



0622242139

THIS DOCUMENT PREPARED BY
AND AFTER RECORDING RETURN TO:

Doc#: 0622242139 Fee: \$48.00
Eugene "Gene" Moore RHSP Fee:\$10.00
Cook County Recorder of Deeds
Date: 08/10/2006 01:29 PM Pg: 1 of 13

Much Shelist
191 N. Wacker Drive, Suite 1800
Chicago, IL 60606-1615
Attn: Scott L. David, Esq.

This space reserved for Recorder's use only

SUBORDINATION AND INTERCREDITOR AGREEMENT

THIS SUBORDINATION AND INTERCREDITOR AGREEMENT ("Agreement") is made as of August 3, 2006, by and between (i) NORTH SHORE COMMUNITY BANK & TRUST CO. ("Senior Lender"), and (ii) FIDELITY CAPITAL CORPORATION, an Illinois corporation ("Subordinated Lender").

RECITALS

A. Senior Lender is the owner and holder of a certain Promissory Note (the "Senior Note") dated the date of this Agreement in the original principal amount of \$3,380,000 made by BEVERLY CENTER, L.L.C., an Illinois limited liability company (the "Borrower") payable to the order of Senior Lender.

B. Senior Lender is also the owner and holder of (i) a Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing (the "Senior Mortgage") made by Borrower dated the date of this Agreement encumbering certain property (the "Mortgaged Premises") located in Cook County, Illinois and legally described on Exhibit A, and (ii) a separate Guaranty of Payment (each, a "Senior Guaranty") from each of Jeffrey Devine, Steve Disse, Jeffrey Kahan, Michael Madura and Brett Walrod (collectively, the "Guarantor"). The Senior Note, Senior Mortgage, Senior Guaranties and all other documents and instruments evidencing and securing the loan evidenced by the Senior Note are hereinafter collectively referred to as the "Senior Loan Documents."

C. Subordinated Lender is the owner and holder of a certain Mortgage Note (the "Subordinated Note") dated the date of this Agreement in the original principal amount of \$1,000,000 made by Borrower payable to the order of Subordinated Lender.

D. Subordinated Lender is also the owner and holder of (i) a Junior Mortgage, Security Agreement, Assignment of Rents and UCC Fixture Filing (the "Subordinated Mortgage") made by Borrower dated the date of this Agreement encumbering the Mortgaged Premises, and (ii) an Unconditional Guaranty (the "Subordinated Guaranty") made jointly and severally by Guarantor dated the date of this Agreement which does not encumber the Mortgaged Premises, but does secure the Subordinated Note. The Subordinated Note, Subordinated Mortgage and Subordinated Guaranties and the documents and instruments evidencing and securing the loans evidenced by the Subordinated Note are hereinafter collectively referred to as the "Subordinated Loan Documents."

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F. All obligations of Borrower and/or Guarantor to Senior Lender now existing or hereafter arising, due or to become due, under the Senior Note and the Senior Loan Documents are herein called the "**Senior Liabilities**" (except that the term "Senior Liabilities" shall exclude a Senior Subordinate Loan, as hereinafter defined).

G. All obligations of Borrower and/or Guarantor 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 are herein called the "**Subordinated Liabilities**".

H. Senior Lender has agreed to make the loan evidenced by the Senior 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.** Subject to the limitation set forth in the following paragraph, 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.

Notwithstanding anything contained in this Agreement to the contrary, Senior Lender represents to Subordinated Lender that upon disbursement of the proceeds of the Senior Note, Senior Lender does not intend to make any future loans or advances to the Borrower which will be secured by the Senior Loan Documents or the Mortgaged Premises, other than Protective Advances (as hereinafter defined) made by Senior Lender in its sole and absolute discretion. Any such future loans or advances made by Senior Lender, other than Protective Advances, shall be called a "Senior Subordinate Loan". Notwithstanding anything contained in the preceding paragraph or any other provision of this Agreement to the contrary, if for any reason, Senior Lender does make a Senior Subordinate Loan, Senior Lender agrees that the lien of the Senior Mortgage, to the extent it secures repayment of the Senior Subordinate Loan, shall be subordinate to the lien of the Subordinated Mortgage, to the extent the Subordinated Mortgage secures the Subordinated Liabilities.

The term "Protective Advances" shall mean all advances made by Senior Lender under the Senior Loan Documents to pay for delinquent taxes (including interest and penalties) on the Mortgaged Premises, insurance premiums for the Mortgaged Premises, and all other costs and expenses (including attorneys' fees) expended to protect, perfect, preserve, defend or foreclose the lien of the Senior Mortgage (all of the foregoing collectively "Protective Advances").

2. **Subordination of Payment.** 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, condemnation proceeds, tax or insurance deposits, or distributions of revenue, income or profits) 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, so long

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as no written notice of default (a "Senior Default Notice") has been given under any document evidencing or securing the Senior Liabilities (except any such Senior Default Notice which has subsequently been waived in writing by the party giving such notice), then Senior Lender will permit Borrower to make regularly scheduled interest payments to Subordinated Lender (but not prepayments) as provided in the Subordinated Note, provided 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. Should Senior Lender issue a Senior Default Notice, it will concurrently send such notice to Subordinated Lender. Senior Lender shall further promptly notify Subordinated Lender once the default which is the subject of the Senior Default Notice is cured.

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 Loan Documents until the Senior Liabilities are repaid in full (such period, the "**Standstill Period**"). If Subordinated Lender commences or participates in an action proceeding based upon the Subordinated Loan Documents in violation of this Agreement, the Senior Lender may intervene and interpose a defense in its name or in the name of the Borrower. If Senior Lender initiates foreclosure proceedings, Subordinated Lender shall be entitled to be named in such proceedings solely for the purpose of protecting Subordinated Lender's interest in any surplus proceeds remaining after the Senior Liabilities shall have been paid in full.

5. **Waiver by Subordinated Lender.** Subordinated Lender waives (a) notice of the existence, creation or nonpayment of all or any of the Senior Liabilities, and (b) all diligence in 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 (which will not be unreasonably withheld or delayed), (a) modify, amend or consent to any modification or amendment of any document evidencing or securing the Subordinated Liabilities; (b) 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 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.

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8. Notices of Default.

(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. 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, subject to the provisions of Section 4 of this Agreement, 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 hereby agrees to give Subordinated Lender, contemporaneously with the giving thereof 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. Senior Lender will accept a cure of such default if made by Subordinated Lender within any cure period.

9. Insurance Proceeds and Condemnation Awards. Subordinated Lender agrees that in the event of a casualty to the buildings or improvements constructed on the Mortgaged Premises or a condemnation or taking under a power of eminent domain of the Mortgaged Premises, the buildings or improvements thereon, 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 assigns 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 or held for the benefit of 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, 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 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 waives and releases any and all rights of subrogation which it has or may have

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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.

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 Subordinated Lender and its respective successors and assigns whether immediate or remote.

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 notices, communications and waivers under this Mortgage shall be in writing and shall be (a) delivered in person, (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (c) by overnight express carrier, addressed in each case as follows:

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To Senior Lender: North Shore Community Bank & Trust Co.
 7800 North Lincoln Avenue
 Skokie, IL 60077
 Attn: Laretta Burke
 Telephone: 847.853.3608
 Fax: 847.853.5957

With a copy to: Much Shelist
 191 North Wacker Drive, Suite 1800
 Chicago, IL 60606.1615
 Attn: Scott L. David, Esq.
 Telephone: 312.521.2404
 Fax: 312.521.2304

To Subordinated Lender: Fidelity Capital Corporation
 5750 Old Orchard Road, Suite 450
 Skokie, Illinois 60077
 Attn: Michael S. Schechtman, President
 Fax: 847.581.1877

With copy to: Cohen, Salk & Huvard, P.C.
 630 Dundee Road, Suite 120
 Northbrook, Illinois 60062
 Attn: Bennett L. Cohen, Esq.
 Fax: 847.480.7882

or to any other address as to any of the parties hereto as such party shall designate in a written notice to the other party hereto. All notices sent pursuant to the terms of this Paragraph shall be deemed received (i) if personally delivered, then on the date of delivery, (ii) if sent by overnight, express carrier, then on the next federal banking day immediately following the day sent, or (iii) if sent by registered or certified mail, then on the earlier of the third federal banking day following the day sent or when actually received.

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.

[NO FURTHER TEXT ON THIS PAGE]

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

SENIOR LENDER:

NORTH SHORE COMMUNITY BANK & TRUST CO.

By: *Lauretta Burke*
Name: LAURETTA BURKE
Title: President

SUBORDINATED LENDER:

FIDELITY CAPITAL CORPORATION,
an Illinois corporation

By: _____
Name: Michael S. Shechtman
Title: President

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


SENIOR LENDER:

NORTH SHORE COMMUNITY BANK & TRUST
CO.

By: _____
Name: _____
Title: _____

SUBORDINATED LENDER:

FIDELITY CAPITAL CORPORATION, an Illinois
corporation

By: 
Name: Michael S. Shechtman
Title: President

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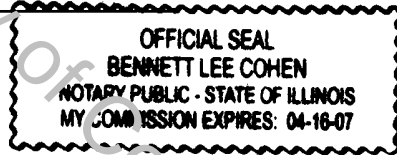
STATE OF ILLINOIS)
) .ss
COUNTY OF COOK)

I the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Michael S. Shechtman, the President of **FIDELITY CAPITAL CORPORATION**, an Illinois corporation, 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 14 day of August, 2006.

Bennett Lee Cohen
Notary Public

My Commission Expires: _____



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EXHIBIT A

Legal Description of Mortgaged Premises

LOTS 25 TO 39, INCLUSIVE, (EXCEPT A PORTION OF LOT 38, DEDICATED FOR PUBLIC ALLEY) IN BLOCK 2 IN JOHN JENSEN AND SONS BEVERLY HIGHLANDS, BEING A SUBDIVISION OF THE SOUTH 9.25 ACRES OF THE SOUTHWEST ¼ OF THE SOUTHWEST ¼ OF THE NORTHWEST ¼ OF SECTION 7, TOWNSHIP 37 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PINs: 25-07-116-022-0000
25-07-116-023-0000
25-07-116-024-0000
25-07-116-025-0000
25-07-116-026-0000
25-07-116-027-0000
25-07-116-028-0000
25-07-116-029-0000
25-07-116-030-0000
25-07-116-031-0000
25-07-116-032-0000
25-07-116-033-0000
25-07-116-034-0000
25-07-116-035-0000
25-07-116-036-0000

Address: 9831 S. Western Avenue
Chicago, Illinois

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CONSENT AND AGREEMENT OF BORROWER

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.

BORROWER:

BEVERLY CENTER, L.L.C., an Illinois limited liability company

By: 

Name: Michael Madura

Title: Manager

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