City of North Tonawanda

OFFICE OF THE CITY ATTORNEY
CITY HALL
216 PAYNE AVENUE
NORTH TONAWANDA, N.Y. 14120-5489

SHAWN P. NICKERSON
CITY ATTORNEY

ROBERT SONDEL
ASSISTANT CITY ATTORNEY

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MAR - 6 2012

February 29, 2012

Hon. Mayor and Common Council
City Hall, 216 Payne Avenue
North Tonawanda, New York 14120

RE: Remington Lofts, 184-185 Sweeney Street
Restore NY and Dormitory Authority Grant Funds

Dear Honorable Body:

Attached is a proposed resolution and related mortgage and note documents regarding grant funding for the above-referenced project, which the City has received from the Restore NY Communities Initiative Program and the NYS Dormitory Authority. The resolution would allow the City to receive and distribute the project funds, and to authorize the Mayor of act on behalf of the City in the execution of any further agreements, instruments and documents deemed necessary to facilitate the grant transactions.

If your Honorable Body concurs, please pass a resolution to allow the City to receive and distribute the project funds from the Restore NY Communities Initiative Program and the NYS Dormitory Authority, and to empower the Mayor to act on behalf of the City of North Tonawanda to facilitate the grant transactions regarding the Remington Lofts Project, subject to any further review by the City Attorney.

Very truly yours,

Shawn P. Nickerson

Shawn P. Nickerson
City Attorney

SPN/lk
Atts.

RECEIVED
CITY CLERK'S OFFICE
2012 FEB 29 PM 1:18
NORTH TONAWANDA, N.Y.

Date: March 6, 2012

To: Mayor/Common Council

From: City Attorney

Subject: Remington Lofts, 184-185 Sweeney Street
Restore NY and Dormitory Authority Grant Funds

WHEREAS, the City of North Tonawanda is the recipient of grant funds in an aggregate amount of $1,750,000 from (1) the Empire State Development Corporation under the Restore NY Communities Initiative program and (2) the Dormitory Authority of the State of New York, each grant designated to assist with the renovation and restoration of the historic Remington Rand Co. building located at 184-185 Sweeney Street, City of North Tonawanda (the "Project"); and

WHEREAS, Remington Lofts On The Canal LLC (the "Owner"), as owner of the Project, desired to maintain the historic fabric and significance of the building, applied for and received approval from New York State Parks, Recreation and Historic Preservation and the United States Park Service for use of Historic Rehabilitation Tax Credits to assist in the rehabilitation of the project; and

WHEREAS, in order to preserve the full benefit of the grants intended for the Project and maximize the Historic Rehabilitation Tax Credits, it is recommended that such grant funds be loaned to the Owner.

NOW, THEREFORE, the following resolution is hereby offered for your consideration:

BE IT RESOLVED, that the City of North Tonawanda is hereby authorized and empowered to receive the proceeds of the aforementioned grants, to make a loan of such proceeds the Owner, and to enter into any and all loan documents in connection with such loan, which loan documents may contain such terms, provisions, conditions, stipulations and agreements that the City may deem proper and advisable, and that the Mayor is authorized to act on behalf of the City to execute and deliver such loan documents and such other documents as the Common Council and/or City Attorney may deem proper and advisable in order to effectuate the foregoing transactions; and

BE IT FURTHER RESOLVED, that the Mayor is hereby authorized and empowered to take any and all other actions and execute and deliver all such other agreements, instruments and documents, with advice of the Common Council and/or City Attorney, which may be deemed necessary or desirable in connection with the aforementioned grants and the loan and to otherwise carry out the intent of this resolution and the consummation of the transactions described herein.

Record and return to:
Shawn Nickerson, Esq.
City of North Tonawanda
216 Payne Avenue
North Tonawanda, NY 14120

SUBORDINATE MORTGAGE

REMINGTON LOFTS ON THE CANAL, LLC

and

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY

TO

THE CITY OF NORTH TONAWANDA

THIS SUBORDINATE MORTGAGE (this "Mortgage"), made as of the ____ day of February, 2012, from **Remington Lofts On The Canal, LLC**, having an office at 298 Main Street, Suite 222, Buffalo, New York 14202 (the "Borrower") and **Niagara County Industrial Development Agency**, having an office at 6311 Inducon Corporate Drive, Suite One, Sanborn, New York 14132 (the "Agency") to **The City of North Tonawanda**, having an office at 216 Payne Avenue, North Tonawanda, New York 14120 ("Lender").

W I T N E S S E T H :

WHEREAS, the Lender has, as of the date hereof, made a loan to the Borrower in the principal amount of up to $1,750,000.00, or so much thereof as may be advanced from time to time, as evidenced by a Promissory Note dated as of the date hereof ("Note"); and

NOW, THEREFORE, in order to secure the Borrower's obligations under the Note, the Borrower and Agency hereby mortgage to Lender their respective interests in the Property, consisting of that certain property more particularly described in Schedule A annexed hereto (the "Property ").

TOGETHER WITH all of the Borrower's and Agency's right, title and interest in and to (a) easements and other rights appurtenant to the Property; (b) current and future buildings, improvements, fixtures, chattels and articles of personal property and attached to or used in connection with the Property, if any; (c) condemnation and

insurance awards, real property tax refunds, leases and other intangibles arising out of the Property; and (d) the land lying in the streets and roads in front of and adjoining the Property, and any strips or gores of property adjoining the Property.

The Borrower covenants as follows:

1. **LOAN DOCUMENTS: INDEBTEDNESS**. This Mortgage, the Note and all other instruments now or hereafter delivered to evidence and/or secure the Indebtedness (as hereinafter defined) evidenced by the Note, and all modifications and replacements thereof, are sometimes hereinafter collectively called the "Loan Documents," and the provisions of all of them shall be deemed incorporated herein as if set forth herein at length. Principal, interest and other sums now or hereafter becoming owing under the Loan Documents are sometimes hereinafter collectively described as the "Indebtedness."

2. **WARRANTY OF TITLE**. The Borrower warrants that it holds fee simple title to the Property and that the Agency holds a leasehold interest in the Property pursuant to a certain Lease Agreement dated as of November 1, 2009 by and between Borrower, as lessor, and the Agency, as lessee, a memorandum of which was recorded in the Niagara County Clerk's office, as the same may be extended, amended, restated, supplemented or otherwise modified (the "Lease Agreement")

3. **INSURANCE.** The Borrower shall keep the buildings on the Property insured in a commercially reasonable manner.

4. **TAXES AND LIENS**. The Borrower shall pay prior to delinquency all taxes or PILOT payments, as the case may be, assessments, sewer and water rents and charges, and in default thereof, the Lender may pay the same.

5. **FORECLOSURE**. The Lender, in any action to foreclose this Mortgage, shall be entitled to the appointment of a receiver.

6. **ESTOPPEL**. The Borrower within five (5) days upon request in person or within ten (10) days upon request by mail, shall furnish a written statement in recordable form of the amount due under the Loan Documents, and whether any offsets or defenses exist against the Indebtedness.

7. **ASSIGNMENT OF LEASES AND RENTS**. Subject to the rights of any prior mortgage holder, the Borrower hereby assigns to the Lender the Borrower's right to all existing and future leases of the Property or any portion thereof (including, but not limited to, any amendments, renewals, extensions or modifications thereof) and the rents, issues and profits of the Property as further security for the Indebtedness, and grants to the Lender the right to enter upon and take possession of the Property for the

purpose of collecting such rents, issues and profits, to let the Property or any part thereof, and to apply the rents, issues and profits, after payment of all necessary charges and expenses, on account of the Indebtedness. This assignment and grant shall continue in effect until the Indebtedness is paid in full. The Lender hereby waives the right thus to enter upon and take possession of the Property, and the Borrower and Agency shall be licensed to collect such rents issues and profits, until default under the Loan Documents, whereupon such license shall be deemed to have been revoked.

8. **CURE OF DEFAULT**. If the Borrower fails to comply with any provision of the Loan Documents, the Lender may, but need not, make any payment or take any other action, which the Lender deems appropriate to cure such default. The cost thereof shall be repaid to the Lender upon demand, shall be secured by this Mortgage and shall earn interest at the rate applicable after default from time to time under the Note.

9. **ACTIONS TO UPHOLD AND DEFEND**. If any action or proceeding is commenced (except an action to foreclose this Mortgage or to collect the Indebtedness), to which action or proceeding the Lender is made a party, or in which it becomes necessary to defend or uphold the lien or priority of this Mortgage, all sums paid by the Lender for the expense of any litigation, up to and including, all trial and appellate levels, to prosecute or defend the rights and lien created by this Mortgage (including reasonable attorneys' fees), shall be repaid to the Lender upon demand.

10. **COSTS OF DELIVERY AND RECORDING**. The Borrower shall promptly cause this Mortgage to be recorded so as to protect the validity and priority of the lien hereof (subject to the subordination provisions contained herein). Except as prohibited by law, the Borrower shall pay (a) all expenses incident to the recording of this Mortgage, and (b) all taxes and charges, if any, now or hereafter imposed with respect to the delivery, recordation or holding of this Mortgage.

11. **SECURITY AGREEMENT**. The Property shall be considered real property to the fullest extent permitted by law. To the extent that any of the same is nonetheless considered to be personalty, the Borrower hereby grants a security interest therein to the Lender, according to the provisions hereof and of the Uniform Commercial Code. The Borrower, at the Borrower's expense, shall deliver and file such financing statements, continuation statements and other instruments as the Lender may reasonably request to perfect such security interest.

12. **LIEN LAW COVENANT.** The Borrower, in compliance with Section 13 of the New York Lien Law, covenants that it will receive the advances to be made under the Loan Documents and to be secured by this Mortgage, and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of the improvement, and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any purpose.

13. ACCELERATION. The Lender may declare the entire Indebtedness at once due and payable, without prior or further notice or demand, upon the occurrence at any time of any of the following events (such election being sometimes hereinafter called "acceleration"):

(a) the occurrence of an Event of Default under any of the Loan Documents;

(b) in the event of (1) the petition for an order for relief under the United States Bankruptcy Code affecting, (2) the insolvency of, (3) an assignment for benefit of creditors by, or (4) the appointment of a receiver of any of the property of, any party primarily or secondarily liable for the fulfillment of any of the Borrower's obligations under the Loan Documents, provided that no such acceleration shall be allowed with respect to actions or proceedings not voluntarily commenced by such party if the same are withdrawn or discharged within ninety (90) days; or

(c) if the Borrower fails to cure any other default hereunder or under the other Loan Documents within ninety (90) days after the Lender gives notice specifying such default with reasonable particularity. Notwithstanding anything contained herein to the contrary, for a period of nineteen years from the date hereof, Lender will not (i) commence foreclosure proceedings with respect to the Property under the Note and Mortgage and other documents or exercise any other rights or remedies it may have under the Note and the Mortgage and other Loan Documents, including, but not limited to accelerating sums due under the Note, collecting rents, appointing (or seeking the appointment of) a receiver or exercising any other rights or remedies thereunder or (ii) join with any other creditor in commencing any bankruptcy reorganization arrangement, insolvency or liquidation proceedings with respect to the Partnership.

14. SUCCESSORS AND ASSIGNS. Wherever the terms "Lender", "Agency" or "Borrower" are used herein, they shall be deemed to also include the successors, and assigns of the Lender, Agency or Borrower. References to the "Lender" shall be deemed to refer, unless the context clearly requires otherwise, to the holder of this Mortgage from time to time.

15. REAL PROPERTY LAW. Nothing contained herein shall limit the application of Section 254 of the New York Real Property Law, it being intended that the provisions thereof shall, to the fullest possible extent, apply in addition to the other provisions hereof.

16. NOTICES. All notices hereunder shall be written, and shall be either personally delivered (so long as the delivery service issues receipts of delivery), sent by certified mail, postage prepaid, return receipt requested, delivered by any reputable overnight

courier service which issues receipts of delivery, or sent by facsimile and shall be deemed effective as of the date of delivery or date of refusal to accept delivery by the addressee (as evidenced by the receipt of delivery). Notice of change of any addressee or address shall be given by written notice in the manner detailed in this Section 16.

17. SUBORDINATION. This Mortgage is subordinate to the mortgages (the "Superior Mortgages", the beneficiaries thereof are herein referred to as the "Senior Creditors") described in Schedule B attached hereto, whether heretofore or hereafter granted, and any extensions, modifications, consolidations, increases, renewals, refinancings and/or replacements thereof, and all advances made and to be made thereunder (whether such advances are made in accordance with the terms of such mortgages and whether such advances are obligatory or voluntary), together with interest thereon, all curative payments made by the holder(s) thereof and all other sums secured thereby. The aforesaid subordination shall be effective without the execution and delivery of any other instruments. Notwithstanding the foregoing, the parties shall execute, acknowledge and deliver any other instrument(s) which the holder of any such superior mortgage may reasonably require for the purposes of evidencing the relative priorities of said mortgages.

18. THIRD PARTY BENEFICIARIES. The Senior Creditors together with their respective successors and assigns shall be express third party beneficiaries of this Mortgage for the purposes of Section 17 hereof.

19. NON-RECOURSE. This Agreement is non-recourse to the Borrower, and neither the Borrower, nor any member, partner, officer, director or employee thereof, nor any other person, shall be responsible or liable for payment or performance of the obligations under this Agreement or the Note.

20. NO RECOURSE; SPECIAL OBLIGATION. The obligations and agreements of the Agency contained herein and in any other instrument or document executed in connection herewith or therewith, and any instrument or document supplemental hereto or thereto, shall be deemed the obligations and agreements of the Agency and not of any member, officer, agent or employee of the Agency in his individual capacity; and the members, officers, agents and employees of the Agency shall not be liable personally hereon or thereon or be subject to any personal liability or accountability based upon or in respect hereof or thereof or of any transaction contemplated hereby or thereby. The obligations and agreements of the Agency contained herein or therein shall not constitute or give rise to an obligation of the State of New York or the County of Niagara, and neither the State of New York nor the County of Niagara shall be liable hereon or thereon. Further, such obligations and agreements shall not constitute or give rise to a general obligation of the Agency, but rather shall constitute limited obligations of the Agency, payable solely from the revenues of the Agency derived, and to be derived from, the lease, sale or other disposition of the Project. No order or decree of

specific performance with respect to any of the obligations of the Agency hereunder or therunder shall be sought or enforced against the Agency unless:

(i) the party seeking such order or decree shall first have requested the Agency in writing to take the action sought in such order or decree of specific performance, and ten days shall have elapsed from the date of receipt of such request, and the Agency shall have refused to comply with such request (or if compliance therewith would reasonably be expected to take longer than ten (10) days, shall have failed to institute and diligently pursue action to cause compliance with such request) or failed to respond within such notice period; and

(ii) If the Agency refuses to comply with such request and the Agency's refusal to comply is based on its reasonable expectation that it will incur fees and expenses, the party seeking such order or decree shall have placed in an account with the Agency an amount or undertaking sufficient to cover such reasonable fees and expenses; and

(iii) If the Agency refuses to comply with such request and the Agency's refusal to comply is based on its reasonable expectation that it will or any of its members, officers, agents (other than the Borrower), or employees shall be subject to potential liability, the party seeking such order or decree shall (1) agree to indemnify and hold harmless the Agency and its members, officers, agents (other than the Borrower) and employees against any liability incurred as a result of its compliance with such demand; and (2) if requested by the Agency, furnish to the Agency satisfactory security to protect the Agency and its members, officers, agents (other than the Borrower) and employees against all liability expected to be incurred as a result of compliance with such request.

Any failure to provide such notice, indemnity or security to the Agency pursuant to Section 9.11 of that certain Leaseback Agreement between the Agency and the Borrower dated as of November 1, 2009 ("Leaseback Agreement") shall not alter the full force and effect of any Event of Default under the Leaseback Agreement.

21. REPRESENTATIONS AND COVENANTS OF AGENCY.

(a) The Agency hereby represents and warrants that it is duly authorized under the Constitution and laws of the State of New York, including particularly and without limitation, the Act (as such term is defined in the Agency Lease Agreement), to execute and deliver this Mortgage and to pledge and encumber the Property in the manner and to the extent herein set forth; and that all action on its part for the execution and delivery of the Mortgage has been duly and effectively taken.

22. LOAN ADVANCES. Lender and Borrower hereby acknowledge that the source(s) of funding for the loan being secured by this Mortgage (the "Loan") are (a) Restore New York Program funds in the amount of $1,000,000.00 granted to the Lender from the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and (b) $750,000.00 granted to the Lender from the Dormitory Authority of the State of New York (the "Dormitory Authority") (together, (a) and (b) are referred to as the "Grants"). Lender agrees to disburse the Loan to Borrower or for Borrower's account, at Borrower's direction, upon receipt of the proceeds of the Grants. Notwithstanding the foregoing, the Lender's obligation to make disbursements of the Loan shall be conditioned upon the receipt of the Grant funds by the Lender from ESDC and the Dormitory Authority.

The parties acknowledge and agree that, as of the date hereof, a portion of the Grant funds in the amount of $330,178.00 has been received by Lender and disbursed to Borrower pursuant to the terms of the Loan Documents. The parties hereby acknowledge that, as of the date hereof, the amount of funds remaining to be disbursed to Borrower pursuant to the Loan Documents is $1,419,822.00.

23. COMPLIANCE AND INDEMNIFICATION. Borrower hereby agrees that it will comply with all of the terms and conditions of the Grants and will hold Lender harmless, defend and indemnify Lender against any and all claims of ESD or the Dormitory Authority that the terms and conditions of the Grants have been violated or otherwise not performed, to the extent that performance of and compliance with such terms and conditions are the responsibility of the Borrower.

24. STAND-ALONE. This Mortgage is and shall remain a valid and enforceable mortgage lien on the Property, subject and subordinate to the Superior Mortgages and any extensions, consolidations, modifications (including, without limitation, increases in the principal amount thereof and increases in the interest rate), restatements or renewals thereof. Borrower, at its own cost and without expense to Lender, will preserve such title and will defend the validity and priority of the lien hereof against the claims of any and all other persons. Notwithstanding anything to the contrary set forth in this Mortgage, the Lender shall not exercise any right of re-entry, reversion or foreclosure or any other remedy described herein unless and until the holder of the Superior Mortgages shall consent thereto or the Superior Mortgages shall be paid in full.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF, the _____ has executed this Mortgage as of the date first written above.

REMINGTON LOFTS ON THE CANAL, LLC

By: **RLOTC MM, LLC**,
its managing member

By:_____
Name: Scott LaCasse
Title: Member

STATE OF NEW YORK)
)ss.:
COUNTY OF)

On the ___ day of _____ in the year 2012 before me, the undersigned, personally appeared Scott LaCasse, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY

By:_____
Name:
Title:

STATE OF NEW YORK)
)ss.:
COUNTY OF)

On the ___ day of _____ in the year 2012 before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

SCHEDULE A

DESCRIPTION

SCHEDULE B

SUBORDINATION

NOTE

$1,750,000.00 As of February __, 2011

FOR VALUE RECEIVED, REMINGTON LOFTS ON THE CANAL, LLC, with offices at 298 Main Street, Suite 222, Buffalo, New York 14202 ("Borrower"), promises to pay to the order of the CITY OF NORTH TONAWANDA, with offices at 216 Payne Avenue, North Tonawanda, New York 14120 (the "Holder"), or at such other place as may be designated in writing from time to time by the Holder, the principal sum of up to One Million Seven Hundred Fifty and NO/1000 Dollars ($1,750,000.00) in lawful money of the United States of America, or so much thereof as may be advanced from time to time (such amount disbursed by the Holder to Borrower, the "Principal Sum").

The following terms shall have the following meanings:

(a) "Default Interest Rate" shall mean the interest payable under this Note which shall increase, at the Holder's sole option upon the happening of any Event of Default, to the rate of three percent (3%) per annum.

(b) "Event of Default" shall mean any default or non-compliance with this Note or any Event of Default under the Mortgage which shall remain uncured following a thirty (30) day cure period commencing upon the receipt by Borrower of written notice of any such non-compliance or default.

(c) "Maturity Date" shall mean the thirtieth (30th) anniversary of the date of this Note.

(d) "Mortgage" shall mean a mortgage in the maximum principal amount of $1,750,000.00 held by the Holder securing this Note.

(e) "Project" shall mean the mixed-use development located in the City of North Tonawanda, County of Niagara, State of New York and commonly known as Remington Lofts on the Canal.

(1) The interest rate on the outstanding principal balance of this Note shall be Zero Percent (0%).

(2) Prior to the Maturity Date, the Borrower shall not be required to make principal or interest payments on this Note except in the Event of Default. On the Maturity Date the entire unpaid principal balance of this Note shall be immediately due and payable.

(3) Notwithstanding anything contained herein to the contrary, upon the occurrence of any

Event of Default the interest rate under this Note shall increase to the Default Interest Rate at the Holder's sole option.

(4) All parties to this Note:

(a) Agree that this Note for construction/permanent funds shall be secured by the Mortgage, and that all the covenants, terms and conditions of the Mortgage (including all rights of acceleration) are made a part hereof;

(b) Agree that the occurrence of any Event of Default hereunder or under the Mortgage shall (at the option of the Holder) cause the entire Principal Sum to become immediately due and payable, and that failure of the Holder to exercise such option shall not constitute a waiver of the right to exercise the same thereafter;

(c) Severally waive presentment for payment, demand, protest, notice of protest, and notice of dishonor;

(d) Agree that the agreements herein made and expressed shall not be changed, modified, waived or discharged orally; and

(e) Agree that the Borrower shall pay all costs and expenses incurred by the Holder in enforcing this Note or in collection of the Principal Sum, including, without limitation, if the Holder retains counsel for any such purpose, reasonable attorneys' fees and expenses.

(5) This Note is subject to the express condition that at no time shall the Borrower be obligated or required to pay, nor shall the Holder be permitted to collect, interest at a rate in excess of the maximum rate permitted by law. If by the terms of this Note or any related loan documents, the Borrower is required to pay interest at a rate in excess of such maximum rate, the rate of interest shall be deemed to be reduced immediately to such maximum rate, and every such excess payment previously made shall be immediately and automatically applied to the unpaid balance of the Principal Sum and not to the payment of interest.

(6) The Holder of this Note agrees that for payment of this Note it will look solely to the premises described in the Mortgage and such other collateral, if any, as may now or hereafter be given to secure payment of this Note, and no other property or assets of the Borrower shall be subject to levy, execution or other enforcement procedures of any kind or character. This Note shall be non-recourse to the Borrower, and neither the Borrower nor any partner, member, officer, director or employee thereof, nor any person affiliated with the Holder, shall be responsible or liable for the payment or performance of the covenants and obligations contained in this Note or the Mortgage.

(7) This Note shall be governed by and construed according to the laws of the State of New York.

(8) All advances and repayments under the Mortgage and under this Note shall be inscribed by the Holder on a schedule which may be attached by Holder at the end of this Note, which may be kept by Holder on a separate schedule, or which may be kept by Holder on computer equipment, at Holder's option, and on any subsequent continuations of such schedule, which schedule(s) shall be considered a part hereof. Each such inscription (or such computer entry) shall be prima facie evidence of the facts so set forth, provided such funds have actually been advanced by Holder and received by Borrower, or repaid by Borrower and received by Holder, as the case may be.

(9) This Note may be prepaid, in whole or in part, at any time prior to due date without prepayment penalty or charge. All such prepayments shall be applied to and used to reduce the Principal Sum.

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IN WITNESS WHEREOF, this Note has been executed as of the date set forth above.

BORROWER

REMINGTON LOFTS
ON THE CANAL, LLC

By: RLOTC MM, LLC,
its managing member

By:_____
Name: Scott LaCasse
Title: Member