previously may have been waived by Lender;

(5) Lender's receipt of all of the following:

(A) a review fee in the amount of \$_____;

(B) a transfer fee in an amount equal to _____% of the unpaid principal balance of the Indebtedness immediately before the Transfer; and

(C) the amount of Lender's out-of-pocket costs (including reasonable attorneys' fees) incurred in reviewing the Transfer request; and

(6) All of the requirements of Section 21 of the Security Instrument shall have been satisfied.

3. Restrictions on Transfer of Collateral [RIGHT TO ONE TRANSFER ONLY -- WITH LENDER APPROVAL]

(a) The occurrence of any of the following events shall constitute a default under this Assignment:

(1) if Beneficiary is a limited partnership, a Transfer, as that term is defined in the Security Instrument, of (A) any general partnership interest, or (B) limited partnership interests in Beneficiary that would cause the Initial Owners, as that term is defined in the Security Instrument, of Beneficiary to own less than 51% of all limited partnership interests in Beneficiary;

(2) if Beneficiary is a general partnership or a joint venture, a Transfer of any general partnership or joint venture interest in Beneficiary;

(3) if Beneficiary is a limited liability company, a Transfer of (A) any membership interest in Beneficiary which would cause the Initial Owners to own less than 51% of all the membership interests in Beneficiary, or (B) any membership or other interest of a manager in Beneficiary;

(4) if Beneficiary is a corporation, (A) the Transfer of any voting stock in Beneficiary which would cause the Initial Owners to own less than 51% of any class of voting stock in Beneficiary or (B) if the outstanding voting stock in Beneficiary is held by 100 or more shareholders, one or more transfers by a single transferor within a 12-month period affecting an aggregate of 5% or more of that stock; and

(5) a Transfer of any interest in a Controlling Entity, as that term is defined in the Security Instrument, which, if such Controlling Entity were Beneficiary, would result in an Event of Default under any of Sections 3(a)(1) through (4) above.

Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default in order to exercise any of its remedies with respect to a default under this Section 3.

(b) The occurrence of any of the following events shall not constitute a default under this Assignment, notwithstanding any provision of Section 3(a) to the contrary:

(1) a Transfer to which Lender has consented;

(2) a Transfer that occurs by devise, descent, or by operation of law upon the death of a natural

person;

(3) the grant of a leasehold interest in an individual dwelling unit for a term of two years or less not containing an option to purchase; and

(4) a Transfer of obsolete or worn out Personalty or Fixtures, as those terms are defined in the Security Instrument, that are contemporaneously replaced by items of equal or better function and quality, which are free of liens, encumbrances and security interests other than those created by the Loan Documents or consented to by Lender.

(c) Lender shall consent, *one time only* and without any adjustment to the rate at which the Indebtedness secured by this Assignment bears interest, to a Transfer that would otherwise violate this Section 3 if, prior to the Transfer, Beneficiary has satisfied each of the following requirements:

(1) the submission to Lender of all information required by Lender to make the determination required by this Section 3(c);

(2) the absence of any default under this Assignment or any Event of Default, as that term is defined in the Security Instrument;

(3) the transferee meets all of the eligibility, credit, management and other standards (including but not limited to any standards with respect to previous relationships between Lender and the transferee and the organization of the transferee) customarily applied by Lender at the time of the proposed Transfer to the approval of borrowers in connection with the origination or purchase of similar mortgages on multifamily properties;

(4) the Collateral, at the time of the proposed Transfer, meets all standards as to its condition that are customarily applied by Lender at the time of the proposed Transfer in connection with the origination or purchase of similar mortgages on multifamily properties;

(5) the loan to value ratio at the time of the proposed Transfer is 70% or less ("loan to value ratio" means the ratio of (A) the outstanding principal balance of the Indebtedness to (B) the value of the Mortgaged Property, as that term is defined in the Security Instrument, as determined by Lender, expressed as a percentage);

(6) the debt service coverage ratio for the last twelve full months preceding the proposed Transfer was 1.35 or more ("debt service coverage ratio" means the ratio of (A) the annual net operating income from the Mortgaged Property's operations during that month which is available for repayment of debt, after deducting operating expenses, to (B) the annual principal and interest

payable under the Note); and

(7) in the case of a Transfer of all or any part of the Collateral, (A) the execution by the transferee of an assumption agreement that is acceptable to Lender and that, among other things, requires the transferee to perform all obligations of Beneficiary set forth in the Note, this Assignment and any other Loan Documents, and may require that the transferee comply with any provisions of this Assignment or any other Loan Document which previously may have been waived by Lender, and (B) if a guaranty has been executed and delivered in connection with the Note, this Assignment or any of the other Loan Documents, the transferee causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender;

(8) in the case of a Transfer of any interest in a Controlling Entity, if a guaranty has been executed and delivered in connection with the Note, this Assignment or any of the other Loan Documents, the Beneficiary causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender;

(9) Lender's receipt of all of the following:

(A) a review fee in the amount of \$ _____;

(B) a transfer fee in an amount equal to _____% of the unpaid principal balance of the Indebtedness immediately before the applicable Transfer; and

(C) the amount of Lender's out-of-pocket costs (including reasonable attorneys' fees) incurred in reviewing the Transfer request; and

(10) All of the requirements of Section 21 of the Security Instrument shall have been satisfied.

3. Restrictions on Transfer of Collateral [RIGHT TO UNLIMITED TRANSFERS -- WITH LENDER APPROVAL]

(a) The occurrence of any of the following events shall constitute a default under this Assignment:

(1) if Beneficiary is a limited partnership, a Transfer, as that term is defined in the Security Instrument, of (A) any general partnership interest, or (B) limited partnership interests in

Beneficiary that would cause the Initial Owners, as that term is defined in the Security Instrument, of Beneficiary to own less than 51% of all limited partnership interests in Beneficiary;

(2) if Beneficiary is a general partnership or a joint venture, a Transfer of any general partnership or joint venture interest in Beneficiary;

(3) if Beneficiary is a limited liability company, a Transfer of (A) any membership interest in Beneficiary which would cause the Initial Owners to own less than 51% of all the membership interests in Beneficiary, or (B) any membership or other interest of a manager in Beneficiary;

(4) if Beneficiary is a corporation, (A) the Transfer of any voting stock in Beneficiary which would cause the Initial Owners to own less than 51% of any class of voting stock in Beneficiary or (B) if the outstanding voting stock in Beneficiary is held by 100 or more shareholders, one or more transfers by a single transferor within a 12-month period affecting an aggregate of 5% or more of that stock; and

(5) a Transfer of any interest in a Controlling Entity, as that term is defined in the Security Instrument, which, if such Controlling Entity were Beneficiary, would result in an Event of Default under any of Sections 3(a)(1) through (4) above.

Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default in order to exercise any of its remedies with respect to a default under this Section 3.

(b) The occurrence of any of the following events shall not constitute a default under this Assignment, notwithstanding any provision of Section 3(a) to the contrary:

(1) a Transfer to which Lender has consented;

(2) a Transfer that occurs by devise, descent, or by operation of law upon the death of a natural person;

(3) the grant of a leasehold interest in an individual dwelling unit for a term of two years or less not containing an option to purchase; and

(4) a Transfer of obsolete or worn out Personalty or Fixtures, as those terms are defined in the

Security Instrument, that are contemporaneously replaced by items of equal or better function and quality, which are free of liens, encumbrances and security interests other than those created by the Loan Documents or consented to by Lender.

(c) Lender shall consent, without any adjustment to the rate at which the Indebtedness secured by this Assignment bears interest or to any other economic terms of the Indebtedness, to a Transfer that would otherwise violate this Section 3 if, prior to the Transfer, Beneficiary has satisfied each of the following requirements:

(1) the submission to Lender of all information required by Lender to make the determination required by this Section 3(c);

(2) the absence of any default under this Assignment, or any Event of Default, as that term is defined in the Security Instrument;

(3) the transferee meets all of the eligibility, credit, management and other standards (including but not limited to any standards with respect to previous relationships between Lender and the transferee and the organization of the transferee) customarily applied by Lender at the time of the proposed Transfer to the approval of borrowers in connection with the origination or purchase of similar mortgages on multifamily properties;

(4) the Collateral, at the time of the proposed Transfer, meets all standards that are customarily applied by Lender at the time of the proposed Transfer in connection with the origination or purchase of similar mortgages on multifamily properties;

(5) in the case of a Transfer of all or any part of the Collateral, (A) the execution by the transferee of an assumption agreement that is acceptable to Lender and that, among other things, requires the transferee to perform all obligations of Beneficiary set forth in the Note, this Assignment and any other Loan Documents, and may require that the transferee comply with any provisions of this Assignment or any other Loan Document which previously may have been waived by Lender, and (B) if a guaranty has been executed and delivered in connection with the Note, this Assignment or any of the other Loan Documents, the transferee causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender;

(6) in the case of a Transfer of any interest in a Controlling Entity, if a guaranty has been executed and delivered in connection with the Note, this Assignment or any of the other Loan Documents, the Beneficiary causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender; and

(7) Lender's receipt of all of the following:

(A) a review fee in the amount of \$_____;

(B) a transfer fee in an amount equal to _____% of the unpaid principal balance of the Indebtedness immediately before the applicable Transfer; and

(C) the amount of Lender's out-of-pocket costs (including reasonable attorneys' fees) incurred in reviewing the Transfer request.

(8) All of the requirements of Section 21 of the Security Instrument shall have been satisfied.

4. Single Asset Beneficiary

Until the Indebtedness is paid in full, the Beneficiary (a) shall not acquire any real or personal property other than the Property and personal property related to the operation and maintenance of the Property; (b) shall not operate any business other than the management and operation of the Property; (c) shall not maintain its assets in a way difficult to segregate and identify; and (d) shall not acquire or hold the beneficial interest under any trust other than the trust referred to in Recital A of this Assignment.

5. Right to Approve

Beneficiary irrevocably directs Land Trustee to accept no further transfers or encumbrances of interest of Beneficiary in, to or under the Trust Agreement or in Beneficiary or in the Collateral or any part of the Collateral, without the prior written consent of Lender. In addition to, and without impairing or detracting from the force and effect of the foregoing, Beneficiary grants to Lender the right to approve the execution by Land Trustee of any and all documents and instruments which in any way relate to or concern the Trust Agreement, the Property, the Collateral, or the Supplemental Collateral.

6. Remedies of Lender

At any time that a default exists under the Note, regardless of whether or not the maturity of the principal thereof is accelerated, or at any time that a default exists under this Assignment or an Event of Default exists under the Security Instrument, Lender

(a) Shall have the remedies of a secured party under the Uniform Commercial Code and, at Lender's option, may exercise any one or more of the rights or remedies set forth in the Note or the Loan Documents. Any requirement of the Uniform Commercial Code for reasonable notice shall be met if the notice is given in accordance with the requirements of Section 14, at least twenty (20) business days prior to the time of the sale, disposition or other event or thing giving rise to the requirement of notice (which period and method of giving notice is hereby agreed to be commercially reasonable). In exercising any of its remedies, Lender may proceed against the items of real property and any items of personal property comprising the Collateral separately or together and in any order, without in anyway affecting the availability of Lender's remedies under the Code or of the remedies provided in this Agreement or any other Loan Documents. The right of Lender to be the purchaser for its own account at any sale or other disposition of the Collateral shall not be affected by the fact that Lender is or may be now or at the time of such sale or disposition record titleholder to the Collateral, nor shall that fact in any manner affect the rights of Lender to sell, dispose of or otherwise deal with the security interest granted in this Agreement;

(b) notwithstanding that Lender may also be record titleholder to the Property, proceed immediately to exercise each and all of the powers, rights and privileges reserved or granted to Beneficiary under the Trust Agreement, including without limitation, the right to collect and receive the proceeds from rentals and from mortgages, sales, conveyances or other dispositions or realizations of any kind or character of or from the Property or any part thereof; and/or

(c) institute a judicial proceeding at law or in equity or otherwise, or pursue any other remedies in the enforcement of the rights of Lender to exercise Beneficiary's rights, powers, and privileges in the Property, the Collateral, and/or the Supplemental Collateral to foreclose the security interest and lien conferred by this Assignment, to seek the appointment of a receiver or receivers for the Property or any part thereof, or for the enforcement of any other proper legal or equitable remedy available under applicable law.

Any and all net proceeds realized by Lender pursuant to this Section 6, after first deducting all legal or other costs and expenses incurred by Lender in effecting such realization, shall be applied to pay any or all of the Indebtedness as Lender shall deem proper, with any surplus to be returned to Assignor. Upon full payment and performance of all Indebtedness, obligations and liabilities hereby secured, Lender agrees to release this Assignment and the lien or charge created hereby. The recorded satisfaction or release of the Security Instrument shall automatically effect the release of this Assignment.

7. Beneficiary Liable Under Trust Agreement

Notwithstanding anything to the contrary appearing in the Trust Agreement, the Collateral is assigned and transferred to Lender by way of collateral security only, and accordingly Lender by its acceptance of this Assignment shall not be deemed to have assumed or become liable for any of the obligations or liabilities of Beneficiary under the Trust Agreement, whether provided for by its terms, arising by operation of law, or otherwise. Beneficiary acknowledges and agrees that

Beneficiary is and remains liable under the Trust Agreement as though this Assignment had not been made.

8. Waiver of Homestead and Redemption

Beneficiary releases and waives all rights under the homestead and exemption laws of the State of Illinois. Beneficiary acknowledges that the Mortgaged Property does not include agricultural real estate or residential real estate as those terms are defined in 735 ILCS 5/15-1201 and 5/15-1219. Pursuant to 735 ILCS 5/15-1601(b), Beneficiary waives any and all rights of redemption from sale under any order of foreclosure of this Assignment, or other rights of redemption, which may run to Beneficiary or any other Owner of Redemption, as that term is defined in 735 ILCS 5/15-1212. Beneficiary waives all rights of reinstatement under 735 ILCS 5/15-1602 to the fullest extent permitted by Illinois law.

9. Amendment of Trust Agreement

Beneficiary agrees, for the benefit of Lender, that notwithstanding any provision of the Trust Agreement requiring the Land Trustee to sell any Property remaining in the trust created by the Trust Agreement, twenty years from the date thereof or on any other specified date, if the Security Instrument has not been released of record at or prior to said date, the duration of such trust shall be extended without further action of the parties until the obligations evidenced by the Note and the Security Instrument have been paid in full. Notwithstanding the foregoing, the provisions of this Section shall not postpone the vesting of the trust property or any portion thereof for a period of more than twenty-one (21) years after the death of the last to survive of the President of the United States as of the date of this Assignment, and that President's children and grandchildren living at the time of the execution of this Assignment.

10. Transferees of Lender

As used in this Agreement, the term "Lender" includes all transferees of the Note and the Loan Documents, whether or not the original Lender shall retain any right to service the loan evidenced by the Note; provided, however, that Land Trustee shall not be required to deal with any such transferee until it has received evidence of the transfer reasonably satisfactory to Land Trustee.

11. Remedies

All rights and remedies set forth in this Assignment or afforded by law or equity are in the alternative and are cumulative, and may be exercised concurrently, independently, or successively, in any order.

12. No Waiver

No delay on the part of Lender in the exercise of any right or remedy shall operate as a waiver, and no single or partial exercise by Lender of any right or remedy shall preclude other or further exercise of any other right or remedy; nor shall any modification or waiver of any of the provisions of this Assignment be binding upon Lender except as expressly set forth in a writing duly signed and delivered on behalf of Lender. No action of Lender permitted by this Assignment shall in any way affect or impair the rights of Lender and the obligations of Beneficiary under this Assignment except as expressly set forth in a writing duly signed and delivered on behalf of Lender. No right or power of the Borrower, the Beneficiary, or anyone else to assert any claim or defense as to the invalidity or unenforceability of any of the Obligations shall affect or impair the obligations of Beneficiary under this Assignment.

13. Governing Law; Severability

This Assignment shall be governed by the law of the Property Jurisdiction, as that term is defined in the Security Instrument. In the event that any provision of this Assignment conflicts with applicable law, such conflict shall not affect other provisions of this Assignment which can be given effect without the conflicting provisions, and to this end the provisions of this Assignment are declared to be severable.

14. Notices

Except for any notice required under applicable law to be given in another manner, any notice required to be given pursuant to this Assignment shall be deemed to have been given on the second day after it is deposited with the United States postal service, postage prepaid, certified mail, return receipt requested, addressed to the party to whom such notice is required to be given at the address set forth below, or at such other place as such party may have designated in writing in accordance with this Section:

(a) If to Beneficiary:

(b) If to Lender:

(c) If to Land Trustee:

15. Survival of Covenants

The foregoing covenants shall survive any transfer of the beneficial interest in the trust, any transfer by Lender of the Note or the Loan Documents, and any conveyance of the Property by Land Trustee.

16. WAIVER OF TRIAL BY JURY.

BENEFICIARY AND LENDER EACH (A) AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS ASSIGNMENT OR THE RELATIONSHIP BETWEEN THE PARTIES AS LENDER AND BENEFICIARY THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

IN WITNESS WHEREOF, Beneficiary has executed this Assignment the day and year first above written.

Beneficiary

Beneficiary

Beneficiary

LAND TRUSTEE'S RECEIPT AND AGREEMENT

Land Trustee acknowledges receipt of a duplicate original of the foregoing Collateral Assignment of Beneficial Interest (the "Assignment"). All terms used herein shall have the meaning specified in the Assignment.

In no event shall Lender be liable to Land Trustee for any claim, bills, expenses or fees incurred prior to the date upon which Lender notifies Land Trustee that it is exercising a remedy provided in the Assignment. Notwithstanding the foregoing, Land Trustee may look to Lender for the payment of any fees due to Land Trustee under the terms of the Trust `Agreement, if such fees are incurred after the date of Lender's notice to Land Trustee that it is exercising a remedy provided in the Assignment.

Land Trustee represents that, as disclosed by its records, as of the date hereof, Beneficiary is the sole owner of the beneficial interest and power of direction under the Trust Agreement, free and clear of all liens and encumbrances other than those of Lender. Land Trustee agrees that it will accept no further assignments, transfers, pledges, sales, conveyances, assignments or encumbrances of any of the Collateral without the prior written consent of Lender.

Land Trustee agrees that it shall not execute and deliver any document or otherwise act pursuant to any direction delivered to it from time to time by or on behalf of Beneficiary, unless Lender shall have consented in writing to such direction.

Land Trustee agrees to act, as provided in the Trust Agreement, upon the written direction of the parties as provided therein, subject to the terms, conditions, limitations, and directions of the Assignment.

Land Trustee agrees to the amendment of the Trust Agreement as provided in Section 9 of this Assignment to extend the duration of the Trust under certain circumstances.

Land Trustee will send Lender a copy of every notification sent by Land Trustee to Beneficiary and a copy of every communication received by Land Trustee from Beneficiary or any other party directing Land Trustee to deal with the title to the Property, attempting to transfer any

portion of the beneficial interest in the trust, or otherwise relating to the Property, the Collateral, or the Supplemental Collateral.

Land Trustee hereby agrees to recognize the rights of Lender granted under this Assignment.

Dated this day of , .

LAND TRUSTEE

By:

Name:

Title:

**CONSENT AND AGREEMENT OF HOLDER
OF POWER OF DIRECTION**

The undersigned holder of the power of direction under the Trust Agreement hereby consents to the foregoing Assignment and agrees that the exercise of such power of direction is subject and subordinate to the provisions of the Assignment.

Dated this day of , .

Name of Holder of
Power of Direction

By:

Title:

ACCEPTANCE BY LENDER

Lender acknowledges and accepts receipt of the foregoing Assignment this day of , .

LENDER

By:

Name:

Title:

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ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

RPPT *e*REPORT

NEWS, PRACTICE UPDATES AND MEMBER BENEFITS

Article

DEED IN LIEU OF FORECLOSURE AND SUBSEQUENT FORECLOSURE

A Case Study in Ohio

by Nancy B. Young

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The real estate market goes in cycles, and from all the evidence around us, this is a down cycle. Lower home mortgage interest rates have strained apartment occupancy rates. Many areas are suffering from a glut of office and retail space. New glitzy suburban malls are drawing shoppers away from the inner city shopping malls.

With higher vacancy rates come lower property values, and with lower income and values, come an interest in the borrower to “turn over the keys.” Although there are potentially adverse income tax consequences from deeding a property back to a lender, the benefits may far outweigh the downside. Many of the loans made during the past 15 or more years are non-recourse, that is the borrower is not liable for a deficiency after liquidation of the mortgage collateral, except in enumerated special areas of deliberate wrongdoing, called “carve-outs,” such as misapplication of insurance proceeds or security deposits. If there are guarantors, their liability is typically limited to the carve-outs and environmental issues. Also many if not most of the loans over the 15-year period were made to special purpose entities, formed solely to hold the mortgaged property with

nothing else at risk. The borrower can stop the loss of operating expenses, avoid the adverse publicity, embarrassment and expense of a foreclosure trial, assure that the lender will pick up responsibility for landlord's obligations under leases, and move on to develop yet more property.

If the title to the mortgaged property has no encumbrances other than those of the mortgagee that will itself, or far more commonly through a nominee, take fee title to the property, the issues become more simple. However, in many a deed in lieu situation, there are junior lienholders whose interests must be addressed.

It is still often more advantageous for a lender to accept the deed either itself or through a nominee. It removes the defaulting borrower from the picture. The lender now controls the property, can commence making any repairs or improvements that may improve the property's value on the marketplace, can begin marketing the property on a limited basis and often has significant reporting and other regulatory gains by moving the property into the "real estate owned" category.

The lender's chief concern is that the junior lienholder will argue that, by the doctrine of merger, the lesser mortgage interest merges into the fee simple interest that the lender holds and thereby ceases to exist, elevating their junior lien to a primary lien on the real estate. As the Supreme Court of Ohio stated in the seminal Ohio case on merger, *Bell vs. Tenny*, 29 Ohio St. Rep. 240, 242 (1876), "[a] merger is said to arise where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate." This theory would have the mortgage interest, lesser than a fee simple, evaporate. The Court declined to apply that theory, stating that "...it is well settled in equity that the conveyance of the mortgaged premises, by the mortgagor to the mortgagee, does not necessarily merge the mortgage nor extinguish the mortgage debt. The question generally depends upon the intention of the person in whom the two estates unite." The Court went on to say at page 243:

Where the intent to merge or not to merge, is, with knowledge of the facts, expressly or unequivocally fixed and declared, the question is settled by such determination. But where there is no expressed intent, or the party is incapable of expressing any, the court looks into the circumstances, and implies an intent upon the part of the owner of the two interests to keep the charge or incumbrance subsisting, where its subsistence is beneficial to him, and where there are no equitable circumstances which ought to require its extinguishment.

In the late 1970's, my firm of Porter Wright Morris & Arthur, LLP ("Porter Wright") was representing Aetna Life Insurance Company ("Aetna"), among other life insurance companies, in making agricultural loans to farmers as farm land prices soared. Within a very few years, the value dropped out of farmland, and the revenue from the farms declined, sending the industry into a wash of foreclosures. One of the foreclosures that we handled was *Aetna life Insurance Company vs. Terry B. Hager, et al.*, Case No. 84-CI-41, Common Pleas Court of Ross County, Ohio (1984). Prior to the institution of the foreclosure action in January, 1984, on December 29, 1983, United Ag-Gro Enterprises, successor to Terry B. Hager and Vicki L. Hager (collectively the "Hagers") and wholly owned by them, deeded the mortgaged property in Ross and Pickaway Counties, Ohio to Acme Holding Company, a subsidiary of Porter Wright, as the nominee of Aetna. The deeds both stated that the conveyance was "[s]ubject to covenants, conditions and restrictions of record, real estate taxes and assessments not yet due and payable, and to all existing mortgages, liens and encumbrances...." As the Court found in its Opinion and Judgment Entry filed on October 3, 1984:

...the facts show that plaintiff is the holder of two promissory notes. The first note was executed by Defendants Terry and Vicki Hager on July 25, 1978, and these defendants are in default of this note as of October 1, 1983. This note (hereinafter FIRST NOTE) is secured by a first FIRST MORTGAGE (emphasis in original) on real estate and a security interest in other collateral. The second note (hereinafter HAGER NOTE) was executed September 7, 1979, by Defendants Terry Hager, Umberto Del Rivo and James Hager. These defendants defaulted on this note October 1, 1983. The HAGER NOTE is secured by a mortgage (hereinafter HAGER MORTGAGE) on real property and a security interests in certain collateral. There are several other liens attached to the property securing these notes, but there is no dispute as to the plaintiff's liens. ...

Defendants James Hager and Umberto Del Rivo oppose summary judgments on two basic grounds. First, both of these defendants are holders of secondary liens on the property which secures plaintiff's FIRST MORTGAGE (emphasis in original) and therefore allege that summary judgment would be improper and highly prejudicial to their interests....Secondly, Defendant James Hager claims that summary judgment is improper because title to the real property subject to this action is held by the Acme Holding Company, for the benefit of the plaintiff. Defendant Hager argues that Acme is the alter ego of the plaintiff and consequently plaintiff has already received title and no longer has standing to foreclose.

Plaintiff has replied to this claim by stating that the conveyance to Acme did not result in a merger of the estates since the agreement between the plaintiff and the defendants clearly reflected an intention that no merger occur. A copy of this agreement, signed by Aetna and by Terry and Vicki Hager, as sole shareholders of United Ag-gro Enterprises, on December 29, 1983, clearly evidences an agreement between these parties that Acme will be a nominee for Aeta [sic]; that Aeta [sic] will foreclose on the mortgages held by it; that Aetna will direct Acme to lease the property to Frankfort Farms (another corporation owned solely by the Hagers); and that there is to be no merger of the two mortgages into the conveyance to Acme. Plaintiff argues that this agreement was merely a conveyance of Ag-gro's equity of redemption in consideration for Aetna's agreement to rent the farm to Frankfort Farms.

It is a general rule of law that a merger of estates occurs when a mortgagee acquires title to the mortgaged property from the mortgagor....However, equitable principles now govern the determination of merger and therefore, the intentions of all parties to such a transaction is the key to determining whether a merger took place....We hold that the agreement between Aetna, as mortgagee, and Defendants Hager and United Ag-gro, as mortgagors, clearly evidences an intent that the defendant's mortgage debt not be extinguished nor the mortgages merged in the fee. Under this agreement, Aetna elected to keep the mortgages separate and distinct and such an election is clearly an available option....It should also be noted that the parties to this agreement are not the ones who are disputing or questioning the intentions as evidenced by this agreement. Hence, this Court can find no genuine issues regarding this agreement which would require further litigation. (Citations omitted)

Obviously the best protection for a lender in accepting a deed in lieu of foreclosure with the intention of reserving the right to foreclose its mortgage is appropriate documentation at the time of the deed in lieu transaction.

An extra thought. In Ohio a deed in lieu of foreclosure is exempt from the conveyance fee of \$1.00/\$1,000.00 to the County Auditor and up to an additional \$3.00/\$1,000.00 if voted in by the County Commissioners. Recording a deed from a sheriff's sale is not exempt.

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