

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. FAR-31007**

E. MARK NOONAN
Plaintiff/Appellant/Respondent

v.

CBW LENDING, LLC
Defendant/Appellee/Petitioner

**DEFENDANT/APPELLEE/PETITIONER CBW LENDING LLC'S
APPLICATION FOR FURTHER APPELLATE REVIEW FOLLOWING A
DECISION OF THE MASSACHUSETTS APPEALS COURT**

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July 27, 2026

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21(a), by and through its undersigned counsel, CBW Lending, LLC (“CBW”) states that its sole member is Coastal Belmont, LLC and that Vornado Realty, L.P., which is a subsidiary of Vornado Realty Trust, which is publicly held, owns a 50% membership interest in Coastal Belmont, LLC.

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW.

CBW Lending, LLC (“CBW”) respectfully requests further appellate review of the Appeals Court’s July 6, 2026, Memorandum and Order Pursuant to Rule 23.0 (the “Decision,” Add. at 22). CBW has also filed a motion for reconsideration with the Appeals Court, which remains pending.

This dispute involves interlocking commercial real estate loan documents entered into in 2005 by CBW’s predecessor-in-interest with a senior and a junior lender and a settlement agreement executed in 2011 that resolved an earlier dispute concerning those loans. The Appeals Court panel (the “Panel”) determined that a provision (the “Capital Event provision”) in the subordinated promissory note was ambiguous, overruling the determination of the Business Litigation Session of the Superior Court (“BLS”) that the language was clear (the “BLS Order,” Add. at 39, 45). It then resolved the meaning of that provision as a matter of law and directed judgment for the Appellant (“Noonan”), who was originally the junior lender. In doing so, the Panel declared CBW’s and the BLS judge’s plain reading of the provision “commercially meaningless,” Decision at 12–13, even though the provision simply recognized the priority of the first mortgage over Noonan’s subordinated position, and the Panel framed Noonan’s sworn deposition testimony supporting the same plain reading as a possible “misunderstanding or misspeaking.” Decision at 14. The Panel did all of this without remanding for a trial, without

viewing the evidence in CBW's favor on Noonan's cross-motion for summary judgment, and without meaningfully addressing CBW's potentially dispositive alternative defenses, including that the settlement agreement superseded the Capital Event provision that the Panel determined was dispositive.

This Court should grant further appellate review because the Decision raises substantial questions affecting the public interest and the interests of justice. The Decision disregards the fundamental principle that when evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Blake v. Hometown Am. Cmty., Inc.*, 486 Mass. 268, 272 (2020). The Decision also departs from the settled framework of *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 779 (2002), under which whether a contract is ambiguous is a question of law, but once ambiguity is found, the meaning of the ambiguous provision is a question of fact for trial. The Decision also contravenes the principle that an appellate court should remand for the trial court to address unresolved questions in the first instance. *Merrimack Coll. v. KPMG LLP*, 480 Mass. 614, 629 (2018). The Decision also undermines both the ability of sophisticated parties to rely on the plain text of commercial agreements, *see Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 638 (2007), and the strong Massachusetts public policy favoring settlement. *See Peters v. Wallach*, 366 Mass. 622, 623 (1975).

II. STATEMENT OF PRIOR PROCEEDINGS.

In March 2021, Noonan sued CBW in Superior Court, alleging that CBW breached a 2005 promissory note (the “Noonan Note,” Add. at 49), a related mortgage (the “Noonan Mortgage”), and the 2011 settlement agreement (the “Settlement Agreement,” Add. at 47) by entering into a mortgage on the property with a maximum loan amount of \$5 million (the “2017 Mortgage”) without Noonan’s consent. Decision at 7–8.

On June 22, 2023, the parties cross-moved for summary judgment. On October 2, 2023, the BLS granted summary judgment to CBW because “under the unambiguous terms of the relevant contracts, no acceleration-triggering default or action requiring immediate payment occurred.” BLS Order at 5. First, the court observed that the Noonan Mortgage required written notice and a ten-day cure period before any breach could ripen into a default, and it concluded that CBW had cured any alleged breach related to entering into the 2017 Mortgage without Noonan’s consent before Noonan gave such notice. *Id.* at 6. Second, it determined that the Capital Event provision unambiguously applied to financings that generated in excess of \$8.82 million, and it straightforwardly observed that the \$5 million loan secured by the 2017 Mortgage did not trigger the provision because the loan amount was below that threshold. *Id.* at 7. Third, it determined that the 2017 Mortgage was

not a “disposition” of the property entitling Noonan to share 50/50 in the proceeds thereof under the Settlement Agreement. *Id.* at 7–8.

Noonan appealed. On July 6, 2026, the Panel reversed the BLS and directed entry of judgment for Noonan. Decision at 16–17. The Panel determined that the Capital Event provision was ambiguous, resolved the ambiguity in Noonan’s favor, and concluded that the 2017 Mortgage constituted an event of default under the Noonan Mortgage. Decision at 11–16.

On July 20, 2026, CBW filed a motion for reconsideration in the Appeals Court. That motion remains pending.

III. STATEMENT OF FACTS.

The following facts and provisions are essential to the issues presented.

The Capital Event Provision. The Noonan Note requires mandatory prepayment “upon the occurrence of a Capital Event,” defined in relevant part as “any equity financing, debt financing or combination thereof by either the Borrower or [its parent] which generates in excess of” \$8,820,000.00. Decision at 4–5. The 2017 Mortgage was limited to \$5 million. Decision at 7.

The Intercreditor Agreement. On September 12, 2005, the original borrower and the two lenders executed an Intercreditor and Subordination Agreement (the “ICA,” Add. at 53) simultaneously with the other loan documents. The ICA defined the “Senior Loan” as the principal sum of \$8,820,000 loaned by Anglo-Irish Bank.

Id. The ICA fully subordinated Noonan’s right to repayment: “the payment of all or any part of [Noonan’s] Subordinate Indebtedness shall be postponed and subordinated to the payment in full of the Senior Indebtedness.” *Id.* § 3. Noonan could receive “regularly scheduled payments (*but not prepayments*)” while the senior debt remained outstanding. *Id.* (emphasis added). In the event of conflict between the ICA and the subordinate loan documents, the ICA controlled. *Id.* § 20. As described below, the ICA remained in place until it was terminated by the Settlement Agreement. The Decision does not discuss the ICA, its payment-subordination provisions, or the rationale for and impact of the Settlement Agreement’s termination of the ICA.

The Federal Court’s Analysis of the Same Documents. In earlier litigation involving these same documents, the Massachusetts federal District Court held that the ICA’s payment subordination controlled over the Capital Event provision: “even if the \$1,000,000 future advance or the property option agreement was a capital event under the second promissory note, there was no immediate payment obligation on the part of [CBW’s predecessor] because section three of the ICA postponed any such capital event payment.” *Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298, 337 (D. Mass. 2010). The federal court also concluded that a “Mandatory Prepayment” under the Capital Event provision was a “prepayment” blocked by the ICA until the senior debt was paid in full. *Id.* at 337 n.97.

The Settlement Agreement’s Comprehensive Restructuring. In May 2011, the parties to the federal litigation—including Noonan, CBW, and Anglo Irish Bank—executed a “binding and enforceable” Settlement Agreement that resolved the federal action and fundamentally restructured the parties’ relationship. Decision at 5–6; Add. at 47. The Settlement Agreement eliminated the ICA, elevated Noonan’s formerly subordinated loan to shared first priority (Settlement Agreement § 12; Decision at 5–6), ceased all interest accrual on both debts (Settlement Agreement § 4), limited both lenders’ recourse to the property (§§ 2–3), established a new payout structure under which the two lenders would share 50/50 in the proceeds of a “subsequent disposition” of the property until Noonan received \$6.8 million (§ 10), prohibited foreclosure without mutual consent (§ 12), and provided for a \$2 million immediate cash payment to Noonan (§§ 5–6).¹

Noonan ultimately recovered \$8.8 million on an original \$3,929,000 loan, including the \$2 million settlement payment, \$6,796,500 from an eventual eminent domain taking of the property, and his \$3,500 share of the proceeds of the sale of a sliver of the property to a neighbor. Decision at 8; RA/1270, ¶ 21, 1276–77, ¶ 42.

¹ Although the Settlement Agreement contemplated a “definitive agreement” memorializing its terms, one was never executed. Settlement Agreement § 7; Decision at 6–7. However, in a subsequent Release Agreement, the Parties agreed that the “Settlement Agreement . . . and together with the CBW Note, the Noonan Note, the CBW Mortgage, and the Noonan Mortgage (*all as they have been amended by the Settlement Agreement*), governs the rights and obligations of the Parties with respect to the matters set forth therein” RA/234–35 (emphasis added).

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT.

1. Whether a court evaluating cross-motions for summary judgment may view the facts in the light most favorable to only one party (who is the non-moving party as to one cross-motion and the moving party as to the other), or whether the court must instead view the facts in the light most favorable to the non-moving party when evaluating each cross-motion.

2. Whether an appellate court that determines a contract provision is ambiguous on de novo review may resolve the ambiguity and direct entry of judgment as a matter of law, or whether ambiguity requires remand for trial—particularly where the plaintiff’s own sworn deposition testimony supports the non-moving defendant’s (and the BLS judge’s) reading.

3. Whether an appellate court may direct entry of judgment for the plaintiff while the defendant’s potentially dispositive alternative defenses remain unresolved—including defenses arising from a comprehensive settlement agreement—and whether such treatment adheres to the strong Massachusetts public policy favoring settlement.

4. Whether the Panel erred in finding ambiguous a capital-event provision whose plain text sets a prospective prepayment threshold at the amount of senior debt ahead of the noteholder—a reading the Superior Court and the noteholder himself confirmed.

V. STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE.

A. The Decision Misapplies the Summary Judgment Standard.

The parties cross-moved for summary judgment. On cross-motions, the court must evaluate each motion independently, viewing the evidence in the light most favorable to the nonmoving party on each motion. *Blake*, 486 Mass. at 272. When the Panel evaluated CBW’s motion for summary judgment, it viewed the evidence in Noonan’s favor. But when the Panel considered Noonan’s cross-motion, it failed to view the evidence in CBW’s favor. *See Smiley First, LLC v. Dep’t of Transp.*, 492 Mass. 103, 108 (2023) (requiring reviewing court on cross-motions for summary judgment to assess record in light most favorable “to the party against whom judgment has been entered”). The Panel effectively granted Noonan’s cross-motion while viewing every disputed issue—including the Capital Event provision, Noonan’s deposition testimony, the Settlement Agreement, and damages—exclusively from a pro-Noonan perspective.

The Panel’s treatment of Noonan’s deposition testimony exemplifies its erroneous application of the summary judgment standard. Noonan testified under oath that the Capital Event provision means “beyond the fully drawn-down at the time Anglo Irish loan, no more than \$8.82 million could be borrowed or of—any form of capital could be raised without prepayments on my note being made.” Decision at 13. Noonan’s sworn admission directly supports the Superior Court’s

decision. BLS Order at 7.

On Noonan’s cross-motion, the Panel should have evaluated this testimony in CBW’s favor. Instead, the Panel, noting that the testimony came “at the very end of the then seventy year old plaintiff’s four-hour deposition,” dismissed it as possible “misunderstanding or misspeaking,” Decision at 13–14, weighed it against Noonan’s own pleadings, and chose which version to credit—a forbidden exercise on summary judgment. Even if Noonan’s testimony is internally inconsistent, that *creates* a genuine issue of material fact rather than resolving one. *See Benvenuto v. 204 Hanover, LLC*, 97 Mass. App. Ct. 140, 146–47 (2020) (contradictory statements within a deposition “create a factual conflict that must be resolved by the jury”).

This Court should grant further appellate review to clarify the standard for evaluating cross-motions for summary judgment.

B. The Decision Misapplies the Standard for Resolving Ambiguity.

Whether a contract is ambiguous is a question of law, but once ambiguity is found, “the intent of the parties is a question of fact to be determined at trial.” *Seaco*, 435 Mass. at 779. This Court has reversed on this ground repeatedly. *See, e.g., Wortis v. Trustees of Tufts Coll.*, 493 Mass. 648, 668 (2024) (reversing summary judgment because contractual provision was ambiguous); *Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 650–51 (2008) (finding error where lower court resolved meaning of ambiguous provision).

The Decision collapsed two distinct inquiries into one. After determining that the provision was ambiguous, the Panel resolved its meaning and directed judgment—without a trial and without remanding. When the Panel selected what it called “[t]he best reading” of the provision, Decision at 13, including by evaluating Noonan’s testimony, it overlooked the fact-finder’s role in resolving ambiguity.

This Court should grant further appellate review to clarify the framework that governs when an appellate court determines that a contract is ambiguous.

C. The Decision Directed Judgment While CBW’s Alternative Defenses Remained Unresolved, Undermining Settlement Policy.

Having granted summary judgment in CBW’s favor, the Superior Court declined to address CBW’s alternative defenses, including the impact of § 9 of the Settlement Agreement, which gave CBW sole discretion and control over the property; whether §§ 2 and 10–12 of the Settlement Agreement superseded the Capital Event provision; and whether Noonan suffered any cognizable injury. The Panel did not reach §§ 2 or 9 and gave the other defenses only cursory treatment. Decision at 14–16.

The Panel’s interpretation of the Capital Event provision nullifies § 9, which gave “sole discretion and control of ownership, development and disposition of the Wonderland Property” to CBW. For example, the events underlying Noonan’s case arose when one of three members of CBW declined to cover the costs of demolition mandated by the City of Revere and the other two members funded the work through

the 2017 Mortgage loan to protect their interests against the third member's. RA/1273–74 ¶ 33. The Capital Event provision applies to both debt and equity financings. Add. at 49. Under the Panel's interpretation, even if the third member had agreed to contribute his share of the demolition costs through an all-member equity financing (and, accordingly, the 2017 Mortgage had never existed), the equity financing undertaken to pay for the demolition would have immediately triggered a payment obligation to Noonan. This interpretation denies CBW the right to deploy equity toward the ownership and development of the Wonderland Property—a fundamental right under the Settlement Agreement—and entirely disregards the Settlement Agreement's restructured payout and control provisions.

The Panel concluded that the Settlement Agreement amended the Capital Event provision only by resetting the threshold to \$9.82 million, calling this “the only amendment . . . that could have been wrought.” Decision at 15 n.7. The Panel overlooked that because of Noonan's subordination under the original documents, the Settlement Agreement necessarily had to restructure the Capital Event provision to accomplish the Settlement Agreement's new payout structure. Appellee's Br. at 42–43.

From the origination of the loans until the Settlement Agreement, Noonan's right to repayment was fully subordinated to the senior debt under ICA § 3. When the parties agreed to elevate Noonan to a shared first-priority position, the Capital

Event provision, which was designed for a subordinated second mortgagee, no longer fit. The Settlement Agreement replaced it with the payout mechanism in §§ 10–12, under which the now-equal-priority lenders share 50/50 in the proceeds of a disposition of the property. By eliminating the ICA and replacing the Capital Event provision, the Settlement Agreement allowed Noonan to share in the first dollar raised from the Property’s disposition, while under the original loan documents, Noonan would have received no payment, even if a Capital Event occurred, until the first mortgage was paid in full. *Noonan*, 723 F. Supp. 2d at 337&n.97. It would have been commercially irrational for CBW to agree to eliminate the ICA and to adopt the 50/50 split if doing so simultaneously activated the Capital Event provision against CBW and precluded CBW (by then also one of the two lenders) from collecting its own 50% share of the disposition proceeds—yet that is the consequence of the Panel’s interpretation.

The Panel’s cursory treatment of a comprehensive settlement—which restructured the entire payment waterfall and control of the property—undermines the strong Massachusetts public policy favoring settlement. *See Peters*, 366 Mass. at 623 (affirming enforcement of a settlement agreement).

The Panel’s damages conclusion is similarly unsupported. Noonan has already recovered \$8.8 million on his \$3,929,000 loan. Under the Settlement Agreement, when securing that payout from his out-of-the-money, subordinated

position, he agreed to forgo the accrual of any further interest (§ 4), receive no further payment until disposition (§§ 10–11), limit his recourse to the property (§ 2), and cede sole discretion and control to CBW (§ 9)—all with no exception for breach of the Noonan Note or Mortgage. By directing judgment for Noonan including additional damages without applying these key provisions, through which Noonan bargained for an immediate \$2 million payout and a shared first-priority position, the Panel generated an impermissible windfall and contradicted § 2 of the Settlement Agreement. Add. at 47 (“Noonan’s Debt is set at \$8.8 million with recourse *only* to the Wonderland real property” (emphasis added)).

When a trial court grants summary judgment on one ground and the appellate court reverses, the proper disposition is remand so the trial court may consider alternative grounds. *See, e.g., Merrimack*, 480 Mass. at 629 (“We vacate the order granting summary judgment and remand the case to the Superior Court for consideration of KPMG’s three other grounds for summary judgment.”). Directing judgment in Noonan’s favor while several potentially dispositive defenses remain unexamined and unresolved contravened this principle.

The Court should grant further appellate review to preserve the public interest in the durability of settlement agreements and in a judicial system that fully evaluates disputes when settlements cannot be reached.

D. The Decision Misread Plain Text and Overlooked the Commercially Explicable Reason for the \$8.82 Million Threshold.

The Capital Event provision requires mandatory prepayment only when a financing “generates in excess of” \$8.82 million. The 2017 Mortgage was limited to \$5 million—well below that threshold. The Superior Court correctly concluded this was not a Capital Event. The Panel’s contrary determination was wrong.

First, the Panel overlooked the provision’s unambiguously prospective language. The provision protected Noonan in the event of future capital raises. It did not refer to the first-day funding of the notes. Add. at 49 (“[T]he Borrower *shall be required* to make prepayments to Lender of the *then-outstanding* principal and accrued interest under this Note *upon the occurrence of* a Capital Event.” (emphasis added)).

Second, the Panel overlooked the significance of Noonan’s position as a subordinated second mortgagee who was behind \$8.82 million in senior debt when it concluded that CBW “has not put forward any commercially explicable reason . . . for the choice to allow an exact doubling of the amount borrowed from Anglo Irish Bank,” and that the matching figure is “commercially meaningless with respect to any future borrowing that might be prohibited.” Decision at 12–13.

The Capital Event threshold matched that figure because Noonan was entitled to prepayment only from new, post-closing capital raised *in excess of* the amount needed to fully repay the senior debt ahead of him—not from the first \$8.82 million

of such capital. *See* Appellee’s Br. at 28–30. Noonan himself confirmed this understanding at his deposition. *Id.*

The Decision inverts the priority of the mortgages. Under the Panel’s reading, the mortgagor cannot partially or entirely pay off the first mortgage with proceeds of a capital event unless it first pays off the second mortgage entirely. In contrast, under the BLS’s interpretation, the provision protected Noonan because whether or not the mortgagor used financing proceeds to pay down the senior loan, Noonan would be entitled to claim prepayment of his Note as soon as the mortgagor had raised enough money to do so.

By reversing the BLS’s straightforward reading of clearly worded text, the Panel undermined the ability of investors like CBW—which was not a party to the Noonan Note—to rely on the plain text of the commercial agreements they evaluate. *Cabot*, 448 Mass. at 638 (“Where knowledgeable and fully represented parties choose to embody their relationship in a carefully crafted document, negotiated over several months, they are entitled to and should be held to the language they chose.”).

This Court should grant further appellate review to address the Panel’s erroneous interpretation of the Capital Event provision.

E. This Case Is a Strong Vehicle for Resolving These Questions.

This case presents clean legal questions on a fully developed record. The record contains the complete text of every relevant instrument. The questions

presented are squarely teed up: the Panel found ambiguity, resolved it as a matter of law while viewing evidence in Noonan's favor, and directed judgment for Noonan while CBW's alternative defenses remained unresolved—allowing this Court to address the proper frameworks without the complications of a mixed factual record.

CONCLUSION

For these reasons, CBW respectfully requests that this Court grant further appellate review.

Dated: July 27, 2026

Respectfully submitted,

CBW Lending, LLC

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RULE 27(b) STATEMENT

I hereby certify that this Application complies with Mass. R. App. P.

27.1(b). The Statement of Reasons Why Further Appellate Review Is Appropriate totals 1,895 words in Times New Roman 14-point font, as counted by using the Microsoft Word “Word Count” function to count all words, including headings, footnotes, and quotations. The Application was prepared using Microsoft Word for Microsoft 365.

/s/ Michael R. Walsh

Michael R. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2026, I served this document on counsel of record via email and eFileMA.

/s/ Michael R. Walsh

Michael R. Walsh

ADDENDUM

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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-1311

E. MARK NOONAN

vs.

CBW LENDING, LLC.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, E. Mark Noonan, filed a complaint in the Superior Court against the defendant, CBW Lending, LLC (CBW Lending), alleging breaches of a promissory note, a mortgage, and a prior settlement agreement between the parties. After a hearing on cross motions for summary judgment, the judge issued an order granting summary judgment to the defendant. The plaintiff appealed from the decision, which was later entered as a final judgment.¹ We find that the defendant committed a breach

¹ Although the plaintiff's notice of appeal preceded the entry of final judgment, this appeal encompasses the final judgment, where the order from which the plaintiff noticed his appeal "adjudicated all remaining claims." Mass. R. A. P. 3 (c) (1) (D), as appearing in 491 Mass. 1601 (2023).

of the "Capital Event" provision of the promissory note, and that that was an event of default under § 21 (e) of the mortgage, and hence we reverse.

Background. We summarize the undisputed facts. On September 12, 2005, Wonderland Greyhound Park Realty, LLC (WGPR), entered into two mortgages. The first mortgage, with Anglo Irish Bank Corporation Limited (Anglo Irish Bank), was in the amount of \$8.82 million, and the second mortgage (Noonan mortgage), with the plaintiff, was in the amount of \$3,929,000. Both mortgages were secured by the Wonderland Greyhound Park property (property) at 190 VFW Parkway in Revere. Wonderland Greyhound Park was a racetrack for parimutuel² greyhound racing, that is, greyhound racing upon which patrons could bet. On January 1, 2010, following passage of a popular referendum, parimutuel dog racing was banned in Massachusetts. On the same date as it entered into the Noonan mortgage, WGPR signed a promissory note to Noonan labelled "Second Mortgage Note" (Noonan note). The mortgage with Anglo Irish Bank took first priority over the Noonan mortgage. In February 2010, the defendant, CBW Lending, purchased the first mortgage from Anglo Irish Bank (CBW mortgage). CBW Lending was an affiliate of

² Parimutuel betting is a wagering system where all bets are pooled and winners share the total pool.

Suffolk Sterling Racecourse, LLC, the owner of Suffolk Downs, then a horse racing track in East Boston.³

The Noonan mortgage includes the following relevant provisions:

"The Mortgagor hereby covenants and agrees . . .

"1. to perform all of the covenants and agreements in the Note; . . .

"4. to fully and timely comply with all representations, warranties and covenants of the First Mortgage; . . .

"13. to notify the Mortgagee promptly of the existence of and the exact details of any other security interest in the Premises . . . ;

"16. [t]hat the Mortgagor shall not:

"(a) create or permit to be created any encumbrance to attach to the Premises . . . and if such encumbrance is attached upon the Premises without the consent of the Mortgagor, to discharge the same within thirty (30) days of the date of such attachment; . . .

"17. if this Mortgage is at any time subject or subordinate to another mortgage, the Mortgagor shall not modify, amend, or extend such prior mortgage, or the debt or other obligation secured thereby, without the consent of the Mortgagee; any default under said prior mortgage or the obligations secured thereby shall be a default hereunder, and the Mortgagee shall be entitled but not obligated to cure said default, as provided in Paragraph 14 hereof; and . . .

"21. . . . [t]he occurrence of any one or more of the following events (each an "Event of Default") shall

³ CBW Lending is a limited liability company that has a single member, Coastal Belmont, LLC. Coastal Belmont, LLC, had three members, all owners of Suffolk Downs, through August 7, 2018. Two of them, not including the principal owner of Suffolk Downs, remained members thereafter.

constitute a default under and breach of this Mortgage:
. . .

"(e) failure to observe or perform any covenant, agreement, condition, term or provision of any of the restrictions, covenants and conditions set forth or referred to in any of the Security Documents other than this Mortgage; or . . .

"(g) failure to observe or perform any covenant, agreement, condition, term or provision of this Mortgage, and such failure shall continue without having been duly cured for a period of 10 days after written notice thereof given by the Mortgagee to the Mortgagor

"Upon the occurrence of any Event of Default, Mortgagee may at any time thereafter, at its option and without notice, exercise any or all of the following rights and remedies:

"(a) declare the entire debt secured hereby due and payable, and such debt shall thereupon become and be immediately due and payable"

Meanwhile, the Noonan note includes a provision (capital event provision) that reads

"Notwithstanding anything set forth herein to the contrary, the Borrower shall be required to make prepayments to Lender of the then-outstanding principal and accrued interest under this Note upon the occurrence of a Capital Event, as defined below (in each case, a 'Mandatory Prepayment'). For the purposes of this Note, a 'Capital Event' shall mean any of . . . (ii) any equity financing, debt financing or combination thereof by either the Borrower [WGPR] or Westwood [its parent company] which generates in excess of EIGHT MILLION EIGHT HUNDRED AND TWENTY THOUSAND and 00/100ths DOLLARS (\$8,820,000.00). The amount of any such Mandatory Prepayment shall equal the aggregate amount of capital generated by a Capital Event, after deduction of all of the Borrower's reasonable fees and expenses occurred in connection therewith, and shall be payable to Lender concurrently with the closing on the relative Capital Event."

In December 2008, the plaintiff filed a suit against numerous parties, including WGPR and Anglo Irish Bank, after discovering, among other issues, further borrowing by WGPR from the Anglo Irish Bank of \$1 million and a concomitant agreed-upon increase in the principal amount of the first mortgage to \$9.82 million. He argued that, by accruing the additional \$1 million debt without obtaining his consent or making any mandatory prepayment, WGPR violated §§ 16 and 17 of the Noonan mortgage and the capital event provision of the Noonan note. After CBW Lending purchased the first mortgage from Anglo Irish Bank in 2010, the plaintiff amended the complaint to include claims against CBW Lending, alleging a breach of the covenant of good faith and fair dealing.

In May 2011, the parties to that action, including Noonan, CBW Lending, WSGR, and Anglo Irish Bank, executed a "binding and enforceable" settlement agreement that contained all the "material terms" of the settlement. Under the settlement agreement, the CBW mortgage and Noonan mortgage were both given first priority. Noonan agreed to forego any further interest accrual, and to limit his recourse to the property only. The settlement agreement fixed the CBW mortgage debt at \$9.82 million and the Noonan mortgage debt at \$8.8 million, and said "The CBW and Noonan promissory notes and mortgages shall be

amended in accordance with the terms of the definitive agreement."⁴

The settlement agreement provided for a payment of \$2 million to Noonan upon his execution of the agreement. It provided that CBW Lending and Noonan were to "share 50/50 in the proceeds of any subsequent disposition of the Wonderland Property," up to a total payment of \$6.8 million to Noonan, and that Noonan would discharge his mortgage for his half of the proceeds, even if that was less than \$6.8 million. CBW Lending and Noonan agreed not to foreclose on the property without mutual consent.

The settlement agreement was subsequently supplemented with a release agreement in August 2011, after the parties failed to agree on the terms of a definitive agreement. The release agreement states

"1. Settlement Agreement. The Settlement Agreement . . . together with the CBW Note, the Noonan Note, the CBW Mortgage, and the Noonan Mortgage (all as they have been amended by the Settlement Agreement), governs the rights and obligations of the Parties with respect to the matters set forth therein Nothing contained in this Release Agreement shall release or modify the rights and obligations set forth in the Settlement Agreement or in the CBW Note, the

⁴ Section 7 of the settlement agreement specifies that "Parties shall work together in good faith to finalize the definitive agreement memorializing these material terms" However, the parties were unable to agree on certain specific terms and failed to reach a definitive agreement.

Noonan Note, the CBW Mortgage or the Noonan Mortgage as amended by the Settlement Agreement."⁵

In March 2012, after the ban on greyhound racing went into effect, a quitclaim deed granted CBW Lending title to the property, while the CBW mortgage remained "in full force and effect and separate and distinct."

In 2017, the city of Revere ordered CBW to demolish the grandstands at the property. Two of the three members of Coastal Belmont, LLC, the sole member of CBW Lending, formed VNO Belmont Wonderland LLC (VNO) to loan CBW Lending the money for demolition. CBW Lending, now the owner of the property and thus the mortgagor in the Noonan mortgage, granted VNO a \$5 million mortgage (VNO mortgage) secured by the property. CBW Lending recorded the mortgage but did not notify Noonan, obtain his consent, or otherwise repay the Noonan mortgage. The VNO mortgage was converted to equity in 2019, after the person who had been the third member of Coastal Belmont, LLC, was no longer a member.

In February 2021, the plaintiff discovered the VNO mortgage. He sent e-mail messages asking CBW Lending to provide copies of the VNO mortgage and the accompanying note on February 2, 2021, and called CBW Lending to inquire about the mortgage on

⁵ The release agreement elsewhere referenced the fact that no definitive agreement had ever been reached.

February 10, 2021. On March 8, 2021, the plaintiff commenced this action against CBW Lending. CBW Lending discharged the VNO mortgage shortly after that, on March 18, 2021. In March 2022, the plaintiff sent a formal written notice of default.

The city of Revere took the property by eminent domain on January 17, 2023. In connection with the taking, the city paid Noonan \$6,796,500 on February 17, 2023, paying off the principal of the Noonan debt and some interest accrued between January 17, 2023, and the payment a month later.

The plaintiff alleges several breaches of the Noonan mortgage, including breaches of its § 13, the provision requiring notification of other security interests, and its § 16 (a), the provision prohibiting new encumbrances without the plaintiff's consent. The plaintiff also alleges violation of the capital event provision in the Noonan note, as well as the provision in the first mortgage forbidding the mortgagor to "sell, convey, mortgage, pledge, hypothecate, encumber, lease, assign or otherwise transfer" the property without written consent by the mortgagee.⁶ Finally, the plaintiff argues the

⁶ After CBW acquired the first mortgage and the title to the property, it became simultaneously the mortgagor and mortgagee of the first mortgage. Noonan argued that by violating the provision in the first mortgage, CBW Lending also violated paragraph 4 of the Noonan note, which required the mortgagor "to fully and timely comply with all representations, warranties and covenants made by Borrower under the First Mortgage."

2017 mortgage constituted a "disposition" of the property under the settlement agreement, and that he was entitled to 50% of the proceeds.

On September 22, 2023, the plaintiff filed a motion for summary judgment and the defendant filed its cross motion for summary judgment. The Superior Court judge granted the defendant's cross motion for summary judgment and denied the plaintiff's motion. The judge found that while the defendant accrued new debt funding without notifying the plaintiff, committing a breach of §§ 13 and 16 (a) of the Noonan mortgage, no event of default occurred because the plaintiff failed to give written notice of breach, pursuant to § 21 (g) of the mortgage, before the mortgage was discharged. The judge then reasoned that since the defendant was both the holder of the first mortgage and the owner of the encumbered property, the consent to the 2017 mortgage by the defendant is implicit. For the capital event provision, the judge stated that the unambiguous language of the provision defined a capital event as accruing any debt beyond \$8.82 million in addition to the existing encumbrances. Since the fund generated by the 2017 mortgage was below \$8.82 million, the judge concluded the capital event provision did not apply. Finally, the judge concluded that the 2017 mortgage was not a "disposition" under

the settlement agreement, as a matter of law, nor was this result commercially absurd or otherwise improper.

The plaintiff appeals from the allowance of the defendant's cross motion for summary judgment and the denial of his own motion for summary judgment.

Discussion. Summary judgment may enter when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). We apply a de novo standard of review to decisions on motions for summary judgment. See Business Interiors Floor Covering Business Trust v. Graycor Constr. Co., 494 Mass. 216, 220 (2024). Whether a contract is ambiguous is a question of law that we review de novo. See Bank v. Thermo Elemental, Inc., 451 Mass. 638, 648 (2008). When determining whether the language at issue is ambiguous, we look to both the contested language and the text of the contract as a whole. See Balles v. Babcock Power Inc., 476 Mass. 565, 572 (2017).

We resolve this case on the basis of the capital event provision in the Noonan note and § 21 (e) of the Noonan mortgage, which addresses breaches of the Noonan note. We therefore need not and do not address the other claimed breaches.

The capital event provision of the Noonan note states that "For the purposes of this Note, a 'Capital Event' shall mean any of . . . (ii) any equity financing, debt financing or combination thereof by [the Borrower or its parent company] which generates in excess of EIGHT MILLION EIGHT HUNDRED AND TWENTY THOUSAND and 00/100ths DOLLARS (\$8,820,000.00)." The capital event provision bound the defendant, CBW Lending, after it acquired the property. "Contract language is ambiguous 'where the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken'" (citation omitted). Bank, 451 Mass. at 648. The language quoted is ambiguous. It does not say whether it means any financing in excess of that amount in addition to the money being borrowed in exchange for the Noonan mortgage, or any financing in that amount in addition to the total debt incurred that day, i.e., the financing from Anglo Irish Bank and the financing obtained by the Noonan mortgage.

Because it is ambiguous, we may look at extrinsic evidence to determine its meaning. See Wortis v. Trustees of Tufts College, 493 Mass. 648, 663 (2024). On the same date the Noonan note was signed, the property was encumbered by the first mortgage given to Anglo Irish Bank (now the CBW mortgage), which provided debt financing in the amount of \$8.82 million.

The defendant argues that the provision should be construed, as the judge concluded, to mean that a further mortgage, i.e., further debt financing, is a capital event only if it produces in excess of an additional \$8.82 million above the amount borrowed from Anglo Irish Bank and Noonan combined. By contrast, Noonan argues that this is intended to permit the mortgage with Anglo Irish Bank of \$8.82 million itself, and no further debt or equity financing after the money from the Noonan mortgage.

It is a "basic rule of construction that we must . . . construe the language to give it reasonable meaning wherever possible." Shea v. Bay State Gas Co., 383 Mass. 218, 224-225 (2018). Noonan and WGPR could have agreed to allow further financing beyond what was being borrowed that day, \$12,749,000 (Noonan's \$3,929,000 and Anglo Irish Bank's \$8.82 million), without it being a capital event. They could have set the cap on such borrowing at any amount -- another \$1 million, for example, or \$5 million, or \$8 million, or \$12 million. But they chose exactly the same amount as that day's borrowing from Anglo Irish Bank.

The defendant has not put forward any commercially explicable reason, under its reading of the provision, for the choice to allow an exact doubling of the amount borrowed from Anglo Irish Bank that day. The mere fact that it is the amount

the borrower wanted or needed that day from Anglo Irish Bank is commercially meaningless with respect to any future borrowing that might be prohibited.

The best reading of the capital event provision, therefore, is that this is (as it appears to be) a reference to the amount slated to be borrowed from Anglo Irish Bank that same day, and that it is a prohibition on any borrowing, in addition to the Noonan mortgage, above that.

The defendant relies on Noonan's deposition testimony to argue that he accepted its preferred definition of a capital event. At the very end of the then seventy year old plaintiff's four-hour deposition, when asked about his discussions concerning the capital event provision, the plaintiff stated "Well, effectively, this note represents what I've been referring to in the complaint documents as the no new money mortgage loan.· So what [the capital event provision] means is beyond the fully drawn-down at the time Anglo Irish loan, no more than \$8.82 million could be borrowed or of -- any form of capital could be raised without prepayments on my note being made." The defendant says that what Noonan was saying was that \$8.82 million more could be borrowed above the \$8.82 million borrowed from Anglo Irish Bank.

To begin with, it is not at all clear that is what it means. Although counsel for the defendant agreed when defense

counsel repeated the second sentence and asked if it was the meaning of the capital event provision, Noonan's answer begins by saying that "no new money mortgage" was permitted. He ends by saying that not "any form of capital could be raised without prepayments on my note being made."

But even assuming the defendant's characterization is correct, it may well have been an indication of the plaintiff misunderstanding or misspeaking. Not only did he begin by saying "this note represents what I've been referring to in the complaint documents as the no new money mortgage loan." In the complaint filed by the plaintiff -- indeed in the complaints of both this case and the 2008 case -- the provision is described as prohibiting any new money mortgages beyond the first mortgage at all. And throughout his deposition, the plaintiff testified that the 2017 mortgage rendered his debt due and payable in full. In any event, the extrinsic evidence of what we are assuming was this one inconsistent answer is hardly sufficient to demonstrate that the meaning of the capital event provision is as the defendant claims.

The defendant makes two arguments that there was no violation here even if the capital event provision is construed as we have construed it. The defendant argues first that the capital event provision was replaced by §§ 10-12 of the 2011 settlement agreement. But the sections cited by the defendant

merely reset the priorities and amounts of the two mortgages and describe what will happen if and when there is a disposition of the property. Neither is inconsistent with nor modifies the capital event provision. The capital event provision was neither superseded nor amended by §§ 10-12 of the settlement agreement -- assuming the settlement agreement worked amendments in the absence of a definitive agreement -- and, like the rest of the Noonan note as amended, it continues to describe the "rights and obligations of the parties."⁷

Next, the defendant argues the plaintiff suffered no injury, because the Noonan debt was eventually paid off by the city of Revere, or that any injury was cured by that repayment and the discharge of the mortgage. We are not convinced.

The capital event provision accelerated payment of the Noonan debt when the defendant encumbered the property for new debt financing in 2017. By delaying such payment, the defendant practically withheld funds that would have been available to the defendant for almost four years. This constitutes the denial of use of his capital, an injury recognized under Massachusetts law. See G. L. c. 231, § 6C; Salvi v. Suffolk County Sheriff's

⁷ The only amendment to the capital event provision that could have been wrought by the settlement agreement, in our opinion, is resetting the debt ceiling in the capital event provision at \$9.82 million from \$8.82 million, in accordance with § 3 of the settlement agreement, which sets the CBW Lending Debt to \$9.82 million.

Dep't, 67 Mass. App. Ct. 596, 609 (2006) ("Prejudgment interest, as is well understood, compensates the prevailing party for loss of the use of money [by] that party" [citation omitted]). Nor was this injury cured by merely discharging the mortgage in 2021.

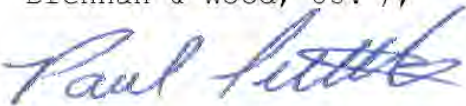
We thus conclude that the defendant owed Noonan the amount borrowed as specified in the Noonan note at the time the defendant issued the VNO mortgage. Of course, the VNO loan was for less than the total value of the debt owed by the defendant to Noonan, but the balance was due under the mortgage itself. Section 21 (e) of the Noonan mortgage provides that "failure to observe or perform any covenant, agreement, condition, term or provision of any of the restrictions, covenants and conditions set forth or referred to in any of the Security Documents other than this Mortgage" is an event of default. The Noonan note is such a "Security Document," under the definition in § 21 (c) of the mortgage. Consequently, the giving of the VNO mortgage without notice to Noonan was also an event of default under the mortgage, making the full amount owed to Noonan under the mortgage due and payable.⁸

⁸ Noonan has also argued that the VNO mortgage violated §§ 4, 13, and 16 (a) of the mortgage. The defendant argues such violations would not be events of default because of the language of Section 21 (g) of the mortgage, which makes "failure to observe or perform any covenant, agreement, condition, term

The judgment is reversed. The case is remanded for the entry of a new judgment in favor of the plaintiff, including a calculation of damages consistent with this memorandum and order.

So ordered.

By the Court (Rubin,
Brennan & Wood, JJ.⁹),


Clerk

Entered: July 6, 2026.

or provision of this Mortgage" an event of default only if "such failure shall continue without having been duly cured for a period of 10 days after written notice thereof given by the Mortgagee to the Mortgagor." The defendant avers it received no such notice.

We need not reach the question of whether the VNO mortgage was a breach of one of those terms of the mortgage, because of our conclusion that it was a violation of the capital event provision of the Noonan note. That is an event of default under § 21 (e), which contains no notice and cure provision. Our conclusion thus also obviates the need to address the question of the meaning of the notice provision in § 21 (g) in circumstances where there is a breach of an obligation to disclose something to the borrower which might also prevent the borrower from having the knowledge necessary to provide written notice.

The defendant does not argue that any steps beyond an event of default -- for example, if there was a breach of a mortgage provision and the notice and cure provision of § 21 (g) were met -- are required under the mortgage before the amounts described are due and payable. Any such argument therefore is waived.

⁹ The panelists are listed in order of seniority.

NOTIFY

66

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2184CV00528-BLS-1

E. MARK NOONAN

vs.

CBW LENDING, LLC

**MEMORANDUM OF DECISION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT**

The present dispute arises from multiple interconnected real estate loan documents, other agreements, and prior litigation, all concerning the approximately thirty-five-acre Wonderland property in Revere ("Property"). One of the loans was a 2005 note and mortgage on the Property granted to plaintiff E. Mark Noonan ("Noonan") ("Noonan Mortgage"). In 2021, Noonan commenced this action against the Property's owner at the time, defendant CBW Lending, LLC ("CBW"), alleging that CBW's granting of an additional mortgage on the Property in 2017 triggered an obligation on its part to immediately repay the Noonan Mortgage. The matter is presently before the court on the parties' cross motions for summary judgment. After consideration of the written submissions and a hearing on August 2, 2023, Noonan's motion is **DENIED** and CBW's cross motion is **ALLOWED**.

BACKGROUND

The summary judgment record sets forth the following undisputed facts, with further facts reserved for later discussion. In 2005, Wonderland Greyhound Park Realty, LLC ("WGPR") owned the Property. On September 12, 2005, it granted a first mortgage to Anglo Irish Bank to secure payment of a \$8,820,000 loan ("First Mortgage"). On the same day, WGPR

executed the Noonan Mortgage to secure payment of a \$3,929,000 loan from Noonan. In relevant part, the Noonan Mortgage provides:

The Mortgagor hereby covenants and agrees . . .

13. to notify the Mortgagee promptly of the existence of and the exact details of any other security interest in the Premises, now existing or hereafter arising . . . and at the request of the Mortgagee to assign to the Mortgagee all its right, title and interest in and to any and all agreements evidencing such security interest covering any of said security, and the Mortgagor hereby grants the Mortgagee full power and authority as attorney irrevocable of the Mortgagor to make, execute, acknowledge and deliver such assignments. . . .

16. That the Mortgagor shall not:

(a) create or permit to be created any encumbrance to attach to the Premises . . . and if such encumbrance is attached upon the Premises without the consent of the Mortgagor, to discharge the same within thirty (30) days of the date of such attachment; . . .

21. This mortgage is upon the STATUTORY CONDITION and upon the further condition that all representations, conditions, covenants and agreements of the Mortgagor in the Note, this Mortgage, all other instruments executed in connection therewith and in all other mortgages, debts and obligations of and from the Mortgagor to the Mortgagee shall be true and correct, and kept, observed, and fully performed and satisfied

The occurrence of any one or more of the following events (each an "Event of Default") shall constitute a default under and breach of this Mortgage:

(g) failure to perform any covenant, agreement condition, term or provision of this Mortgage, and such failure shall continue without having been duly cured for a period of 10 days after written notice thereof given by the Mortgagee to the Mortgagor

Under the Noonan Mortgage, upon the occurrence of an Event of Default, Noonan as mortgagee was entitled to "declare the entire debt secured hereby due and payable." The corresponding note ("Noonan Note") matured on September 12, 2007.

On September 12, 2005, Noonan and Anglo Irish Bank also entered into an agreement whereby Noonan subordinated his right to repayment on the Noonan Mortgage to the First Mortgage, and Noonan was granted a right to buy the First Mortgage in the event of a default

("Intercreditor Agreement"). No payments were made toward the Noonan Note either before or after the maturity date passed. In August 2008, the parent company of WGPR, Westwood, Inc., nevertheless entered into an option agreement concerning the Property, which was then assigned to SSR Acquisitions, LLC ("SSRA"). SSRA is a Suffolk Downs entity. At some point, Anglo Irish Bank also loaned WGPR an additional million dollars without Noonan's consent.

In December 2008, Noonan commenced a lawsuit against WGPR and others in the United States District Court for the District of Massachusetts, alleging default of the Noonan Mortgage, other breaches of the First Mortgage, Noonan Mortgage, and Intercreditor Agreement, and related causes of action ("Federal litigation"). In 2010, the United States District Court largely denied the parties' motions to dismiss and for summary judgment in that case. *See Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298 (D. Mass. 2010). That same year, Anglo Irish Bank sold the First Mortgage to CBW. In April 2011, Noonan moved to add CBW as a party in the Federal litigation, which was allowed. CBW is a related entity of Suffolk Downs.

In May 2011, the parties to the Federal litigation, including CBW, executed a settlement agreement ("Settlement Agreement"). It provides that "Noonan's debt is set at \$8.8 million" offset by a two-million-dollar payment to be wired to Noonan's attorneys, and that all interest will cease accruing on the Noonan Mortgage and the First Mortgage, now owned by CBW. The Settlement Agreement further provides, in relevant part, that:

1. This document is a binding an enforceable agreement. . . .
7. Parties shall work together in good faith to finalize the definitive agreement memorializing these material terms and execute the definitive agreement promptly, using best efforts to complete and execute the agreement by the close of business on May 19, 2011. . . .
9. Suffolk Downs (or a related entity) shall take title to the Wonderland Property pursuant to the Option Agreement between Westwood and Suffolk Downs.

Suffolk Downs (or its related entity) shall have sole discretion and control of ownership, development and disposition of the Wonderland Property.

10. Suffolk Downs/CBW and Noonan shall share 50/50 in the proceeds of any subsequent disposition of the Wonderland Property, up to payment to Noonan of \$6.8 million.

12. The [Intercreditor Agreement] shall terminate.

After further negotiation, the parties failed to execute a definitive agreement as intended. They did, however, exchange releases.

In 2012, CBW took title to the Property pursuant to a quitclaim deed, which stated that the First Mortgage, which CBW owned, remained "in full force and effect and separate and distinct."

In 2017, Revere issued an order requiring CBW to demolish the grandstands at the Property. To pay for the demolition, on May 16, 2017, CBW granted a mortgage on the Property to VNO Belmont Wonderland ("VNO") ("2017 Mortgage") in exchange for a maximum payment of five million dollars. VNO was a special purpose entity through which two of CBW's three owners funded the 2017 Mortgage. CBW recorded the 2017 mortgage without notifying Noonan, obtaining his consent, or repaying the Noonan Mortgage. All of the money CBW received from the 2017 Mortgage was used to perform the ordered demolition and associated environmental work; none was used to pay off existing mortgage debt. In 2019, the 2017 Mortgage was converted to equity.

In emails on February 2 and 3, 2021, Noonan asked Charles Morneau ("Morneau"), CBW's Mass. R. Civ. P. 30(b)(6) designee, about the 2017 Mortgage. In a telephone call with Morneau on February 10, 2021, Noonan asserted for the first time that the 2017 Mortgage violated the Noonan Mortgage. On February 17, 2021, VNO executed a discharge of the 2017 Mortgage. On March 8, 2021, Noonan commenced the present action, asserting that the granting of the 2017 Mortgage triggered CBW's obligation under the Noonan Mortgage, Noonan Note,

and Settlement Agreement to immediately repay the Noonan Mortgage. On March 18, 2021, the 2017 Mortgage discharge was recorded. On March 18, 2022, Noonan, through his attorney, sent CBW a formal notice of default.

In 2022, the City of Revere took the Property by eminent domain. On February 17, 2023, it paid Noonan \$6,796,500 as part of the pro tanto payment made in connection with the taking.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the moving party bears the burden of “show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” based on the undisputed facts. Mass. R. Civ. P. 56(c). See *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). In considering a motion for summary judgment, the court views the evidence and draws all reasonable inferences in the light most favorable to the nonmoving party. *Currier v. National Bd. of Med. Examiners*, 462 Mass. 1, 11 (2012). “When parties have filed cross motions for summary judgment, we view the evidence in the light most favorable to the party against whom summary judgment was entered.” *ProQuip Ltd. v. Northmark Bank*, 103 Mass. App. Ct. 133, 135 (2023) (citation omitted).

DISCUSSION

Noonan’s first amended complaint alleges that when CBW granted the 2017 mortgage without seeking his prior consent, it breached the terms of the Noonan Mortgage, Noonan Note, and the Settlement Agreement, thereby accelerating the debt owed. CBW counters that under the unambiguous terms of the relevant contracts, no acceleration-triggering default or action requiring immediate payment occurred. The court agrees with CBW.

The interpretation of an unambiguous contract is a question of law, as is the question whether an ambiguity exists. *Quinn v. Mar-Lees Seafood, LLC*, 69 Mass. App. Ct. 688, 695 (2007). “Contracts that are free from ambiguity must be interpreted according to their plain

terms.” *Suffolk Constr. Co. v. Lanco Scaffolding Co.*, 47 Mass. App. Ct. 726, 729 (1999).

“[I]nterlocking documents [that] are part of a single transaction and are interrelated in purpose must be read together to effectuate the intention of the parties.” *Matthews v. Planning Bd. of Brewster*, 72 Mass. App. Ct. 456, 463 (2008) (citation omitted).

Noonan first cites Section 16(a) of the Noonan Mortgage in support of his claim. Its plain terms, as quoted *supra*, prohibit CBW, as WGPR’s successor, from allowing any encumbrance to attach to the Property without Noonan’s consent. Thus, Noonan is correct that the 2017 Mortgage was a breach of that provision. However, under the Noonan Mortgage’s additional provisions, for such a breach to trigger acceleration CBW must also fail to timely cure the breach after notice. Specifically, Section 21(g) requires both: 1) the mortgagor’s, i.e., CBW’s, failure to perform any mortgage term, and 2) CBW’s failure to cure within ten days “after written notice thereof given by the Mortgagee [Noonan] to the Mortgagor.” Here, because the 2017 Mortgage was discharged prior to any written notice of breach (which occurred at the earliest when Noonan filed the original complaint), any breach was cured. Noonan’s breach of contract claim premised on a violation of Section 16(a) accordingly fails. *See Noonan*, 723 F. Supp. 2d at 338 (interpreting Sections 16(a) and 21(g) of the Noonan Mortgage in the same manner).

Noonan’s citation to Section 13 of the Noonan Mortgage fails for the same reason. Although that section requires notification of further encumbrances, under Section 21(g), because the 2017 Mortgage was discharged before Noonan raised any violation of Section 13, again, no Event of Default occurred. *See Noonan*, 723 F. Supp. 2d at 338.¹

¹ CBW also did not breach of Section 4 of the Noonan Mortgage, which Noonan also cites. It requires the mortgagor to comply with the provisions of the First Mortgage, which in turn requires the mortgagee of the First Mortgage to consent to any further encumbrances. Where by 2017 CBW was both the holder of the First Mortgage and the Property Owner, i.e., both the mortgagee and mortgagor, its consent to the 2017 Mortgage is implicit.

Section 1 of the Noonan Mortgage, which requires performance of the Noonan Note, including its “Capital Event provision, is equally unavailing to Noonan. The “Capital Event” provision requires mandatory prepayment of the Noonan Note if, as relevant here, the borrower obtains “any equity financing, debt financing, or combination thereof . . . which generates in excess of . . . \$8,820,000.00.” Because funds generated by the 2017 Mortgage were well below that figure, it plainly does not apply and no mandatory prepayment under the Noonan Note was required.²

The parties strongly dispute the effect of the Settlement Agreement on the Noonan Mortgage and the Noonan Note — particularly whether Section 9 of the Settlement Agreement, which gives CBW, as the Property owner, “sole discretion and control of ownership, development and disposition of the Wonderland Property,” amended and/or essentially eliminated Noonan’s rights of notice and consent under the prior agreements. However, because no Event of Default or right of prepayment occurred under either the Noonan Mortgage or the Noonan Note regardless of any later amendment that may have reduced or eliminated Noonan’s rights, the court need not address the import of Section 9. Either way, Noonan was not entitled to accelerated payment in 2017.

The 2017 Mortgage also was not a “disposition” of the Property entitling Noonan to “share 50/50 in the proceeds” thereof, as provided in Section 10 of the Settlement Agreement. The 2017 Mortgage, as a matter of law under these circumstances, was not a “disposition” of the Property. See Black’s Law Dictionary p. 505 (8th Ed. 2004) (defining “disposition” as “[t]he act

² In deposition testimony, Noonan agreed with this unambiguous interpretation. See Noonan Deposition p. 119 (agreeing that “the meaning of this capital event provision is that beyond the fully drawn-down Anglo Irish loan, no more than \$8.82 million could be borrowed or any form of capital could be raised without prepayments on your note being made”).

of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property").

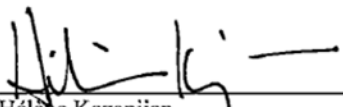
Finally, the result here is not commercially absurd or otherwise improper. Because the 2017 Mortgage was recorded in the Suffolk County Registry of Deeds, it was not secret, and Noonan easily could have discovered it on his own with reasonable diligence. That the 2017 capital infusion was needed to pay for the ordered demolition and maintain the value of the Property is equally undisputed. Noonan is also a sophisticated investor and businessperson who has had a relationship with his present counsel since at least 2010. He skillfully negotiated the relevant contracts, and leveraged his position following the Federal litigation to reach a favorable Settlement Agreement. In exchange for no further interest accruing, he negotiated an immediate payment of two million dollars and that any proceeds be split equally between him and CBW as the First Mortgage holder until his loan was discharged, rather than remain subordinate to the senior mortgage. *See generally, Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 638 (2007) ("[w]here knowledgeable and fully represented parties choose to embody their relationship in a carefully crafted document, negotiated over several months, they are entitled to and should be held to the language they chose").

For all these reasons, Noonan's motion for summary judgment is **DENIED**, and CBW's cross motion for summary judgment is **ALLOWED**.

ORDER

For the forgoing reasons, Noonan's motion for summary judgment is **DENIED**, and CBW's cross motion for summary judgment is **ALLOWED**.

Dated: October 2, 2023


Hélène Kazanjian
Justice of the Superior Court

Noonan-Suffolk Downs/CBW-Westwood/Wonderland/Sarkis-Anglo Irish Settlement

1. This document is a binding and enforceable agreement.
2. Noonan's Debt is set at \$8.8 million with recourse only to the Wonderland real property (the "Wonderland Property").
3. CBW Lending's Debt is set at \$9.82 million with recourse only to the Wonderland Property.
4. All interest ceases accruing on Noonan's Debt and CBW Lending's Debt effective immediately.
5. Suffolk Downs shall wire to the IOLTA Account of O'Connor, Carnathan and Mack LLC ("OCM") \$2 million by wire transfer on May 18, 2011.
6. OCM shall act as escrow agent and shall release the \$2 million payment to Noonan upon execution of a definitive agreement memorializing these material terms, agreement of Suffolk Downs or order of the Court enforcing this agreement.
7. Parties shall work together in good faith to finalize the definitive agreement memorializing these material terms and execute the definitive agreement promptly, using best efforts to complete and execute the agreement by the close of business on May 19, 2011;
 - a. Latham Watkins shall prepare and circulate the first draft of the definitive agreement;
 - b. Noonan and Fields shall personally communicate and work out any points of disagreement that do not affect or change these material terms.
8. The \$2 million payment from Suffolk Downs shall be deducted from Noonan's Debt upon release of the \$2 million to Noonan.
9. Suffolk Downs (or a related entity) shall take title to the Wonderland Property pursuant to the Option Agreement between Westwood and Suffolk Downs. Suffolk Downs (or its related entity) shall have sole discretion and control of ownership, development and disposition of the Wonderland Property.
10. Suffolk Downs/CBW and Noonan shall share 50/50 in the proceeds of any subsequent disposition of the Wonderland Property, up to payment to Noonan of \$6.8 million.
11. After Noonan is paid \$6.8 million, all further proceeds go to CBW or Suffolk Downs (or its related entity) and Noonan's mortgage shall be discharged or assigned at Suffolk Downs's option. Noonan shall discharge his mortgage in exchange for 50% of the proceeds of sale upon any bona fide sale of the Wonderland Property, even if the sales proceeds are insufficient to pay Noonan's Debt in full.

12. The ICA shall terminate. The CBW and Noonan promissory notes and mortgages shall be amended in accordance with the terms of the definitive agreement. The CBW and Noonan mortgages, as amended, shall have shared first priority. Neither mortgage may be foreclosed without the consent of Suffolk Downs or Noonan, notwithstanding any claimed default under the definitive agreement or mortgages.

13. If a gaming license (excluding the current racing/simulcast license) is issued for the Wonderland site, Noonan will be paid up to \$6.8 million upon issuance of that license to the extent Noonan's Debt has not earlier been repaid, which payment shall be in full satisfaction of Noonan's Debt.

14. Within 30 days hereof, Charles Sarkis shall pay Noonan \$250,000 separately in exchange for a full release, including any claims against Back Bay Restaurant Group, which release shall be effective upon payment.

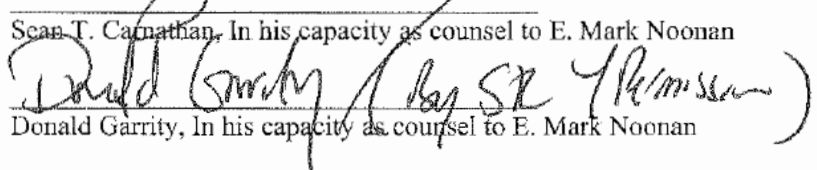
15. Clean break otherwise – general releases in all directions (excepting rights under the Option Agreement, as amended, between Suffolk and Westwood, none of which rights in any way affect the development, sale or disposition of the Property by Suffolk Downs).

16. On May 18, 2011, Counsel shall report the case settled to Court and request 30-day Nisi Order. Subject to paragraph 17 below, the Parties shall file a stipulation of dismissal with prejudice of all claims and counterclaims by and against all Parties upon execution of the definitive agreement.

17. Notwithstanding the terms in paragraphs 15 and 16 above, Anglo Irish's release of Charles Sarkis is dependent upon approval by its Credit Committee in Dublin. In the event that Anglo Irish does not release Charles Sarkis, then it shall not receive a release from any of the other Parties to this Agreement and Noonan will only dismiss his claims against Anglo Irish without prejudice.

READ AND AGREED TO this 17th Day of May, 2011:

Sean T. Carnathan, In his capacity as counsel to E. Mark Noonan


Donald Garrity, In his capacity as counsel to E. Mark Noonan

Brian Hurley, In his capacity as counsel to the Suffolk Downs Parties

Bruce Falby, In his capacity as counsel to the Suffolk Downs Parties
[SIGNATURES CONTINUED ON PAGE THREE]

SECOND MORTGAGE NOTE

\$3,929,000

Boston, MA
September 12, 2005

FOR VALUE RECEIVED, the undersigned, WONDERLAND GREYHOUND PARK REALTY, LLC, a limited liability company organized under the laws of the State of Delaware and qualified to do business in the Commonwealth of Massachusetts, having an address of 190 V.F.W. Parkway, Revere, Massachusetts 02151 ("the Borrower"), hereby promises to pay to the order of E. MARK NOONAN, an individual, having an address of 10 Sanderson Road, Lexington, MA, 02420 (the "Payee"), the principal sum of THREE MILLION NINE HUNDRED AND TWENTY NINE THOUSAND and 00/100 DOLLARS (\$3,929,000) (the "Loan Proceeds"), with interest thereon as provided herein, in lawful money of the United States of America, together with interest on the unpaid principal balance thereof from time to time at a fixed rate per annum (the "Stated Rate") of twelve percent (12%). Such interest shall be compounded quarterly and shall accrue until and be payable on the Maturity Date (as defined below). The Borrower and Lender hereby acknowledge and agree that One Hundred Percent (100%) of the Loan Proceeds have been advanced to the Borrower concurrently herewith.

If not sooner paid as provided herein, all outstanding principal and accrued and unpaid interest thereon and all other charges due hereunder, if any, shall be paid to the Lender on September 12, 2007 (the "Maturity Date").

Notwithstanding anything set forth herein to the contrary, the Borrower shall be required to make prepayments to Lender of the then-outstanding principal and accrued interest under this Note upon the occurrence of a Capital Event, as defined below (in each case, a "Mandatory Prepayment"). For the purposes of this Note, a "Capital Event" shall mean any of (i) the sale of any assets of either the Borrower or the parent company of the Borrower, The Westwood Group, Inc., a Delaware corporation ("Westwood"); (ii) any equity financing, debt financing or combination thereof by either the Borrower or Westwood which generates in excess of EIGHT MILLION EIGHT HUNDRED AND TWENTY THOUSAND and 00/100ths DOLLARS (\$8,820,000.00). The amount of any such Mandatory Prepayment shall equal the aggregate amount of capital generated by a Capital Event, after deduction of all of the Borrower's reasonable fees and expenses occurred in connection therewith, and shall be payable to Lender concurrently with the closing on the relative Capital Event.

Notwithstanding anything to the contrary set forth in the preceding paragraph or elsewhere herein, if at any time while this Note remains outstanding Borrower elects to sell or market for sale (or lease, as applicable) (i) all or any portion of the fee interest in the premises located at 190 V.F.W. Parkway, Revere, Massachusetts 02151 (the "Property"); (ii) any ground leasehold interest in all or a portion of the Property; or (iii) all or any portion of the direct or indirect limited liability company membership interests in Borrower, then Borrower shall be obligated to negotiate exclusively and in good faith with Lender for any such transaction.

This Note may be prepaid at any time, either in whole or in part, without premium or penalty, subject to the interest payment terms set forth above. This Note represents all prior

indebtedness of Borrower to Payee and supersedes any and all prior notes and/or amounts previously loaned to Borrower by Payee, including accrued interest thereon.

All payments hereunder shall be payable in lawful money of the United States which shall be legal tender for public and private debts at the time of payment. All payments shall be applied first to interest due hereunder, and any balance shall be applied in reduction of principal.

It is expressly agreed that the occurrence of any one or more of the following shall constitute an "Event of Default" hereunder beyond any applicable notice and grace periods: (a) any failure to pay any amount or installment of interest or of principal and interest on any day on which the same is payable hereunder; (b) the Borrower's payout of any proceeds of the Borrower to the members thereof prior to the Maturity Date or repayment in full of this Note; (c) the use of all or any portion of the proceeds of this Note for any purpose other than as short-term working capital for the Borrower and/or Westwood; (d) the dissolution or termination of existence of the Borrower, or if the Borrower either becomes insolvent, a receiver is appointed for any part of the Borrower's property, the Borrower makes an assignment for the benefit of creditors, or an order for relief is entered against the Borrower in any bankruptcy case; (e) any creditor commences any legal action to take any of the Borrower's property on or in which Lender has a lien or security interest; or (f) if any of the events described in subsections (d) and (e) above occur with respect to Westwood. If any such Event of Default hereunder shall occur, the Lender may, at its option, declare to be immediately due and payable the then outstanding principal balance under this Note, with all accrued and unpaid interest thereon, and all other amounts payable to the Lender hereunder, whereupon all such amounts shall become and be due and payable immediately. The failure of the Lender to exercise said option to accelerate shall not constitute a waiver of the right to exercise the same at any other time.

The Borrower will pay on demand all costs and expenses, including reasonable attorneys' fees, incurred or paid by the Lender in enforcing or collecting any of the obligations of the Borrower hereunder. The Borrower agrees that all such costs and expenses and all other expenditures by the Lender on account hereof, other than advances of principal, which are not reimbursed by the Borrower immediately upon demand, all amounts due under this Note after maturity, and any amounts due hereunder if an Event of Default shall occur hereunder, shall bear interest at a rate of fifteen percent (15%), but in no event more than the maximum rate of interest then permitted by law (the "Default Rate"), until such expenditures are repaid or this Note and such amounts as are due are paid to the Lender.

Upon the maturity of all or any portion of the amounts due herein, whether by acceleration or otherwise, Lender is hereby authorized at any time and from time to time, without notice to Borrower (any such notice being hereby expressly waived by Borrower) to set off and apply any amounts payable to the Borrower by the Lender and other indebtedness at any time owing by Lender to or for the credit or the account of Borrower against any and all of the obligations of Borrower now or hereafter existing under this Note. The rights of Lender under this paragraph are in addition to other rights and remedies (including, without limitation, other rights of setoff) which Lender may have.

All agreements between Borrower and Lender are expressly limited so that in no contingency or event whatsoever, whether by reason of advancement of the proceeds hereof, acceleration of maturity of the unpaid principal balance hereof, or otherwise, shall the amount paid or agreed to be paid to Lender for the use, forbearance or detention of the money to be advanced hereunder exceed the highest lawful rate permissible under usury laws applicable to Lender, if any. If, from any circumstances whatsoever fulfillment of any provision hereof, or of the Mortgage and Security Agreement and Fixture Financing Statement executed by Borrower in favor of Lender concurrently herewith (the "Mortgage"), shall involve transcending the limit of validity prescribed by any law which a court of competent jurisdiction may deem applicable hereto, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity, and, if from any circumstance Lender shall ever receive as interest an amount which would exceed the highest lawful rate, such amount which would be excessive interest shall be applied to the reduction of the unpaid principal balance due hereunder and not to the payment of interest. This provision shall control every other provision of all agreements between Borrower and Lender.

All notices required or permitted to be given hereunder shall be in writing and shall be effective when mailed, postage prepaid, by registered or certified mail, addressed in the case of the Borrower and the Lender to them at the address set forth above, or to such other address as either the Borrower or the Lender may from time to time specify by like notice.

All of the provisions of this Note shall be binding upon and inure to the benefit of the Borrower and the Lender and their respective successors and assigns. If there is more than one undersigned Borrower, the obligations of each Borrower shall be joint and several. It is understood and agreed that this Note was negotiated, executed and delivered in The Commonwealth of Massachusetts, which Commonwealth the parties agree has a substantial relationship to the parties and to the underlying transaction embodied by this Note. This Note shall be governed by and construed in accordance with the laws of The Commonwealth of Massachusetts.

Borrower hereby consents to personal jurisdiction in any state or Federal court located within The Commonwealth of Massachusetts. BORROWER AGREES THAT ANY SUIT FOR THE ENFORCEMENT OF THIS NOTE OR THE MORTGAGE MAY BE BROUGHT IN THE COURTS OF THE COMMONWEALTH OF MASSACHUSETTS OR ANY FEDERAL COURT SITTING THEREIN AND CONSENTS TO THE NONEXCLUSIVE JURISDICTION OF SUCH COURT AND SERVICE OF PROCESS IN ANY SUCH SUIT BEING MADE UPON BORROWER BY MAIL AT THE ADDRESS SET FORTH HEREIN. BORROWER HEREBY WAIVES ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE VENUE OF ANY SUCH SUIT OR ANY SUCH COURT OR THAT SUCH SUIT IS BROUGHT IN AN INCONVENIENT FORUM.

BORROWER AND LENDER MUTUALLY HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE OR THE MORTGAGE, OR ANY COURSE OF CONDUCT, COURSE OF DEALINGS, STATEMENTS (WHETHER VERBAL OR

WRITTEN) OR ACTIONS OF ANY PARTY. THIS WAIVER CONSTITUTES A MATERIAL INDUCEMENT FOR LENDER TO ACCEPT THIS NOTE AND MAKE THE LOAN EVIDENCED HEREBY.

The Borrower hereby consents to any extension of time of payment hereof, release of all or any part of the security for the payment hereof, or release of any party liable for this obligation, and waives presentment for payment, demand, protest and notice of dishonor. Any such extension or release may be made without notice to the Borrower and without discharging its liability.

IN WITNESS WHEREOF, the Borrower has executed and delivered this Note, under seal, on the day and year first above written.

WITNESS:



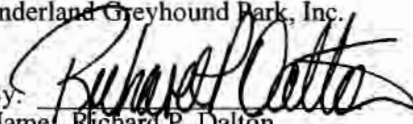
WONDERLAND GREYHOUND
PARK REALTY, LLC

By: Wonderland Greyhound Park, Inc.

By:

Name: Richard P. Dalton

Its: President



**INTERCREDITOR AND
SUBORDINATION AGREEMENT**

BK 587
PG 31

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (the "Agreement") is made as of September 12, 2005, by and among ANGLO IRISH BANK CORPORATION PLC, a banking corporation organized under the laws of the Republic of Ireland ("Senior Lender"), E. MARK NOONAN, an individual ("Subordinate Lender"), and WONDERLAND GREYHOUND PARK REALTY LLC, a Delaware limited liability company ("Borrower"), and is made with reference to the following facts:

A. Senior Lender has agreed to make a first mortgage loan to Borrower in the principal sum of \$8,820,000 (the "Senior Loan"), which Senior Loan is evidenced by that certain Promissory Note dated September 12, 2005 (the "Senior Note") made by Borrower and payable to Senior Lender.

B. The Senior Note is secured by, among other things, (i) that certain Mortgage and Security Agreement from Borrower to Senior Lender (the "Senior Mortgage") dated September 12, 2005 and recorded with the Suffolk County Registry of Deeds in Book _____, Page _____ and filed with the Suffolk County Registry District of the Land Court as Document No. 708370, encumbering certain real property described more fully in Exhibit A attached hereto (the "Property") and (ii) that certain Assignment of Leases and Rents from Borrower to Senior Lender (the "Senior Assignment of Leases") dated September 12, 2005 and recorded with the Registry in Book _____, Page _____ and filed with said Registry District as Document No. 708371, also encumbering the Property. The Senior Note, the Senior Mortgage, the Senior Assignment of Leases and all other documents and instruments evidencing and securing the Senior Loan are hereinafter collectively referred to as the "Senior Loan Documents." All amounts due under the Senior Note and any other Senior Loan Document are hereinafter referred to collectively as the "Senior Indebtedness."

C. Subordinate Lender has agreed to make a second mortgage loan to Borrower in the principal amount of \$3,929,000 (the "Subordinate Loan"), which Subordinate Loan is evidenced by that certain Second Mortgage Note dated September 12, 2005 (the "Subordinate Note") made by Borrower and payable to Subordinate Lender. The Subordinate Note is secured by that certain Mortgage and Security Agreement and Fixture Financing Statement from Borrower to Subordinate Lender dated September 12, 2005 and recorded with said Deeds in Book _____, Page _____ and filed with the Registry District as Document No. 708372 (the "Subordinated Mortgage"), encumbering the Property. The Subordinate Note, the Subordinate Mortgage and all other documents evidencing and securing the Subordinate Loan are hereinafter referred to collectively as the "Subordinate Loan Documents." All amounts due under the Subordinate Note and

Attested hereto
Francis M. Roache
Francis M. Roache
Register of Deeds
Suffolk District

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REGISTERED LAND

any other Subordinate Loan Documents are hereinafter referred to collectively as the "Subordinate Indebtedness."

D. Senior Lender is unwilling to make the Senior Loan to the Borrower or permit the Borrower to further encumber the Property with the Subordinate Mortgage unless the Subordinate Loan Documents are subordinated to the Senior Loan Documents in the manner hereafter set forth.

E. The parties desire to set forth the certain agreements among them relating to the Senior Loan and Subordinate Loan.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto represent, warrant and agree as follows:

1. Subordinate Lender represents and warrants that the copies of the Subordinate Loan Documents previously delivered to Senior Lender represent all of the documents evidencing and securing the Subordinate Indebtedness and that such previously delivered copies are true, accurate and complete copies of such documents.

2. Subordinate Lender hereby agrees that (a) the Subordinate Indebtedness is and shall be subject and subordinate in right of payment to the Senior Indebtedness and (b) the liens and security interests created by the Subordinate Loan Documents are and shall be in all respects subject and 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 heretofore made or hereafter to be made under the Senior Loan Documents pursuant to the terms thereof. The foregoing shall apply, notwithstanding the availability of other collateral to the Senior Lender or the actual date and time of execution, delivery, recordation, filing or perfection of the Senior Mortgage or the Subordinate Mortgage, or the lien or priority of payment thereof, and notwithstanding that the Senior Loan or any claim for the Senior Loan is subordinated, avoided or disallowed, in whole or in part, under Title 11 of the United States Code including any amendments and successor legislation (the "Bankruptcy Code") or other applicable federal or state law. In the event of a proceeding, whether voluntary or involuntary, for insolvency, liquidation, dissolution, bankruptcy or other similar proceeding pursuant to the Bankruptcy Code or other applicable federal or state law, the Senior Loan shall include all interest accrued on the Senior Loan, in accordance with and at the rates specified in the Senior Loan Documents, both for periods before and after the commencement of any of such proceedings, even if the claim for such interest is not allowed pursuant to applicable law. Subordinate Lender agrees not to contest, or to bring or join in

any action or proceeding for the purpose of contesting, the validity, perfection or priority of, or seeking to avoid, any rights of Senior Lender in or with respect to the Senior Loan Documents or the Property.

3. Until such time as the Senior Indebtedness has been paid in full, the payment of all or any part of the Subordinate Indebtedness shall be postponed and subordinated to the payment in full of the Senior Indebtedness and Subordinate Lender shall not accept or receive, nor shall Borrower make, any payment on account of the Subordinate Loan except as expressly permitted by this Agreement. Notwithstanding the foregoing, so long as no Event of Default under any Senior Loan Document has occurred and is continuing, Subordinate Lender shall be permitted to receive regularly scheduled payments (but not prepayments) as provided in the Subordinate Loan Documents.

4. If Subordinate Lender receives any payment from Borrower or from any other source whatsoever in respect of all or any party of the Subordinate Indebtedness other than as expressly permitted by the terms of this Agreement, such payment shall be received and held by Subordinate Lender in trust for Senior Lender and, upon request from Senior Lender, shall be promptly paid over by Subordinate Lender to Senior Lender.

5. Subordinate Lender shall not, without the prior written consent of Senior Lender, (a) transfer or assign all or any part of the Subordinate Indebtedness or any rights in respect thereof, (b) commence, or join with any other creditor in commencing, any bankruptcy, reorganization or insolvency proceedings with respect to Borrower or the Property, or (c) amend or modify any of the terms or provisions of the Subordinate Loan Documents.

6. Unless and until all Senior Indebtedness shall have been satisfied in full, Subordinate Lender will not, without the prior written consent of Senior Lender (which consent may be withheld in the sole and absolute discretion of Senior Lender without regard to reasonableness), take any action:

(a) to assert, collect or enforce all or any part of the obligations secured or evidenced by the Subordinate Mortgage or the Subordinate Loan Documents as against the Property or the Borrower or any other person or entity who or which may be liable to Senior Lender in respect of the Senior Loan Documents; or

(b) to realize upon the Subordinate Mortgage by the foreclosure thereof or by the acceptance of a deed in lieu of foreclosure; or

(c) to obtain any other mortgage, attachment, judgment or other lien against the Property or any other property of the Borrower or any other person

or entity who or which may be liable to Senior Lender in respect of the Senior Loan Documents.

7. Subordinate Lender agrees that in the event of a casualty to the buildings or improvements constructed on the Property or a condemnation or taking under a power of eminent domain of all or any portion of the Property, 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 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 or at Senior Lender's direction for use and application pursuant to the terms and provisions of the Senior Loan Documents. Subordinate 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 Subordinate Lender's behalf necessary in connection with the prosecution or settlement of such claims, awards and payments. Senior Lender shall promptly notify Subordinate Lender of any documents executed under the aforesaid power of attorney. In addition, without limiting the foregoing, the Subordinate Lender agrees that all rights of the Subordinate Lender under the Subordinate Mortgage or under the Subordinate Loan Documents in and to the Property and the proceeds thereof (including assignments of leases and rents, issues and profits) are expressly subject and subordinate to the rights of the Senior Lender in and to the Property and the proceeds thereof (including assignments of leases and rents, issues and profits) on the terms set forth in the Senior Mortgage and the Senior Loan Documents.

8. Subordinate Lender shall deliver to Senior Lender copies of any notice of default or other notice given or received by Subordinate Lender with respect to the Subordinate Indebtedness and Senior Lender shall have the right to cure any default under any of the Subordinate Loan Documents within the applicable cure periods set forth in such Subordinate Loan Documents.

9. Senior Lender shall deliver to Subordinate Lender copies of any notice of default or other notice given or received by Senior Lender with respect to the Senior Indebtedness and Subordinate Lender shall have the right to cure any default under any of the Senior Loan Documents within the applicable cure periods set forth in such Senior Loan Documents.

10. Until such time as the Senior Indebtedness has been paid in full:

(a) Subordinate Lender waives and releases any and all rights of subrogation which it may have against the Property which subrogation would result

in Subordinate Lender obtaining a priority equal or superior to the priority of the Senior Loan Documents for any funds which Subordinate Lender may advance either to cure defaults under the Senior Loan Documents or pay liens encumbering the Property or otherwise protect the lien of the Subordinate Loan Documents;

(b) No tenant under any lease of any portion of the Property will be made a party defendant in any foreclosure of the Subordinate Mortgage nor will any enforcement action under the Subordinated Loan Documents or any other action be taken that would terminate any lease or other rights held by or granted to or by third parties with respect to the Property;

(c) (i) If any action or proceeding shall be brought to foreclose the Subordinate Mortgage or commence any other enforcement action, whether with or without the consent of Senior Lender as required under Section 6 hereof, no portion of the rents, issues and profits of the property shall be collected except through a receiver appointed by the court in which such foreclosure action or proceeding is brought, after due notice of the application for the appointment of such receiver shall have been given to the Senior Lender and the rents, issues and profits so collected by such receiver shall be applied first to the payment of maintenance of taxes and insurance on the Property, and then to the payment of principal and interest due and owing on the Senior Mortgage prior to the payment, if any, of any principal or interest and other sums then due and owing on the Subordinate Mortgage; (ii) if during the pendency of any such foreclosure action or proceeding, an action or proceeding shall be brought by the Senior Lender for the foreclosure of the Senior Mortgage and an application is made by the Senior Lender of an extension of such receivership for the benefit of the Senior Lender, all such rents, issues and profits held by such receiver as the date of such application shall be applied by the receiver solely for the benefit of the Senior Lender, and the Subordinate Lender shall not be entitled to any portion thereof until all sums due and owing pursuant to the Senior Mortgage have been paid in full and applied as aforesaid; and (iii) notice of the commencement of any foreclosure of the Subordinate Mortgage shall be simultaneously given to the Senior Lender and true copies of all notices thereof and papers served or entered in such action shall be delivered to the Senior Lender;

(d) If the Subordinate Lender shall acquire by indemnification, subrogation or otherwise, any lien, estate, right or other interest in the Property, that lien, estate, right or other interest shall be subordinate to the Senior Mortgage as provided herein, and the Subordinate Lender hereby waives any and all rights it may acquire by subrogation or otherwise to the lien of the Senior Mortgage or any portion thereof;

(e) As to all leases now or hereafter in effect with respect to the property, the Subordinate Lender agrees to approve all leases which are approved

by the Senior Lender. The Subordinate Lender shall also enter into recognition and non-disturbance agreements with any tenants to whom the Senior Lender has granted recognition and non-disturbance, on the same terms and conditions given by the Senior Lender; and

(f) The Subordinate Lender shall not collect payments for the purpose of escrowing taxes, assessments or other charges imposed on the Property or insurance premiums due on the insurance policies required under the Senior Mortgage or the Subordinate Mortgage if the Senior Lender is collecting payments for such purposes, however, the Subordinate Lender may collect payments for such purposes if the Senior Lender is not collecting the same, provided such payments shall be held in trust by the Subordinate Lender to be applied only for such purposes.

11. Each party shall, within ten (10) days after request from the other party, provide periodic estoppel certificates, duly signed and acknowledged, setting forth, without limitation, the current outstanding principal balance of the Senior Indebtedness or the Subordinate Indebtedness, as the case may be, whether there exist, to the best of their knowledge, any defaults under the Senior Loan Documents or the Subordinate Loan Documents, as the case may be, and such other matters as the requesting party may reasonably require.

12. Senior Lender hereby consents to the execution and delivery of the Subordinate Loan Documents to Subordinate Lender and the recording of the Subordinate Mortgage, subject to Subordinate Lender entering into this Agreement and performing all of its obligations hereunder.

13. Upon the occurrence of an Event of Default under the Senior Loan Documents, and provided that Senior Lender has not foreclosed upon all or any portion of the Property, Subordinate Lender shall have the right, but not the obligation, to purchase the Senior Loan Documents for a purchase price equal to the sum of all amounts owed by the Borrower under the Senior Loan Documents (including, without limitation, principal, interest, prepayment premium and fees), as such amount is determined by Senior Lender in its discretion (and for the purposes of such determination, such payment to Senior Lender shall be deemed to be a prepayment subject to any applicable breakage cost or like charges) plus all costs and expenses incurred by Senior Lender (including attorneys fees) in connection with the assignment of the Senior Loan Documents to the Subordinate Lender. The assignment of the Senior Lender Loan Documents to the Subordinate Lender shall be without recourse and without representation or warranty, express or implied.

14. This Agreement shall inure to and be binding upon the successors and assigns of each of the parties hereto. The parties hereto shall execute such further

documents or instruments and take such further action as may necessary from time to time to carry out the intent of this Agreement.

15. Senior Lender shall not be prejudiced in its rights under this Agreement by any act or failure to act of Borrower or Subordinate Lender, or any non-compliance of Borrower or Subordinate 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 Subordinate 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 thereof 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 writing duly signed and delivered on behalf of Senior Lender.

16. All notices, demands and other communications in connection with this Agreement shall be in writing and shall be sent by Federal Express, or by other reputable nationally recognized overnight courier service, or by certified or registered mail, postage prepaid, return receipt requested addressed as follows:

If to Senior Lender	Anglo Irish Bank Corporation plc 18/21 St. Stephen's Green Dublin 2, Ireland Attention: Owen O'Neill
------------------------	---

and

Anglo Irish Bank Corporation plc
265 Franklin Street, 19th Floor
Boston, MA 02110
Attention: Billy McArdle

If to Subordinate Lender	E. Mark Noonan 10 Sanderson Road Lexington, MA 02420
--------------------------------	--

If to Borrower: Wonderland Greyhound Park Realty, LLC
 c/o The Westwood Group, Inc.
 284 Newbury Street
 Boston, MA 02115
 Attention: Charles F. Sarkis

By notice complying with this Section, each party may from time to time change the address to be subsequently applicable to it for the purpose of this Section. Any such communication shall be deemed given when received or refused (as indicated on the receipt) when addressed as noted above.

17. This Agreement shall be governed by and construed in accordance with the laws of the State in which the Property is located. 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. This Agreement has been authorized by all requisite action and constitutes the legal, valid and binding obligation of each of the parties hereto. This Agreement may be executed in multiple counterparts.

18. This Agreement shall terminate upon full and final payment of any and all amounts due under the Senior Loan Documents.

19. Each party hereto acknowledges that to the extent that no adequate remedy at law exists for breach of its obligations under this Agreement, in the event either party fails to comply with its obligations hereunder, the other party shall have the right to obtain specific performance of the obligations of such defaulting party, injunctive relief or such other equitable relief as may be available.

20. In the event of any conflict between the provisions of this Agreement and the provisions of the Subordinate Mortgage or the Subordinate Mortgage Loan Documents the provisions of this Agreement shall prevail.