

**City of Oconomowoc  
Finance Committee**

**Aldermen: Spiegelberg, Chairman / Shaw, Secy / Rosek**

**Tuesday, February 04, 2020 - 7:25 PM**  
**City Hall - Conference Room 3**  
*(or immediately following Public Services)*



**Notice:** If a person with a disability requires that the meeting be accessible or that materials at the meeting be in accessible format, call the City Clerk at least 48 hours prior to the meeting to request adequate accommodations. Tel: 569-2186.

1. Call to order and confirmation of appropriate meeting notification
2. Committee Business
  - a. Consider/recommend Substitute Loan Documents for Berkshire Oconomowoc Development
3. Adjourn

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Diane Coenen, City Clerk  
City of Oconomowoc

Notice is hereby given that a majority of the Common Council will be present at the above scheduled meeting to gather information about a subject over which they have decision-making responsibility. This constitutes a meeting of the Common Council pursuant to State ex rel. Badke v. Greendale Village Board, 173Wis. 2d 553, 494 N.W. 2d 408 (1993) and must be noticed as such, although the Common Council will not take any formal action at this meeting.



# MEMORANDUM

## DEPARTMENT

Date: January 20, 2020  
To: Mayor Nold & City Alderpersons  
From: Bob Duffy, Economic Development  
Laurie Sullivan, Finance  
Re: Substitute Loan Documents for Berkshire Oconomowoc Development

## RELATES TO THE STRATEGIC PLAN

Strategic Goal - Increase Partnerships

## BACKGROUND

In 2006, the City of Oconomowoc and the developer of the Berkshire Senior redevelopment project entered into a public/private partnership agreement. The agreement involved the City providing a \$175,000 loan to restore the historic school house structure in return the City received a long term lease for a portion of the building to be used for a Senior Center. At this time the management entity for the Berkshire property is changing, and as a result of the re-financing of the property an updated Substitute Note and Subordination, Non-Disturbance & Attornment Agreement must be approved. The original terms and maturity date in 2036 remain the same.

## ADDITIONAL ANALYSIS

Attorney Riffle has reviewed all of the documentation supplied, and approves the City executing the Subordination, Non-Disturbance and Attornment Agreement

## RECOMMENDATION

Staff recommends approval.

## SUGGESTED MOTION

Motion to approve the Substitute Loan Documents and Subordination, Non-Disturbance and Attornment Agreement.

**U.S. Department of Housing and Urban Development  
Office of Housing Federal Housing Commissioner**

RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:

John W. Hamilton, Esq.  
Wooden McLaughlin LLP  
One Indiana Square  
Suite 1800  
Indianapolis, Indiana 46204

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(Space above this line for Recorder's Use)

**SUBORDINATION, NON-DISTURBANCE  
AND ATTORNMENT AGREEMENT**

THIS AGREEMENT, made as of this 1<sup>st</sup> day of January, 2020, by and between 85 OCONOMOWOC, LLC, a Wisconsin limited liability company ("Lessor"), as lessor under the lease hereinafter described, and CITY OF OCONOMOWOC ("Lessee"), lessee under the aforementioned lease, in favor of MERCHANTS CAPITAL CORP., an Indiana corporation ("FHA Lender"), the owner and holder of the Mortgage hereinafter described.

**WITNESSETH:**

WHEREAS, Lessor has executed, or will execute that certain Multifamily Mortgage, Assignment of Leases and Rents and Security Agreement, dated as of January 1, 2020 (the "Mortgage"), in favor of FHA lender and covering certain real property (the "Property") located in the County of Waukesha, State of Wisconsin, with a legal description as set forth in Exhibit "A" attached hereto and incorporated herein by this reference, and covering the improvements situated thereon (the "Improvements"); and

WHEREAS, Lessor and Lessee entered into that certain Senior Center Lease dated February 26, 2006, and all amendments thereto (the "Lease"), covering the Improvements for the term and upon the conditions set forth therein; an

WHEREAS, the parties hereto now desire to enter into this Agreement to establish certain rights and obligations with respect to their interests, and to provide for various contingencies as hereinafter set forth.

NOW, THEREFORE, in consideration for the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and of the mutual benefits to accrue to the parties hereto, it is hereby declared, understood and agreed that the Lease, all terms and conditions set forth in the Lease, the leasehold interests and estates created thereby, and the priorities, rights, privileges and powers of Lessee and Lessor there under shall be and the same are hereby, and with full knowledge and understanding of the effect thereof, unconditionally made subject and subordinate to the lien and charge of the Mortgage, all terms and conditions contained therein, any renewals, extensions, modifications or replacements thereof, and the rights, privileges and powers of the trustee and FHA lender there under, and shall hereafter be junior and inferior to the lien and charge of the Mortgage. The parties further agree as follows:

1. It is expressly understood and agreed that this Agreement shall supersede, to the extent inconsistent herewith, the provisions of the Lease relating to the subordination of the Lease and the leasehold interests and estates created thereby to the lien or charge of the Mortgage.
2. FHA lender consents to the Lease.
3. In the event FHA lender or any other purchaser at a foreclosure sale or sale under private power contained in the Mortgage, or by acceptance of a deed in lieu of foreclosure, succeeds to the interest of Lessor under the Lease by reason of any foreclosure of the Mortgage or the acceptance by FHA lender of a deed in lieu of foreclosure, or by any other manner, it is agreed as follows:
  - (a) Lessee shall be bound to FHA lender or such other purchaser under all of the terms, covenants and conditions of the Lease for the remaining balance of the term thereof, with the same force and effect as if FHA lender or such other purchaser were the lessor under such Lease, and Lessee does hereby agree to attorn to FHA lender or such other purchaser as its lessor, such attornment to be effective and self-operative without the execution of any further instruments on the part of any of the parties to this Agreement, immediately upon FHA lender or such other purchaser succeeding to the interest of Lessor under the Lease.
  - (b) Subject to the observance and performance by Lessee of all the terms, covenants and conditions of the Lease on the part of the Lessee to be observed and performed, FHA lender or such other purchaser shall recognize the leasehold estate of Lessee under all of the terms, covenants and conditions of the Lease for the remaining balance of the term (as the same may be extended in accordance with the provisions of the Lease) with the same force and effect as if FHA lender or such other purchaser

were the lessor under the Lease and the Lease shall remain in full force and effect and shall not be terminated, except in accordance with the terms of the Lease or this Agreement; provided, however, that FHA lender or such other purchaser shall not be (i) liable for any act or omission of Lessor or any other prior lessor, (ii) obligated to cure any defaults of Lessor or any other prior lessor under the Lease which occurred prior to the time that FHA lender or such other purchaser succeeded to the interest of Lessor or any other prior lessor under the Lease, (iii) subject to any offsets or defenses which Lessee may be entitled to assert against Lessor or any other prior lessor, (iv) bound by any payment of rent or additional rent by Lessee to Lessor or any other prior lessor for more than one (1) month in advance, (v) bound by any amendment or modification of the Lease made without the written consent of FHA lender or such other purchaser, or (vi) liable or responsible for or with respect to the retention, application and or return to Lessee of any security deposit paid to Lessor or any other prior landlord, whether or not still held by Lessor, unless and until FHA lender or such other purchaser has actually received for its own account as lessor the full amount of such security deposit.

Lessee hereby agrees that it will not exercise any right granted it under the Lease, or which it might otherwise have under applicable law, to terminate the Lease on account of a default of Lessor there under or the occurrence of any other event without first giving to FHA lender prior written notice of its intent to terminate, which notice shall include a statement of the default or event on which such intent to terminate is based. Thereafter, Lessee shall not take any action to terminate the Lease if FHA lender (a) within thirty (30) days after service of such written notice on FHA lender by Lessee of its intention to terminate the Lease, shall cure such default or event if the same can be cured by the payment or expenditure of money, or (b) shall diligently take action to obtain possession of the leased premises (including possession by receiver) and to cure such default or event in the case of a default or event which cannot be cured unless and until FHA lender has obtained possession, but in no event to exceed ninety (90) days after service of such written notice on FHA lender by Lessee of its intention to terminate.

4. Lessor and Lessee hereby certify to FHA lender that the Lease as previously submitted to FHA lender has not been further amended.
5. For the purposes of facilitating FHA lender's rights hereunder, FHA lender shall have, and for such purposes is hereby granted by Lessee and Lessor, the right to enter upon the Property and the Improvements thereon for the purpose of affecting any such cure.
6. Lessee hereby agrees to give to FHA lender concurrently with the giving of any notice of default under the Lease, a copy of such notice by mailing the same to FHA lender in the manner set forth herein below, and no such notice given to Lessor which is not at or about the same time also given to FHA lender shall be valid or effective against FHA lender for any purpose.

7. Subordination of Lease to Mortgage and Regulatory Agreement and Regulation by the U.S. Department of Housing and Urban Development (“HUD”).
- (a) The Lease and all estates, rights, options, liens and charges therein contained or created under the Lease are and shall be subject and subordinate to the lien or interest of (i) the Mortgage on the Lessor’s interest in the Property in favor of FHA lender, its successors and assigns insofar as it affects the real and personal property comprising the Property (and not otherwise owned, leased or licensed by Lessee) or located thereon or therein, and to all renewals, modifications, consolidations, replacements and extensions thereof, and to all advances made or to be made there under, to the full extent of amounts secured thereby and interest thereon, and (ii) that certain Regulatory Agreement for Multifamily Housing Projects between Lessor and HUD to be recorded against the Property.
  - (b) The parties to the Lease agree to execute and deliver to FHA lender and/or HUD such other instrument or instruments as the FHA lender and/or HUD, or their respective successors or assigns, shall reasonably request from time to time to reconfirm the status of the Lease and to effect and/or confirm the subordination of the Lease to the lien of the Mortgage and the above-described Regulatory Agreement. To the extent that any provision of the Lease shall be in conflict with the HUD Program Obligations (as such term is defined below), the HUD Program Obligations shall be controlling.
  - (c) In the event HUD, at a foreclosure sale or sale under private power contained in the Mortgage, or by acceptance of a deed in lieu of foreclosure, succeeds to the interest of Lessor under the Lease by reason of any foreclosure of the Mortgage or the acceptance by HUD of a deed in lieu of foreclosure, or by any other manner, it is agreed as follows:
    - (i) HUD can terminate the Lease for any violation of the Lease that is not cured within any applicable notice and cure period given in the Lease.
    - (ii) As used in this Agreement “HUD Program Obligations” shall mean all applicable statutes and regulations, including all amendments to such statutes and regulations, as they become effective, and all applicable requirements in HUD Handbooks, Notices and Mortgagee Letters that apply to the Property, including all updates and changes to such Handbooks, Notices and Mortgagee Letters that apply to the Property, except that changes subject to notice and comment rulemaking shall become effective upon completion of the rulemaking process.
  - (d) To the extent there is any inconsistency between the terms of this Subordination, Non Disturbance and Attornment Agreement, and the Lease, the terms of this Subordination, Non Disturbance and Attornment Agreement shall be controlling.

8. For purposes of any notices to be given to FHA lender hereunder, the same shall be sent by U.S. certified mail, return receipt requested, postage prepaid, to FHA lender at the following address: **410 Monon Boulevard, 5<sup>th</sup> Floor, Carmel, Indiana 46032** or to such other address as FHA lender may hereafter notify Lessee in writing by notice sent to Lessee as aforesaid at Lessee's address at the Property, or such other address as FHA lender may hereafter be advised of in writing by notice sent to FHA lender as aforesaid.
9. The agreements contained herein shall run with the land and shall be binding upon and inure to the benefit of the respective heirs, administrators, executors, legal representatives, successors and assigns of the parties hereto.
10. This Agreement may be executed in one or more counterparts, all of which when taken together shall constitute a single instrument.
11. This Agreement shall, in all respects, be governed by and construed and interpreted in accordance with the laws of the **State of Wisconsin**.

**[SEE ATTACHED SIGNATURE PAGES]**

**LESSOR'S SIGNATURE AND NOTARY PAGE TO  
SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT  
AGREEMENT**

**85 OCONOMOWOC, LLC,**  
a Wisconsin limited liability company

By: General Capital Management, Inc.,  
a Wisconsin corporation,  
its Manager

By: \_\_\_\_\_  
David J. Weiss, CEO

COUNTY OF INDIANA        )  
  ) SS:  
STATE OF MARION         )

Before me, a Notary Public in and for said County and State, personally appeared David J. Weiss, CEO of General Capital Management, Inc., a Wisconsin corporation, which is the Manager of 85 Oconomowoc, LLC, a Wisconsin limited liability company, who, after having been duly sworn, acknowledged the execution of the foregoing Subordination, Non-Disturbance and Attornment Agreement for and on behalf of 85 Oconomowoc, LLC.

WITNESS, my hand and Notarial Seal this \_\_\_\_ day of \_\_\_\_\_, 2020.

My Commission Expires:  
\_\_\_\_\_

\_\_\_\_\_  
Notary Signature

County of Residence:  
\_\_\_\_\_

\_\_\_\_\_  
Notary Printed





## **EXHIBIT A**

### **LEGAL DESCRIPTION**

**PARCEL I:**

Lots 111, 112, 113, 114, 115 and 116, the South 1/2 of Lots 109 and 110 in the Plat of the Village of Oconomowoc, being a part of the West 1/2 of Section 33 and Fractional Lot 1 of Section 32, Town 8 North, Range 17 East, in the City of Oconomowoc, County of Waukesha, State of Wisconsin.

**PARCEL II:**

The East 1/2 of Lot 36 and the East 54 and 1/2 feet of Lot 35, in Worthington's Second Addition, in the Southeast 1/4 of Section 32, Town 8 North, Range 17 East and part of the Northeast 1/4 of Section 5, Town 7 North, Range 17 East, in the City of Oconomowoc, County of Waukesha, State of Wisconsin.

**PARCEL III:**

A non-exclusive easement for ingress and egress set forth in Easement and Agreement recorded December 7, 2005, as Document No. 3343906.

**SUBSTITUTE NOTE**

\$175,000

\_\_\_\_\_, Wisconsin  
\_\_\_\_\_, 2020

The undersigned, 85 Oconomowoc MM, LLC, a Wisconsin limited liability company (the "Borrower"), promises to pay to the order of City of Oconomowoc (the "Lender"), on February 28, 2036 (the "Original Maturity Date"), the sum of One Hundred Seventy Five Thousand and no/100 Dollars. Notwithstanding the foregoing, if the Senior Center Lease dated February 28, 2006 (the "Lease") between 85 Oconomowoc, LLC ("Original Borrower"), as landlord, and the Lender, as tenant, is terminated prior to the Original Maturity Date as a result of (a) the default of the Borrower under the terms of the Lease or (b) the Borrower exercising the termination right provided in the Lease, then in such event, the entire principal balance of this Note shall be due and payable upon the date of the termination of the Lease.

Prior to maturity, this Note shall not bear interest. After maturity, the outstanding principal balance shall bear interest at the rate of twelve percent (12%) per year.

The Borrower waives presentment for payment, notice of dishonor, presentment, notice of protest, protest and all diligence of collection

All payments shall be made in immediately available funds, at the principal office of the Lender in Oconomowoc, Wisconsin. The holder of this Note may, from time to time, designate in writing such other place of payment as it may select.

This Note may be prepaid in whole or in part at any time without penalty.

The undersigned shall pay all costs of collection, including reasonable attorneys' fees.

This Note shall be governed by and construed in accordance with the internal laws of the State of Wisconsin.

This Substitute Note supersedes and replaces that certain Note of the same amount from Original Borrower to Lender dated February 28, 2006.

85 OCONOMOWOC MM, LLC

By: BEDROCK CAPITAL GROUP, LLC,  
Manager

By: GENERAL CAPITAL MANAGEMENT,  
INC., Manager

By: \_\_\_\_\_  
David J. Weiss, CEO