





# City of West Allis

7525 W. Greenfield Ave.  
West Allis, WI 53214

## Resolution

**File Number: R-2006-0327**

**Final Action:**

**Sponsor(s):** Safety & Development Committee

**NOV 08 2006**

Resolution authorizing Intercreditor and Subordination Agreement by and between Nationwide Life Insurance Company, Community Development Authority of the City of West Allis and Whitnall-Summit Company.

WHEREAS, the Common Council of the City of West Allis (the "City") authorized the Community Development Authority of the City of West Allis (the "Authority") to make a Two Million Five Hundred Thousand Dollars (\$2,500,000) loan to Whitnall-Summit Company, LLC (the "Company") and to subordinate the loan to the Company's construction financing lenders for the property located at 6737 W. Washington St. (the "Property"); and,

WHEREAS, the Company now wishes to obtain permanent financing for the Property; and,

WHEREAS, the CDA is being requested to again subordinate the CDA's Two Million Five Hundred Thousand Dollars (\$2,500,000) loan to Nationwide Life Insurance Company as a condition to providing the permanent financing in the amount of Seventy Seven Million, Five Hundred Thousand Dollars (\$77,500,000); and,

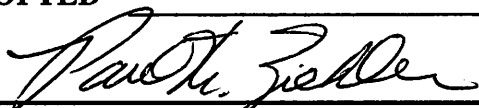
WHEREAS, the Department of Development has reviewed and recommends approval of the Agreement.

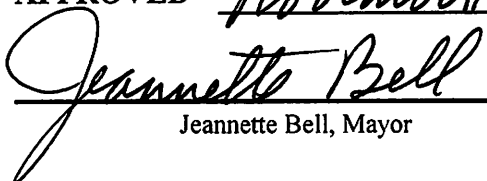
NOW, THEREFORE, BE IT RESOLVED that the Common Council of the City of West Allis authorizes the Community Development Authority of the City of West Allis to approve the attached Intercreditor and Subordination Agreement.

BE IT FURTHER RESOLVED that the City Attorney be and is hereby authorized to make such substantive changes, modifications, additions and deletions to and from the various provisions of the Agreement, including any and all attachments, exhibits, addendums and amendments, as may be necessary and proper to correct inconsistencies, eliminate ambiguity and otherwise clarify and supplement said provisions to preserve and maintain the general intent thereof, and to prepare and deliver such other and further documents as may be reasonably necessary to complete the transactions contemplated therein.

cc: Department of Development

Dev-R-448\dlm\11-8-06

**ADOPTED**      NOV 08 2006  
  
\_\_\_\_\_  
Paul M. Ziehler, City Admin. Officer, Clerk/Treas.

**APPROVED**      *November 14, 2006*  
  
\_\_\_\_\_  
Jeannette Bell, Mayor



**WHEN RECORDED RETURN TO:**

**Thompson & Knight L.L.P.  
1700 Pacific Avenue, Suite 3300  
Dallas, Texas 75201  
Attention: Craig B. Anderson**

**INTERCREDITOR AND  
SUBORDINATION AGREEMENT**

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (as amended, restated or modified from time to time, the "**Agreement**") is dated effective as of November \_\_\_\_, 2006 and made by and between **NATIONWIDE LIFE INSURANCE COMPANY** ("**Senior Lender**"), **COMMUNITY DEVELOPMENT AUTHORITY OF THE CITY OF WEST ALLIS** ("**Junior Lender**") and **WHITNALL-SUMMIT COMPANY, LLC** ("**Borrower**").

**RECITALS**

A. Senior Lender has entered into the Senior Loan Documents with Borrower, which provide for the Senior Loan of \$77,500,000 to Borrower (together with any additional sums advanced by Senior Lender to Borrower pursuant to the Senior Loan Documents and consistent with this Agreement), to finance a office project on a tract of land in West Allis, Wisconsin (as more fully described in Exhibit A attached hereto and incorporated herein by reference) (the "**Project**"). Pursuant to the Senior Loan Documents, Borrower has granted to the Senior Lender the Senior Liens in the Project and the other Collateral described in the Senior Loan Documents.

B. Borrower has previously received funds in the amount of \$2,500,000 from Junior Lender to finance a portion of the Project. Senior Lender has agreed to make the Senior Loan on the condition that the terms and conditions of the Senior Loan Documents are superior to the terms and conditions of the Junior Loan Documents and Junior Lender is willing to consent to certain agreements contained herein about the priority of their respective rights, priorities and interests between them.

**AGREEMENTS**

In consideration of the foregoing, the covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Senior Lender and Junior Lender hereby agree as follows:

**ARTICLE 1  
DEFINITIONS**

Section 1.1. **Definitions.** The following terms shall have the meanings indicated below:

**“Business Day”** means any day other than Saturday, Sunday, or a day that is a legal holiday under the laws of the State or on which banking institutions in the State of Texas are required by law or other governmental action to close.

**“Claim”** means a right to payment, including without limitation, indebtedness of the Borrower payable directly or indirectly to the holder of such Claim and/or a right to an equitable remedy for breach of performance, in either case, as against Borrower or any of the Borrower's property, including without limitation, the Project.

**“Collateral”** means the Project and all other assets of Borrower or any other Person, whether real or personal (including, without limitation, plans, contracts, improvements, land, fixtures, equipment and rents) in which either the Senior Lender or Junior Lender, as the case may be, hold a Lien pursuant to the Senior Loan Documents or the Junior Loan Documents, as applicable.

**“Enforcement”** means, with respect to either of Senior Lender or Junior Lender, as the context requires, the exercise of any right or remedy upon default under its loan documents.

**“Junior Claims”** means all rights, remedies, demands, causes of action and Claims of every type and description at any time and from time to time held or asserted by, or arising in favor of, Junior Lender under the Junior Loan Documents.

**“Junior Loan”** means the loan from Junior Lender to Borrower evidenced by the Junior Loan Documents.

**“Junior Loan Documents”** means, collectively, the documents (as each may be amended, modified or restated from time to time pursuant to such documents and consistent with this Agreement, but only to the extent permitted by this Agreement) listed on Schedule 1 to this Agreement, which documents constitute the only documents executed in connection with and evidencing or securing the Junior Loan.

**“Lien”** means any mortgage, deed of trust, pledge, hypothecation, assignment, deposit arrangement, security interest, encumbrance, lien (statutory or other and including without limitation, any attachment, levy, or judgment lien), preference, priority, or other security agreement or other preferential arrangement whatsoever, including, without limitation, any right of setoff (statutory or otherwise).

**“Person”** means any person, individual, sole proprietorship, partnership, joint venture, corporation, limited liability company, unincorporated organization, association, institution, entity, party, including any government and any political subdivision, agency, or instrumentality thereof.

**“Protective Advances”** means all sums expended as determined by Senior Lender to be necessary or appropriate to: (a) protect the priority, validity and enforceability of the Liens on, and security interests in, any Collateral and the instruments evidencing the indebtedness and obligations of the Borrower to Senior Lender; (b)(1) prevent the value of any Collateral from being diminished (assuming the

lack of such a payment within the necessary time frame could potentially cause such Collateral to lose value), or (2) protect any of the Collateral from being damaged, impaired, mismanaged or taken, or (3) complete or operate the Project; or (c) cure any default or non-performance of obligations of the Borrower related to the Collateral, as required by the Senior Loan Documents.

**"Senior Claims"** means all rights, remedies, demands, causes of action and Claims of every type and description at any time and from time to time held or asserted by, or arising in favor of, the Senior Lender under the Senior Loan Documents or secured by a Lien in favor of the Senior Lender in any of the Collateral pursuant to the Senior Loan Documents.

**"Senior Liens"** means, collectively, the rights, liens, security interests and assignments granted to Senior Lender in the Project and other Collateral described in the Senior Loan Documents.

**"Senior Loan"** means the loan from Senior Lender to Borrower evidenced by the Senior Loan Documents.

**"Senior Loan Documents"** means, collectively, the documents (as each may be amended, renewed, replaced, modified or restated from time to time, but only to the extent permitted by this Agreement) listed on Schedule 2 of this Agreement, which documents constitute the only documents executed in connection with and evidencing or securing the Senior Loan.

**"State"** means the state where the Property is located.

## ARTICLE 2 LIENS

Section 2.1. **Consent to Liens.** Notwithstanding anything to the contrary in any Junior Loan Document, Junior Lender consents to the Senior Liens created and granted in the Collateral pursuant to the Senior Loan Documents, and confirms that the existence of such Liens shall not constitute a default under the Junior Loan Documents.

Section 2.2. **No Junior Lien.** Junior Lender hereby warrants, represents and covenants that the Junior Loan Documents do not represent or create any lien on the Project and the obligations of Borrower under the Junior Loan Documents are unsecured obligations only. Junior Lender further warrants, represents and covenants (i) that no additional loan proceeds have been advanced to Borrower other than the initial \$2,500,000 represented by the Junior Loan Documents, and (ii) as of the date hereof to the knowledge of Junior Lender, no default exists under the Junior Loan Documents.

Section 2.3. **Lien Subordination.** The parties agree that Senior Lender shall have a first and prior Lien in the Collateral and all proceeds thereof to secure the Senior Claims. Any Junior Claim in the Collateral pursuant to the Junior Loan Documents and any other right of subrogation acquired by Junior Lender, shall be, and is, junior and subordinate in all respects to all Liens in the Collateral held by the Senior Lender pursuant to the Senior Loan Documents to

the full extent of the amount of the Senior Claims as such amount may fluctuate from time to time, including any increase in the amount of the Senior Claims from any Protective Advances made by Senior Lender. Any proceeds of such foreclosure sale in excess of the amounts due under the Senior Loan shall be disbursed in accordance with applicable law. Junior Lender agrees that the Junior Loan Documents shall not be cross-collateralized or cross-defaulted with any other indebtedness or obligations (i.e., indebtedness or obligations not arising in connection with the Junior Loan and any Protective Advances) of Borrower or any other Person in favor of Junior Lender.

Section 2.4. **Payment Subordination**. If Junior Lender has received a Default Notice (as defined in Section 3.1 below) that a default under the Senior Loan Documents exists, then the Junior Lender will not ask for, demand, sue for, take, receive or retain, from Borrower, by setoff or in any other manner, payment of all or any part of any of the Junior Claims. Notwithstanding such prohibition, (i) Junior Lender may sue for collection of any Junior Claim for which the statute of limitations will expire within twenty (20) Business Days of the date such suit is instituted, and (ii) Junior Lender may seek injunctive relief against Borrower and its affiliates. Prior to the receipt of a Default Notice, Junior Lender shall be free to pursue any of the remedies set forth in the Junior Loan Documents upon the occurrence of a default by Borrower thereunder (provided Junior Lender has previously delivered written notice of such default to Senior Lender in accordance with Section 3.2 below); provided, however, Junior Lender shall not in any event without the prior written consent of Senior Lender: (i) seek to have a receiver appointed for the Project, (ii) bring any Proceeding (as defined in Section 4.2 below) against the Borrower, (iii) exercise any right of setoff against any insurance proceeds, condemnation awards or escrow funds for taxes and insurance held by Junior Lender, or (iv) attempt to collect rents of the Project.

### ARTICLE 3 ENFORCEMENT OF CLAIMS

Section 3.1. **Senior Claims**. If a default occurs under any Senior Loan Document, then Senior Lender may at its option send to Junior Lender (in accordance with Section 4.16 below) a copy of any written notice of such default sent to Borrower ("**Default Notice**") contemporaneously with the delivery of such notice to Borrower. Senior Lender may at its option also send to Junior Lender at the same time as to Borrower a copy of any notice of acceleration and any other written notice sent by Senior Lender to Borrower with respect to the enforcement by Senior Lender of any remedies under the Senior Loan Documents. If a default under the Senior Loan Documents is not cured within the time period provided in this Section 3.1, then Senior Lender may commence Enforcement of any of its rights and remedies under the Senior Loan Documents, including without limitation, acceleration of the indebtedness outstanding under the Senior Loan, subject to the terms and conditions of Section 3.3 hereof. Notwithstanding anything to the contrary in the Junior Loan Documents, the consent of Junior Lender is not required for any transfer of the Property from Borrower to Senior Lender as a result of Borrower's default under the Senior Loan Documents. The parties agree that the occurrence of a default under the Junior Loan Documents shall not, in and of itself, constitute a default under the Senior Loan Documents (unless Senior Lender in its sole discretion elects to

treat it as such a default); provided, however, that the foregoing shall not be construed to prevent or prohibit Senior Lender from declaring a default under the Senior Loan Documents upon the failure by Borrower to perform an obligation or covenant in the Senior Loan Documents or upon the occurrence of an event which is specified as a default in the Senior Loan Documents, where such failure or event also constitutes a default under the Junior Loan Documents.

Section 3.2. **Junior Claims.** If a default occurs under any Junior Loan Document, then Junior Lender shall provide Senior Lender with a copy of any written notice thereof sent to Borrower contemporaneously with delivery of such notice to Borrower, together with notice as to whether Junior Lender intends to enforce its rights, and if such default is curable, shall permit Senior Lender to cure the default within the time period, if any, specified for cure in such Junior Loan Document. Junior Lender shall also send to Senior Lender at the same time as to Borrower a copy of any notice of acceleration and any other written notice sent by Junior Lender to Borrower with respect to the enforcement by Junior Lender of any remedies under the Junior Loan Documents. Senior Lender shall have the right, but not the obligation, to perform any covenant or agreement under the Junior Loan Documents to be performed by Borrower, and Junior Lender shall accept such performance by Senior Lender as if performed by Borrower and all payments so made and all things so done and performed by Senior Lender shall be effective to prevent the acceleration of the indebtedness evidenced by the Junior Loan Documents, provided any default under the Junior Loan Documents is cured within the applicable time period provided in the Junior Loan Documents.

#### ARTICLE 4 OTHER AGREEMENTS

Section 4.1. **Modification of Senior Loan Documents.** Senior Lender at any time, without the consent of, or notice to, Junior Lender, may do any one of the following:

(a) change the manner, place, or terms of payment or change or extend the time of payment of, or renew, exchange, amend, or alter, the terms of any of the Senior Claims or any Lien in any of the Collateral securing any Senior Claim or any guaranty of any Senior Claim or any liability of Borrower or any guarantor, or any liability incurred directly or indirectly in respect thereof (including, without limitation, any extension of the Senior Claims), or otherwise amend, renew, exchange, increase, extend, modify, supplement in any manner the Senior Claims or any Senior Loan Documents without the consent of Junior Lender (including without limitation the following actions (i) increase the amount of its Senior Loan, (ii) cross-collateralize or cross default the Senior Loan with any other loan, or (iii) change the interest rate under the Senior Loan Documents (except to the extent provided for therein)). Any amendments, modifications, renewals, or extensions of the Senior Loan Documents shall be subject to the terms and conditions of this Agreement. For purposes of this Agreement and without limiting any other provision of this Agreement, the amounts under the Senior Loan which have priority over the amounts due under the Junior Loan shall include without limitation, any Protective Advances made by Senior Lender under the Senior Loan Documents and any amounts incurred by Senior Lender in connection with any Enforcement of its rights and remedies under the Senior Loan Documents.



(b) subject to the terms and provisions of this Agreement, settle or compromise any Senior Claim or any security therefor or any liability directly or indirectly incurred in respect thereof and apply any sums by whomsoever paid and however realized to any liability (including, without limitation, the Senior Claims) in any manner or order.

In the event of any of the foregoing permitted by this Agreement, Junior Lender shall remain bound under this Agreement, and all without impairing, abridging, diminishing, releasing or affecting the subordination by Junior Lender of the Junior Claims and the Junior Loan Documents to the Senior Claims and the Senior Loan Documents provided for herein and the other obligations and covenants of Junior Lender set forth in this Agreement.

**Section 4.2. Modification of Junior Loan Documents; Actions of Junior Lender.**

Unless and until all of the Senior Claims shall have been fully paid and satisfied and the obligations of Senior Lender to make any further loans or advances to the Borrower under the Senior Loan Documents shall have ceased and terminated, Junior Lender will not do any of the following without the prior written consent of Senior Lender:

(a) increase the amount of the Junior Loan or enter into other amendments or modifications of the Junior Loan Documents;

(b) bring or join with any creditor other than Senior Lender in bringing any proceeding against Borrower under any bankruptcy, reorganization, readjustment or arrangement of debt, suspension of payments, receivership, liquidation or insolvency or similar law or statute now or hereafter in effect ("Proceedings");

(c) object to any motion filed by Senior Lender that rents from the Project constitute cash collateral of Senior Lender or any motion filed by Senior Lender to lift the automatic stay as it relates to the Senior Loan Documents and remedies thereunder, or vote for any plan of reorganization which Senior Lender opposes; or

(d) (1) cause or accept the benefits of a marshaling of the assets of Borrower or the assets given as collateral under the Senior Loan Documents or (2) cause Senior Lender to proceed against Borrower and/or any collateral given to secure its obligations to Senior Lender in any particular order.

**Section 4.3. Conflicts.** In the event of any conflict between (a) the provisions of this Agreement in respect to the matters covered hereby and (b) the provisions of either of the Junior Loan Documents or the Senior Loan Documents, the provisions of this Agreement shall govern. In the event of any conflict between the provisions of the Senior Loan Documents and the Junior Loan Documents, then as between the Senior Lender and the Junior Lender, the provisions of the Senior Loan Documents shall govern.

**Section 4.4. Payments.**

(a) Upon any distribution of the assets of Borrower in connection with any dissolution, winding up, liquidation or reorganization of Borrower (whether in Proceedings or upon an assignment for the benefit of creditors or any other marshaling of

the assets and liabilities of Borrower or otherwise), or the distribution of insurance proceeds or condemnation awards received with respect to the Project in the event of a casualty or condemnation, Senior Lender shall first be entitled to receive payment in full of all Senior Claims before Junior Lender shall be entitled to receive any payment in respect of the Junior Claims. Upon any such dissolution, winding up, liquidation or reorganization, any payment or distribution of assets of Borrower of any kind or character, whether in cash, property or securities, to which Senior Lender is entitled shall be made directly to Senior Lender by the liquidating trustee or agent or other persons making such payment or distribution (whether a trustee in bankruptcy, a receiver or liquidating trustee or otherwise) (a "**Paying Party**"). If the aggregate amount of such payments or distributions on the Senior Claims is insufficient to pay the Senior Claims in full, then Junior Lender hereby authorizes the Paying Party to remit promptly to Senior Lender the lesser of (1) the proceeds Junior Lender is entitled to receive by reason of any payment or distribution on the Junior Claims, or (2) the difference between the aggregate amount of the Senior Claims and the proceeds Senior Lender is entitled to receive by reason of any payment on distribution on the Senior Claims. In furtherance of the foregoing, but not by way of limitation thereof, if Borrower is subject to any Proceeding, with the result that Borrower is excused from the obligation to pay all or part of the interest otherwise payable in respect of the Senior Claims during the period subsequent to the commencement of any such Proceedings, Junior Lender agrees that such interest (calculated at the non-default rate of interest set forth in the Senior Loan Documents) shall be payable out of payments or distributions made by the Paying Party in respect of the Junior Claims.

(b) If Senior Lender receives any payment or distribution on the Junior Claims in excess of the difference between the aggregate amount of the Senior Claims and the proceeds Senior Lender receives by reason of any payment or distribution on the Senior Claims, then Senior Lender agrees to remit promptly to Junior Lender such excess amount, subject to the rights of other lenders under that certain Subordination of Mortgage and Intercreditor Agreement dated as of even date of this Agreement by and between Senior Lender, Borrower and those lenders designated as the "Subordinate Mortgagee", such lenders having previously made loans to Borrower which encumber the Project as of the date hereof.

Section 4.5. **Other Liens.** Junior Lender agrees that if Junior Lender acquires any lien or other interest upon or other estate, right or interest in the Project or Borrower (including but not limited to any which may arise in respect to real estate taxes, assessments or other governmental charges) by subrogation, contract or otherwise, which is or may be prior in right to the Senior Liens, such lien or interest shall be subordinate to the Senior Liens. Until such time as the Senior Claims have been paid in full, Junior Lender shall not enforce any rights of subrogation which it may have, which subrogation would result in Junior Lender obtaining a priority equal or superior to the priority of the Senior Loan Documents for any funds which Junior Lender may advance either to cure defaults under the Senior Loan Documents or to pay liens encumbering the Project or otherwise to protect the lien of the Junior Loan Documents or any of them, including any Protective Advances made by Junior Lender. No payment or distribution to Senior Lender shall entitle Junior Lender to exercise any right of subrogation until all Senior Claims have been paid in full.

Section 4.6. **Misapplication.** Junior Lender agrees that, if all or any part of a payment previously applied by Senior Lender to the Senior Claims is or must be returned by Senior Lender, or is recovered from Senior Lender, for any reason (including without limitation, by order of any bankruptcy court), this Agreement shall apply as if the prior application had not been made, and in such event, the liability of the Junior Lender hereunder shall be reinstated and revived, and the rights of the holder of the Senior Loan shall continue, with respect to any amount at any time paid on account of the Senior Loan which shall thereafter be required to be restored or returned by the holders of the Senior Loan Documents in any reorganization, bankruptcy or insolvency or other Proceeding, including without limitation, any repayment made pursuant to any provision of the Federal Bankruptcy Code, all as though such amount had not been paid.

Section 4.7. **Insurance and Condemnation Proceedings.** Junior Lender agrees that in the event of a casualty to the Project or a condemnation or taking under a power of eminent domain of all or any portion of the Project, 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 or at Senior Lender's direction pursuant to the terms and provisions of the Senior Loan Documents, 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 or at Senior Lender's direction for use and application pursuant to the terms and provisions of the Senior Loan Documents. Junior Lender irrevocably assigns to Senior Lender all of its interest in any such claims, settlements or awards and irrevocably grants to Senior Lender a power of attorney, coupled with an interest, to execute any and all documents on Junior Lender's behalf necessary in connection with the prosecution or settlement of such claims, awards and payments. Senior Lender shall promptly notify Junior Lender of any documents executed under the aforesaid power of attorney. Borrower, Junior Lender and Senior Lender agree that notwithstanding anything to the contrary contained in the Senior Loan Documents or Junior Loan Documents, any insurance proceeds or condemnation awards held by Senior Lender and which are not applied to restore and repair the Project as provided in the Senior Loan Documents, and which are remaining after all amounts owed to Senior Lender under the Senior Loan Documents have been paid in full, shall be disbursed to Junior Lender and applied in the manner set forth in the Junior Loan Documents.

Section 4.8. **No Partnership, Responsibilities.** The execution of this Agreement shall not create or be construed as creating a partnership, joint venture or other joint enterprise between the Senior Lender and the Junior Lender, and shall not be construed as creating any special relationship between Senior Lender and Junior Lender. Nothing in this Agreement shall be construed to constitute the Senior Lender or the Junior Lender as trustee or other fiduciary for the other or to impose on either of them any duty, responsibility or obligation other than those expressly provided for herein, including without limitation, any duty of good faith and fair dealing. Each of the Senior Lender and the Junior Lender has, independently and without reliance on the other and based on such documents and information as it has deemed appropriate, made its own credit analysis of the Borrower and agrees that it will, independently and without reliance upon the other, and based on such documents and information as it shall deem appropriate at the time, continue to make its own independent analysis and decisions in taking or not taking action under this Agreement, the Senior Loan Documents or the Junior Loan

Documents, respectively. Among other things, each of the Senior Lender and the Junior Lender will obtain its own inspections, appraisals, and other reports relating to the Borrower and the Project, and will not rely upon inspections, appraisals and other reports produced by or for the other lender. Borrower agrees that Senior Lender and Junior Lender may share information that each may acquire with respect to Borrower, any guarantor, any third party pledgor or the Project, and consents to the transfer of such information, whether financial or otherwise, between them, without having to obtain Borrower's consent. Neither the Senior Lender nor the Junior Lender shall be required to keep itself informed as to the performance or observance by the Borrower of the other lender's loan documents or to inspect the Project or the books and records of the Borrower, including, without limitation, restricting advances of funds under its loan documents because such advances are not allowed under the other lender's loan documents or other agreements between the Borrower and the other lender. It shall be the Junior Lender's responsibility to determine whether the Borrower's agreements and actions under the Senior Loan Documents comply with the Junior Loan Documents. Likewise, it shall be the Senior Lender's responsibility to determine whether the Borrower's agreements and actions under the Junior Loan Documents comply with the Senior Loan Documents. In connection therewith, the Junior Lender releases the Senior Lender from any obligations, costs, claims or expenses (the "Reliance Claims") related to the administration of the Senior Loan or the advance or refusal to advance funds under the Senior Loan Documents that might be contrary to the Junior Loan Documents or any other agreements between the Borrower and the Junior Lender, except as expressly agreed to by the Senior Lender in this Agreement or otherwise expressly prohibited by this Agreement. Likewise, the Senior Lender releases the Junior Lender from any Reliance Claims related to the administration of the Junior Loan or the advance or refusal to advance funds under the Junior Loan Documents that might be contrary to the Senior Loan Documents or any other agreements between the Borrower and Senior Lender, except as expressly agreed to by the Junior Lender in this Agreement. Each of the Junior Lender and the Senior Lender agrees to indemnify and hold harmless the other and its officers, directors and affiliates, from any and all liabilities, costs or expenses of any kind or nature whatsoever relating to or arising out of any Reliance Claims.

Section 4.9. **Approvals by Senior Lender.** Borrower agrees that no request will be made by Borrower to Senior Lender in respect of the operation, leasing and maintenance of the Project or any other matter, which requires the approval of Junior Lender under the Junior Loan Documents (including without limitation consents to easements and/or partial releases), unless Junior Lender has already approved such request in writing and, in receiving and acting upon such request, Senior Lender may conclusively presume that Junior Lender has already approved such request. If requested by Senior Lender, Junior Lender shall confirm such approval in writing.

Section 4.10. **Beneficiaries.** The provisions of this Agreement define the relative rights of Junior Lender and Senior Lender, and nothing contained in this Agreement is intended to or shall impair the obligations of Borrower, which are unconditional and absolute, to pay the Senior Claims and the Junior Claims as and when the same shall become due and payable in accordance with their respective terms, or to affect the relative rights of creditors of the Borrower other than the relative rights of Senior Lender and Junior Lender. Without limiting the generality of the foregoing, it is specifically understood and agreed that the provisions of this Agreement are not

for the benefit of, and may not be enforced by Borrower, or any guarantor or third party pledgor of the Senior Loan or the Junior Loan.

Section 4.11. **Amendments; Waivers.** No amendment, modification, or waiver of any of the provisions of this Agreement by Senior Lender or Junior Lender shall be deemed to be made unless the same shall be in writing signed on behalf of the party making such waiver and any such waiver shall be a waiver only with respect to the specific instance involved, and shall in no way impair the rights of the party making such waiver or, unless otherwise agreed, the obligations of the other party to such party in any other respect or at any other time. No failure to exercise, and no delay in exercising, on the part of Senior Lender and the holders, assignees and beneficiaries (or any agent therefor) from time to time of the Senior Claims and/or the Senior Loan Documents, of any right, power or privilege under this Agreement shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder. Senior Lender shall not be prejudiced in its right to enforce the provisions contained herein in accordance with the terms hereof by any act or failure to act on the part of Borrower. The subordination provisions contained herein are for the benefit of Senior Lender and its successors and assigns as holders from time to time of the Senior Claims and/or the Senior Loan Documents and may not be rescinded or canceled or modified in any way, without the express prior written consent thereto of Senior Lender.

Section 4.12. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State.

Section 4.13. **Notices.** All notices, demands and other communications in connection with this Agreement shall be given personally, by mail, or by Federal Express or other similar national overnight courier, and addressed to the appropriate party at the following address, or such other single address as the party who is to receive such notice may designate in writing by notice given in compliance with this section:



If to Senior Lender: Nationwide Life Insurance Company  
One Nationwide Plaza  
Columbus, Ohio 43215-2220  
Attention: Real Estate Investment Department

If to Junior Lender: City of West Allis  
7525 West Greenfield Avenue  
West Allis, Wisconsin 53214  
Attention: John Stibal, Director of Development

With a copy to: Scott E. Post, City Attorney  
City of West Allis  
7525 West Greenfield Avenue  
West Allis, Wisconsin 53214

If to Borrower: Whitnall – Summit Company, LLC  
6737 West Washington Street  
Suite 2211  
West Allis, Wisconsin 53214

Notice by mail shall be by registered or certified mail. All fees or expenses of mail or overnight courier shall be paid by the sender. Notice shall be deemed received upon actual receipt thereof or if delivery or receipt is refused by the addressee, as of the date of first attempted delivery at the address and in the manner provided herein.

Section 4.14. **Remedies of Senior Lender.** Without in any way limiting any rights or remedies of Senior Lender hereunder or at law or equity, in the event of a breach by Junior Lender or Borrower of any of the terms, covenants or provisions of this Agreement, such Senior Lender shall have, without limitation, the right to specific performance of such terms, covenants and provisions so breached. The rights and remedies provided to Senior Lender in this Agreement, the Senior Loan Documents and in all other agreements, instruments and documents referred to in any of the foregoing are cumulative and shall not be exclusive of any rights or remedies provided by law or equity.

Section 4.15. **Remedies of Junior Lender.** Without in any way limiting any rights or remedies of Junior Lender hereunder or at law or equity, in the event of a breach by Senior Lender or Borrower of any of the terms, covenants or provisions of this Agreement, such Junior Lender shall have, without limitation, the right to specific performance of such terms, covenants and provisions so breached. The rights and remedies provided to Junior Lender in this Agreement, the Junior Loan Documents and in all other agreements, instruments and documents referred to in any of the foregoing are cumulative and shall not be exclusive of any rights or remedies provided by law or equity.

Section 4.16. **Attorneys Fees.** Should any party hereto institute any action or proceeding in court to enforce any provision hereof or for damages by reason of any alleged breach of any provision of this Agreement or for any other judicial remedy, the prevailing party

shall be entitled to receive from the losing party or parties all reasonable attorney's fees and all court costs in connection with said proceeding.

Section 4.17. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which shall together constitute one and the same document.

Section 4.18. **Authorization.** By his signature, each Person executing this Agreement on behalf of a party hereto represents and warrants to the other parties hereto that he is duly authorized to do so.

Section 4.19. **Representations of Senior Lender.**

(a) Senior Lender has all necessary power and authority to execute, deliver and perform its obligations under this Agreement.

(b) All action on the part of Senior Lender that is required for the authorization, execution, delivery and performance of this Agreement has been duly and effectively taken.

(c) This Agreement has been duly executed and delivered by Senior Lender and constitutes the legal, valid and binding obligation of Senior Lender, enforceable in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws affecting the enforcement of creditors' rights and remedies generally, and is subject to general principles of equity.

(d) The loan documents listed on Schedule 2 are all of the documents and instruments executed or delivered to evidence and/or secure the Senior Loan.

Section 4.20. **Representations of Junior Lender.**

(a) Junior Lender has all necessary power and authority to execute, deliver and perform its obligations under this Agreement.

(b) All action on the part of Junior Lender that is required for the authorization, execution, delivery and performance of this Agreement has been duly and effectively taken.

(c) This Agreement has been duly executed and delivered by Junior Lender and constitutes the legal, valid and binding obligation of Junior Lender, enforceable in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws affecting the enforcement of creditors' rights and remedies generally, and is subject to general principles of equity.

(d) The loan documents listed on Schedule 1 are all of the documents and instruments executed or delivered to evidence and/or secure the Junior Loan.

Section 4.21. **Successors and Assigns.** The terms of this Agreement shall apply to, be binding upon, and inure to the benefit of the parties hereto, their successors, assigns and legal representatives, and all other Persons claiming by, through, or under them, including any person who purchases the Senior Loan or a participation interest therein, it being agreed that Senior Lender shall have the right to transfer, sell or assign the Senior Loan and its interests and rights therein and assign its rights and obligations under this Agreement. Junior Lender shall not, without the prior written consent of Senior Lender, pledge, transfer or assign all or any part of the Junior Claims or any rights in respect thereof unless on or prior to the date of transfer, and as a condition thereof, Junior Lender shall obtain a written agreement from such transferee assuming all the obligations of Junior Lender hereunder and agreeing to be bound by this Agreement, in form and substance satisfactory to Senior Lender, in its sole reasonable discretion. Notwithstanding anything to the contrary herein, (i) any transferee or assignee of Senior Lender shall be bound by the terms, provisions and conditions of this Agreement and all of the obligations and covenants of Senior Lender hereunder and (ii) any transferee or assignee of Junior Lender shall be bound by the terms, provisions and conditions of this Agreement and all of the obligations and covenants of Junior Lender hereunder.

Section 4.22. **Termination of Agreement.** The Agreement shall terminate upon full and final payment of any and all amounts due under the Senior Loan Documents.

Section 4.23. **Entire Agreement.** This Agreement embodies the complete agreement between and among the parties hereto and cannot be varied or terminated except by the written agreement of the parties.

Section 4.24. **Gender.** Within this Agreement, words of any gender shall be held and construed to include any other gender, and words in the singular number shall be held and construed to include the plural and words in the plural number shall be held and construed to include the singular, unless the context otherwise requires.

Section 4.25. **Severability of Provisions.** A determination that any provision of this Agreement is unenforceable or invalid shall not affect the enforceability or validity of any other provision hereof and any determination that the application of any provision of this Agreement to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to any other persons or circumstances.

Section 4.26. **Further Agreements.** Until such time as all of the Senior Claims have been paid in full, Junior Lender shall execute, acknowledge and deliver, upon demand by Senior Lender, at any time or times, any and all further subordinations, agreements or other instruments, in recordable form, that Senior Lender may hereafter reasonably require for carrying out the purpose and intent of this Agreement. So long as any Senior Claims are outstanding under the Senior Loan Documents, until such time as all of the Junior Claims have been paid in full, Senior Lender shall execute, acknowledge and deliver, upon demand by Junior Lender, at any time or times, any and all further agreements or other instruments, in recordable form, that Junior Lender may hereafter reasonably require for carrying out the purpose and intent of this Agreement.

Section 4.27. **Borrower's Joinder.** Borrower is executing this Agreement for the sole purpose of evidencing its consent to the terms hereof and the agreements made between Senior

Lender and Junior Lender evidenced hereby, including without limitation, its consent that the Senior Lender and Junior Lender may send notices of any default by Borrower under the Senior Loan Documents or Junior Loan Documents to the other, as the case may be; however, Borrower shall not be entitled to enforce any of the provisions of this Agreement (including without limitation, any cure periods provided herein or any rights to reinstate the Senior Loan or Junior Loan), and Borrower shall not be entitled to receive any copies of any notices provided for under this Agreement. Borrower agrees that Senior Lender and Junior Lender may share information that each may acquire with respect to Borrower, any guarantor, any third party pledgor or the Project, and consents to the transfer of such information, whether financial or otherwise, between them, without having to obtain Borrower's consent. There are no third party beneficiaries to this Agreement.

EXECUTED effective as of the date first above written.

SIGNATURE PAGES FOLLOW









**SCHEDULE 1**

**LIST OF JUNIOR LOAN DOCUMENTS**

1. Resolution Approving October 2005 Amendment to Summit Place Business Park – Amended and Restated Development Agreement dated as of the 11 Day of October 11, 2005 by and between Borrower and Junior Lender.
  
2. Summit Place Business Park Amended and Restated Development Agreement dated December 14, 2004 by and between Borrower, Junior Lender and Whitnall Summit Development Corporation, a Wisconsin corporation

**SCHEDULE 2**

**LIST OF SENIOR LOAN DOCUMENTS**

*(executed as of the date of this Agreement by Borrower unless otherwise noted)*

1. Mortgage and Security Agreement and Fixture Financing Statement
2. Assignment of Leases, Rents and Profits
3. Note
4. Indemnity Agreement
5. Borrower's Certificate
6. Certificate of Non-Foreign Status
7. Escrow Agreement for Reserves and Impounds
8. Escrow Agreement and Closing Instructions
9. Undelivered Items Agreement
10. Guaranty executed by Richard G. Carlson