



THIS DOCUMENT PREPARED BY  
AND AFTER RECORDING RETURN TO:

Doc#: 0608334059 Fee: \$46.00  
Eugene "Gene" Moore RHSP Fee:\$10.00  
Cook County Recorder of Deeds  
Date: 03/24/2006 12:56 PM Pg: 1 of 12

Much Shelist  
191 N. Wacker Drive, Suite 1800  
Chicago, IL 60606.1615  
Attn: Michael R. Wolfe

*This space reserved for Recorder's use only*

**SUBORDINATION AND INTERCREDITOR AGREEMENT**

**THIS SUBORDINATION AND INTERCREDITOR AGREEMENT** is made as of March 23, 2006 (this "**Agreement**"), by and between **MB FINANCIAL BANK, N.A.**, a national banking association ("**Senior Lender**"), and **VAIL CAPITAL, L.L.C.**, an Arizona limited liability company ("**Subordinated Lender**").

**RECITALS**

A. Palatine Commons, LLC, an Illinois limited liability company ("**Borrower**"), is the owner of that certain real property located in the Village of Palatine, County of Cook, State of Illinois, more fully described in Exhibit A attached hereto and made a part hereof (the "**Land**"). The Land and the improvements now or hereafter located on the Land (the "**Improvements**") are collectively referred to herein as the "**Mortgaged Premises**."

B. Senior Lender has made one or more loans available to Borrower in an amount of up to Thirteen Million Twenty-Five Thousand and 00/100 Dollars (\$13,925,000.00) (the "**Senior Loan**") pursuant to that certain Construction Loan Agreement dated as of April 27, 2005, as amended by that certain First Amendment to Construction Loan Agreement dated as of March 22, 2006 (such Construction Loan Agreement, as so amended, the "**Senior Loan Agreement**"), each between Senior Lender and Borrower. The Senior Loan is evidenced by that certain Acquisition and Development Mortgage Note dated as of April 27, 2005 made by Borrower and payable to Senior Lender in the face principal amount of \$6,825,000.00, that certain Amended and Restated Revolving Construction Mortgage Note dated as of April 27, 2005 made by Borrower and payable to Senior Lender in the face principal amount of \$5,500,000.00, and that certain Letter of Credit Note dated as of April 27, 2005 made by Borrower and payable to Senior Lender in the face principal amount of \$700,000.00 (such Notes, collectively, the "**Senior Note**"). The Senior Note is secured by, among other documents, a Mortgage, Security Agreement and Assignment of Leases and Rents-Fixture Filing dated as of April 27, 2005, made by Borrower for the benefit of Senior Lender and encumbering the Mortgaged Premises (the "**Senior Security Instrument**"). Certain obligations under the Senior Loan Documents have been guaranteed by Edward I. Biskind, an individual ("**Guarantor**") pursuant to that certain Guaranty of Payment dated as of April 27, 2005 from Guarantor to Senior Lender (the "**Senior Guaranty**"). Borrower and Guarantor have also entered into that certain Environmental Indemnity dated as of April 27, 2005 in favor of Senior Lender (the "**Senior Indemnity**"). The Senior Loan Agreement, the Senior Note, the Senior Security Instrument, the Senior Guaranty, [the Senior Indemnity,] and the other documents and instruments

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evidencing, governing or securing the Senior Loan, together with all amendments, modifications, renewals, extensions and substitutions thereof, are hereinafter collectively referred to as the "**Senior Loan Documents.**"

C. Subordinated Lender proposes to lend Borrower Two Million and No/100 Dollars (\$2,000,000.00) (the "**Subordinated Loan**") to be evidenced by that certain Mortgage Note dated as of March 23, 2006 in such principal amount and made by Borrower payable to the order of Subordinated Lender together with interest as therein described (the "**Subordinated Note**"). The Subordinated Note is secured by, among other documents, a Junior Mortgage, Security Agreement and UCC Fixture Filing dated as of March 23, 2006, made by Borrower for the benefit of Subordinated Lender and encumbering the Mortgaged Premises (the "**Subordinated Mortgage**") and a Junior Assignment of Rents and of Lessor's Interest in Leases dated as of March 23, 2006 made by Borrower for the benefit of Subordinated Lender and encumbering the Premises (the "**Subordinated Assignment**"). The Subordinated Note, the Subordinated Mortgage, the Subordinated Assignment and the other documents and instruments evidencing, governing or securing the Subordinated Loan, together with all amendments, modifications, renewals, extensions and substitutions thereof, are hereinafter collectively referred to as the "**Subordinated Loan Documents.**"

D. All obligations of Borrower to Senior Lender now existing or hereafter arising, due or to become due, under the Senior Note and the Senior Loan Documents, but solely to the extent they pertain to the Mortgaged Premises, are herein called the "**Senior Liabilities.**"

E. All obligations of Borrower to Subordinated Lender now existing or hereafter arising, due or to become due, under the Subordinated Note, the Subordinated Mortgage and the Subordinated Loan Documents, but solely to the extent they pertain to the Mortgaged Premises, are herein called the "**Subordinated Liabilities.**"

F. Senior Lender has agreed to permit the loan evidenced by the Subordinated Note on the condition that Subordinated Lender enter into this Agreement.

## CLAUSES

Now, therefore, for good and valuable consideration, the receipt and adequacy of which is acknowledged, the parties agree as follows:

1. **Subordination of Liens.** Subordinated Lender agrees that the Subordinated Liabilities are and shall be subordinate to the Senior Liabilities and that the liens and security interests created by the Subordinated Loan Documents are and shall be subordinate to the liens and security interests created by the Senior Loan Documents and to any and all amendments, modifications, extensions, replacements or renewals of the Senior Loan Documents, and to any and all advances made or to be made under the Senior Loan Documents pursuant to their terms.

2. **Subordination of Payment.** Except as set forth in the third sentence of this Section 2, until such time as the date on which the Senior Liabilities have been paid in full, the payment of the Subordinated Liabilities shall be postponed and subordinated to the payment of all of the Senior Liabilities, and Subordinated Lender shall accept no payments or other distributions whatsoever (including without limitation distributions of casualty insurance or condemnation proceeds) on account of the Subordinated Liabilities, nor shall any property or assets of Borrower be applied to the purchase or acquisition or retirement of any Subordinated Liabilities. If Subordinated Lender obtains any payments in violation of this Agreement, Subordinated Lender will hold such payments in trust for Senior Lender and will immediately pay such amount to Senior Lender. The preceding notwithstanding, Senior Lender

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consents to Borrower making regularly scheduled principal and interest payments to Subordinated Lender (but not prepayments) as provided in the Subordinated Note, provided that, (a) no notice of default has been given under any document evidencing or securing the Senior Liabilities (except any such notice of default which has subsequently been waived in writing by the Senior Lender or the corresponding default has been timely cured), and (b) no such default would result from the making of any such payment; and provided further, that no such payment to Subordinated Lender shall be permitted so long as Subordinated Lender is then in default in the performance of any of its obligations under this Agreement.

3. **Constructive Trust.** In the event that Subordinated Lender receives any payment or other distribution of any kind or character from Borrower or from any other source whatsoever in respect to any of the Subordinated Liabilities, other than as expressly permitted by the terms of this Agreement, such payment or other distribution shall be received and shall be held by Subordinated Lender in trust for Senior Lender and promptly turned over by Subordinated Lender to Senior Lender. Subordinated Lender shall execute such further documents or instruments and take such further action as Senior Lender may reasonably require from time to time to carry out the intent of this Agreement.

4. **Limitation on Remedies of Subordinated Lender.** Notwithstanding anything contained in the Subordinated Note, the Subordinated Mortgage or any of the other Subordinated Loan Documents to the contrary, Subordinated Lender shall not be permitted to exercise any of Subordinated Lender's remedies under the Subordinated Mortgage or the other Subordinated Loan Documents until the earlier of (i) 180 days after the occurrence of an event of default under the Subordinated Loan Documents which gives Subordinated Lender the right to exercise such remedies, or (ii) the Senior Liabilities are repaid in full (such period, the "**Standstill Period**"). If Subordinated Lender commences or participates in an action or proceeding based upon the Subordinated Liabilities in violation of this Agreement (other than with the prior written consent of Senior Lender), the Senior Lender (a) may intervene and interpose a defense in its name or in the name of the Borrower, or (b) may take steps to cure any such event of default, in which case such cure shall be deemed to render any such event of default of no effect, and Subordinated Lender shall thereupon revoke any notice of default and/or acceleration with respect thereto and terminate and dismiss any such action or proceeding.

5. **Waiver by Subordinated Lender.** Subordinated Lender waives (a) notice of the existence, creation or except as provided in 8(b) herein, nonpayment of all or any of the Senior Liabilities, and (b) all diligence that may be required of the Senior Lender in the collection, protection of or realization upon the Senior Liabilities or any security therefor.

6. **Covenants of Subordinated Lender.** Subordinated Lender shall not, without the prior written consent of Senior Lender, (a) modify, amend or consent to any modification or amendment of any document evidencing or securing the Subordinated Liabilities, or take or accept any other collateral to secure the Subordinated Liabilities or any other liabilities owed to Subordinated Lender; (b) except as provided above, commence, or join with any other creditor in commencing, any bankruptcy, reorganization or insolvency proceedings with respect to Borrower; (c) seek to appoint a receiver for (i) the Mortgaged Premises, (ii) any part of the Mortgaged Premises or (iii) Borrower, or seek to obtain possession of the Mortgaged Premises; or (d) take any action affecting any lease of the Mortgaged Premises in which Senior Lender claims a security interest (including without limitation any action to subordinate any such lease to the Subordinated Loan Documents, or any of them).

7. **Bankruptcy.** In the event of any dissolution, winding-up, liquidation, readjustment, reorganization or other similar proceedings relating to Borrower, or the Mortgaged Premises (whether voluntary or involuntary, partial or complete, and whether in bankruptcy, insolvency or receivership, or

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upon an assignment to benefit creditors, or any other marshalling of the assets and liabilities of Borrower, or any sale of all or substantially all of the assets of Borrower, or otherwise), the Senior Liabilities shall first be paid in full before Subordinated Lender shall be entitled to receive and to retain any payment or distribution with respect to the Subordinated Liabilities.

## 8. Notices of Default and Right To Cure.

(a) Subordinated Lender agrees to give Senior Lender, contemporaneously with the giving of notice to Borrower, copies of any notices given to Borrower regarding any default under the Subordinated Loan Documents or which notice would, following the passage of time and failure to cure, result in the occurrence of a "default" or "event of default" under the Subordinated Loan Documents. Except as permitted under Section 4 above, Subordinated Lender agrees that the indebtedness evidenced, secured and guaranteed by the Subordinated Loan Documents shall not be accelerated, nor shall any remedies be pursued unless in the case of default under the Subordinated Loan Documents and after expiration of all applicable grace periods, Subordinated Lender shall have given written notice of such default to Senior Lender and Senior Lender shall have consented to Subordinated Lender accelerating such debt or exercising such remedies in the sole discretion of Senior Lender.

(b) Senior Lender agrees to give Subordinated Lender, contemporaneously with the giving of notice to Borrower, copies of any notices given to Borrower regarding any default under the Senior Loan Documents or which notice would, following the passage of time and failure to cure, result in the occurrence of a "default" or "event of default" under the Senior Loan Documents.

Before Senior Lender commences any enforcement of the Senior Loan Documents, the Senior Lender agrees to give Subordinated Lender a right to cure any default under the Senior Loan Documents (which Subordinated Lender may do so in its sole discretion) within five (5) business days after Subordinated Lender's receipt of Senior Lender's notice of intent to commence such enforcement. Any such amount advanced by Subordinated Lender shall be added to the Subordinated Liabilities and be subordinate to the Senior Liabilities as and to the extent set forth herein with respect to the Subordinated Liabilities.

9. Insurance Proceeds and Condemnation Awards. Subordinated Lender agrees that in the event of a casualty to the Improvements or a condemnation or taking under a power of eminent domain of the Mortgaged Premises or any portion thereof, or a threat of such a condemnation or taking, all adjustments of insurance claims, condemnation claims and settlements in anticipation of such a condemnation or taking shall be prosecuted, at Senior Lender's election, by Senior Lender and all payments and settlements of insurance claims or condemnation awards or payments in anticipation of condemnation or a taking shall be paid to Senior Lender. Subordinated Lender hereby irrevocably subordinates to Senior Lender all of its interests in any such claims, settlements or awards (the "Award") and irrevocably grants to Senior Lender a power of attorney, coupled with an interest, to execute any and all documents on Subordinated Lender's behalf necessary in connection with the prosecution or settlement of the Award. In the event the amount of the Award is in excess of all amounts due under the Senior Liabilities, Senior Lender agrees that such excess Award shall be paid to Subordinated Lender.

10. Consent to Easements, Tenant Estoppel Letters, Nondisturbance Agreements and Plats of Subdivision. In the event Borrower requests that Senior Lender and all other mortgagees or trustees under trust deeds of record execute any easements, tenant estoppel letters, nondisturbance agreements or plats of subdivision or similar documents in connection with the construction,

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development, operation or maintenance of the Mortgaged Premises, and Senior Lender executes the same, Subordinated Lender agrees to execute such documents and instruments as its interests appear.

11. **Acquisition of Fee Title by Senior Lender.** Subordinated Lender agrees that an acquisition of fee title to the Mortgaged Premises by Senior Lender, its nominee, or any other person or entity through a foreclosure of the Senior Mortgage (where such foreclosure does not extinguish the liens and security interests created by the Subordinated Loan Documents) or through a deed in lieu of foreclosure is not a "sale or disposition" and will not constitute an event of default under the Subordinated Loan Documents.

12. **Subrogation.** Until such time as the Senior Liabilities have been paid in full, Subordinated Lender shall not exercise any rights of subrogation which it has or may have against the Mortgaged Premises and which subrogation would result in Subordinated Lender obtaining a priority equal or superior to the priority of the Senior Loan Documents for any funds which Subordinated Lender may advance either to cure defaults under security instruments or pay liens encumbering the Mortgaged Premises or otherwise protect the lien of the Subordinated Loan Documents or any of them.

13. **Permitted Actions by Senior Lender.** Senior Lender may, from time to time, in its sole discretion and without notice to Subordinated Lender, take any or all of the following actions: (a) retain or obtain a security interest in any property to secure any of the Senior Liabilities; (b) retain or obtain the primary or secondary obligation of any other obligor or obligors with respect to any of the Senior Liabilities; (c) extend or renew for one or more periods of time (whether or not longer than the original period), alter or modify any of the Senior Liabilities, or release or compromise any obligation of any nature of any obligor with respect to any of the Senior Liabilities; and (d) release its security interest in, or surrender, release or permit any substitution or exchange for all or any part of the property securing any of the Senior Liabilities, or extend or renew for one or more periods of time (whether or not longer than the original period) or release, compromise, alter or modify any obligation of any nature of any obligor with respect to any such property.

Notwithstanding anything contained in this Agreement, Senior Lender agrees that it will not: (i) cross-default the Senior Liabilities with any other indebtedness owed by Borrower or any other person to the Bank, or (ii) modify the Senior Mortgage to secure any such indebtedness.

14. **Assignment.** Senior Lender may, from time to time, without notice to Subordinated Lender, assign or transfer any interest in all or any portion of the Senior Liabilities or any interest therein; and notwithstanding any such assignment or transfer or any subsequent assignment or transfer thereof, such Senior Liabilities shall be and remain Senior Liabilities for the purpose of this Agreement, and every immediate and successive assignee or transferee of any of the Senior Liabilities or of any interest in the Senior Liabilities shall, to the extent of the interest of such assignee or transferee in the Senior Liabilities, be entitled to the benefits of this Agreement to the same extent as if such assignee or transferee were Senior Lender; provided, however, that unless Senior Lender shall otherwise consent in writing, Senior Lender shall have the unimpaired right, prior and superior to that of any such assignee or transferee, to enforce this Agreement for the benefit of Senior Lender as to those of the Senior Liabilities which Senior Lender has not assigned or transferred.

15. **Successors and Assigns.** This Agreement shall be binding upon the Subordinated Lender and the Senior Lender and shall inure to the benefit of their respective successors and assigns whether immediate or remote.

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16. **No Waiver by Senior Lender.** Senior Lender shall not be prejudiced in its rights under this Agreement by any act or failure to act by Borrower or Subordinated Lender, or any non-compliance of Borrower or Subordinated Lender with any agreement or obligation, regardless of any knowledge thereof which Senior Lender may have or with which Senior Lender may be charged; and no action of Senior Lender permitted hereunder shall in any way affect or impair the rights of Senior Lender and the obligations of Subordinated Lender under this Agreement. No delay on the part of Senior Lender in the exercise of any rights or remedies shall operate as a waiver thereof, and no single or partial exercise by Senior Lender of any right or remedy shall preclude other or further exercise or the exercise of any other right or remedy; nor shall any modification or waiver of any of the provisions of this Agreement be binding upon Senior Lender except as expressly set forth in a writing duly signed and delivered on behalf of Senior Lender.

17. **Effect on Due on Sale Provisions.** Subordinated Lender hereby waives any due on sale or due on refinancing provisions of the Subordinated Documents as they relate to the Senior Liabilities.

18. **Notice.** Any notice, demand or other communication which any party may desire or may be required to give to any other party shall be in writing, and shall be deemed given (i) if and when personally delivered, (ii) upon receipt if sent by a nationally recognized overnight courier addressed to a party at its address set forth below, or (iii) on the third (3rd) business day after being deposited in United States registered or certified mail, postage prepaid, addressed to a party at its address set forth below:

To Senior Lender: MB Financial Bank, N.A.  
2 South LaSalle Street  
Chicago, IL 60600  
Attn: Vincent G. Laughlin, Senior Vice President  
Telephone: (312) 456-8510  
Fax: (312) 456-4850

With a copy to: Much Shelist  
191 North Wacker Drive, Suite 1800  
Chicago, IL 60606-1615  
Attn: Michael R. Wolfe  
Telephone: 312-521-2665  
Fax: 312-521-2565

To Subordinated Lender: Vail Capital, L.L.C.  
2441 N. Leavitt Street  
Chicago, Illinois 60647  
Attn: Sheldon J. Mandell  
Telephone: 773-384-2800  
Fax: 773-384-0403

With copy to: Cohen, Salk & Huvar, P.C.  
630 Dundee Road, Suite 120  
Northbrook, Illinois 60062  
Attn: Bennett L. Cohen  
Telephone: 847-480-7800  
Fax: 847-480-7882

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Any party may change the address at which notices are required to be given to such party by notice to the other parties in accordance with this Agreement.

19. **Construction and Interpretation of this Agreement.** This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois. Wherever possible each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law but if any provision of this Agreement shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

20. **Termination.** This Agreement shall terminate upon full and final payment of any and all amounts due under the Senior Liabilities, provided that all rights of Subordinated Lender under this Agreement shall automatically terminate at such time as the Subordinated Liabilities have been paid in full.

*[The rest of this page is intentionally left blank. Signature pages follow.]*

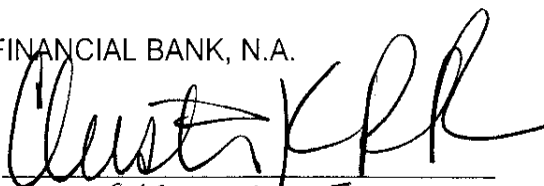
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IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

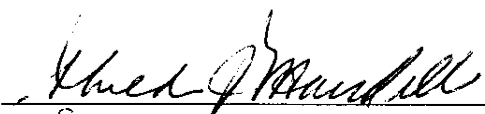
**SENIOR LENDER:**

MB FINANCIAL BANK, N.A.

By:   
 Name: CHRISTINA FRANK  
 Title: VICE PRESIDENT

**SUBORDINATED LENDER:**

VAIL CAPITAL, L.L.C.

By:   
 Name: SHELDON J. MANDELL  
 Title: Manager

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[Signature Page to Subordination and Intercreditor Agreement]



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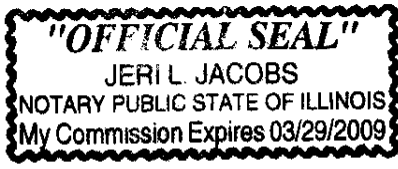
STATE OF ILLINOIS )  
   ).ss  
 COUNTY OF COOK )

I JERI JACOBS, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that CHRISTINA FRANK, FIRST VICE PRES. of MB FINANCIAL BANK, N.A., is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered said instrument as his own free and voluntary act for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 23 day of March, 2006.

*Jeri L Jacobs*  
 \_\_\_\_\_  
 Notary Public

My Commission Expires: 3/29/2009



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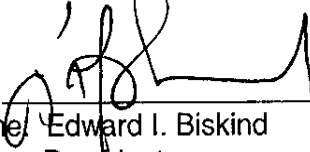
## CONSENT AND AGREEMENT OF OWNER

Borrower acknowledges the terms of and consents to the foregoing Agreement and agrees for itself and its respective successors and assigns, for the benefit of Senior Lender, its successors and assigns, that (i) said Agreement does not constitute a waiver or partial waiver by Senior Lender of any of its rights under the Senior Loan Documents, or in any way release Borrower from its obligations to comply with the terms and conditions contained in the Senior Loan Documents (including without limitation the obligation to refrain from any further encumbering of the Mortgaged Premises without the prior written consent of Senior Lender); and (ii) Borrower will not take any action contrary to or inconsistent with said Agreement, and (iii) said Agreement does not constitute a waiver or partial waiver by Subordinated Lender of any of its rights under the Subordinated Loan Documents, or in any way release Borrower from its obligations to comply with the terms and conditions contained in the Subordinated Loan Documents, provided such compliance shall not violate the terms of this Agreement.

**BORROWER:**

PALATINE COMMONS, LLC, an Illinois limited liability company

By InterCapital Commons, Inc., an Illinois corporation, its Manager

By:   
Name: Edward I. Biskind  
Title: President

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STATE OF ILLINOIS )  
  ).ss  
COUNTY OF COOK )

I Ysidra S. Mathews a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Edward I. Biskind, the President of InterCapital Commons, Inc., an Illinois corporation, the manager of PALATINE COMMONS, LLC, an Illinois limited liability company (the "LLC"), is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such officer, appeared before me this day in person and acknowledged that he signed and delivered said instrument as his own free and voluntary act, and as the free and voluntary act of said corporation, on behalf of and as the manager of the LLC, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 22 day of March, 2006.

Ysidra S. Mathews  
Notary Public

My Commission Expires: 12/19/2009



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