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Skagit County Auditor

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11 11:40AM

LAND TITLE OF SKAGIT COUNTY

After Recording Return to:

Karen Taylor-Lewis, Esq.
Schnader Harrison Segal & Lewis
1600 Market Street
Suite 3600
Philadelphia, Pennsylvania 19103

Document Title or Titles:

Absolute Assignment of Leases and Rents

Reference Nos. Documents Assigned or Released:

None

Name of Grantor:

Newman Development Group of Burlington, LLC

Name of Grantee:

Land Title Company of Skagit County, Trustee, and Wachovia Bank, National Association,
Beneficiary

Pages referencing additional names:

None

Abbreviated Legal Description:

Lots 2 – 11, inclusive & Lots 13 – 15 inclusive, BU BSP 01-04 in 7-34-4 L W.M.
Lots 13 & 14, BU BSP 01-04 in 7-34-4E W.M.

Additional Legal Description Found On:

Exhibit A

Assessor's Property Tax Parcel Number or Account Number:

8048-000-002-0000/P121437; 8048-000-005-0000/P121440; 8048-000-008-0000/P121443;
8048-000-008-0000/P121446; 8048-000-011-0000/P121450; 8048-000-003-0000/P121438;
8048-000-006-0000/P121441; 8048-000-09-0000/P121444; 8048-000-013-0000/P121448

8048-000-004-0000/P121439; 8048-000-007-0000/P121442; 8048-000-010-0000/P121445;
8048-000-014-0000/P121449

ABSOLUTE ASSIGNMENT OF LEASES AND RENTS

ABSOLUTE ASSIGNMENT OF LEASES AND RENTS dated ^{May} April 3, 2004 (together with any amendments or modifications hereto in effect from time to time, the "**Assignment**"), between **NEWMAN DEVELOPMENT GROUP OF BURLINGTON, LLC**, a Washington limited liability company, having an office 3101 Shippers Road, P.O. Box 578, Vestal, New York 13851 ("**Assignor**") and **WACHOVIA BANK, NATIONAL ASSOCIATION**, a national banking association, having an office at PA 1245, 123 South Broad Street, Philadelphia, Pennsylvania 19109 ("**Assignee**").

1. **GRANT OF ASSIGNMENT.** For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Assignor hereby absolutely and presently conveys, transfers and assigns to Assignee, **all of the right, title, and interest** of Assignor now existing or hereafter arising in and to:

1.1. All leases, subleases, tenancies, licenses, occupancy agreements or agreements to lease all or any portion of the property described on **Exhibit "A"** attached hereto (the "**Property**"), together with any extensions, renewals, amendments, modifications or replacements thereof, and any options, rights of first refusal or guarantees of any tenant's obligations under any lease now or hereafter in effect (individually, a "**Lease**" and collectively, the "**Leases**");

1.2. All rents, income, receipts, revenues, reserves, issues and profits arising under any Lease including, without limitation, minimum rents, additional rents, percentage rents, parking, maintenance and deficiency rents (together with the items described in sections 1.3., 1.4. and 1.5. below, the "**Rents**");

1.3. All awards and payments of any kind derived from or relating to any Lease including, without limitation: (i) claims for the recovery of damages to the Property by proceeds of any policy of insurance or otherwise, or for the abatement of any nuisance existing thereon; (ii) claims for damages resulting from acts of insolvency or bankruptcy or otherwise; (iii) lump sum payments for the cancellation or termination of any Lease, the waiver of any term thereof, or the exercise of any right of first refusal or option to purchase; and (iv) the return of any insurance premiums or ad valorem tax payments made in advance and subsequently refunded;

1.4. The proceeds of any rental or loss of rents insurance carried by Assignor on the Property; and

1.5. All security deposits and escrow accounts made by any tenant or subtenant under any Lease.

2. **ABSOLUTE ASSIGNMENT; LICENSE TO COLLECT.**

2.1. This Assignment is intended to be and shall constitute an unconditional, absolute and present assignment from Assignor to Assignee of all of Assignor's right, title and interest in and to the Leases and Rents (subject to Section 6 hereof), and not an assignment in the nature of a pledge of such Leases and Rents or the mere grant of a security interest therein.

2.2. Notwithstanding that this Assignment is effective immediately, so long as no Event of Default (as defined below) exists, Assignor shall have the privilege under a license granted hereby which may be revoked only upon or during the continuance of an Event of Default to operate and manage the Property and to collect, as they become due, but not prior to accrual, the Rents. Assignor shall receive and hold such Rents, as well as the privilege and license to receive such Rents, in trust as a fund to be applied, and Assignor



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that such Rents shall be so applied, first to the operation, maintenance and repair of the Property and the payment of interest, principal and other sums becoming due under the Liabilities, before retaining and/or disbursing any part of the Rents for any other purpose.

3. CERTAIN DEFINED TERMS. As used in this Assignment:

3.1. "Note" mean that certain Mortgage Note of even date herewith from Assignor to Assignee in the principal amount of \$29,164,088.

3.2. "Deed of Trust" means that Deed of Trust and Security Agreement of even date herewith from Assignor to Assignee encumbering the Property and securing the Note.

3.3. "Loan Documents" shall have the meaning set forth in the Note. The terms of the Loan Documents are hereby made a part of this Assignment to the same extent and with the same effect as if fully set forth herein.

3.4. "Liabilities" means, collectively: (i) the repayment of all sums due under the Note (and all extensions, renewals, replacements and amendments thereof) and the other Loan Documents; (ii) the performance of all terms, conditions and covenants set forth in the Loan Documents; (iii) the repayment of all sums due or that may become due under or in connection with any present or future swap agreements (as defined in 11 U.S.C. §101) between Assignor and Assignee; (iv) the repayment of all reimbursement obligations due or that may become due under or in connection with any present or future letters of credit issued by Assignee for the account of Assignor; and (v) all other obligations or indebtedness of Assignor to Assignee whenever borrowed or incurred, including without limitation, principal, interest, fees, late charges and expenses, including attorneys' fees.

3.5. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Loan Documents.

4. REPRESENTATIONS AND WARRANTIES. Assignor represents and warrants to Assignee as follows: (i) Assignor has title to and full right to assign presently, absolutely and unconditionally the Leases and the Rents thereunder; (ii) no other assignment of any interest in any of the Leases or Rents has been made; (iii) there are no leases or agreements to lease all or any portion of the Property now in effect except the Leases, true and complete copies of which have been furnished to Assignee, and no written or oral modifications have been made thereto; (iv) there is no existing default by Assignor or, to Assignor's knowledge, by any tenant under any of the Leases, nor, to the best of Assignor's knowledge, has any event occurred which due to the passage of time, the giving or failure to give notice, or both, would constitute a default under any of the Leases and, to the best of Assignor's knowledge, no tenant has any defenses, set-offs or counterclaims against Assignor; (v) the Leases are in full force and effect; (vi) Assignor has not done anything which might prevent Assignee from or limit Assignee in operating under or exercising the rights granted to Assignee by this Assignment; (vii) Assignor has not accepted Rent under any Lease more than thirty (30) business days in advance of its accrual, and payment thereof has not otherwise been forgiven, discounted or compromised; and (viii) Assignor has not received any funds or deposits from any tenant except as expressly provided for in a Lease.

5. COVENANTS.

5.1. Assignor covenants and agrees that Assignor will perform all of its obligations, as landlord, under the Leases and will enforce the performance by tenants of all of their respective obligations under the Leases, and will not do or permit to be done anything to impair the enforceability thereof. Assignor covenants and agrees that Assignor will not, without the prior written consent of Assignee in each instance: (i) accept or collect the Rent under any Lease more than thirty (30) business days in advance of the due date thereof; (ii) discount, for



encumber or assign the Rents or any part thereof or any Lease or any interest therein; (iii) amend or modify any of the provisions of any Lease that affects the term of such Lease, the amount of space that is subject to such Lease, the amount of rent (including additional rent) payable by the tenant thereunder or the terms of payment of such rent (provided that with respect to leases affecting 5,000 square feet of space or less, Assignee's consent shall not be required for amendments or modifications made by Assignor in good faith); (iv) subordinate any Lease to any deed of trust or other encumbrance; (v) consent to any assignment of or subletting under any Lease other than in Assignor's good faith exercise of its business judgment; (vi) cancel or terminate any Lease or accept a surrender thereof; (vii) release any guarantor or surety of any tenant's obligations under any of the Leases; or (viii) subsequent to the date hereof enter into any Lease of any portion of the Property in excess 5,000 rentable square feet. Any of the foregoing acts, if done without the prior written consent of Assignee in each instance, shall be null and void.

5.2. Assignor covenants and agrees to furnish to Assignee, on request: (i) a complete list, as of the date of such request, of all existing Leases and the Rents payable thereunder, and providing such further detail as Assignee may request; (ii) executed or certified copies of all existing Leases and any modifications or amendments thereto; and (iii) specific, separate assignments of any future Leases duly executed and acknowledged by Assignee.

6. NO OBLIGATIONS OF ASSIGNEE.

6.1. Notwithstanding any legal presumption to the contrary, Assignee shall not be obligated by reason of its acceptance of this Assignment or of any Rent to perform any obligation of Assignor under any of the Leases, and Assignee shall not, prior to entry upon and actually taking physical possession of the Property, be deemed a mortgagee in possession.

6.2. Neither this Assignment nor collection by Assignee of Rents is intended, nor shall it be construed, to operate to place responsibility upon Assignee for: (i) the control, care, operation, management or repair of the Property; (ii) the performance of any of the terms or conditions of the Leases; (iii) any waste committed on, or any dangerous or defective condition at the Property; or (iv) any negligence in the control, care, operation, management or repair of the Property, resulting in loss or injury or death to any tenant, licensee, employee or other person or loss of or damage to the property of any of the foregoing; it being the intent of the parties that the responsibility and liability for the aforesaid matters shall remain solely with Assignor. Assignee assumes no liability for any security deposited with Assignor by any tenant unless and until such deposits are specifically transferred and delivered to Assignee.

7. EVENTS OF DEFAULT. Each of the following shall constitute a default (each, an "Event of Default") hereunder:

7.1. Any representation or warranty made by Assignor in this Assignment shall prove to be false, incorrect or misleading in any material respect as of the date when made;

7.2. A breach by Assignor of any of the covenants contained in the second sentence of Section 5.1 above;

7.3. A breach by Assignor of any other term, covenant, condition, obligation or agreement under this Assignment that is not cured within fifteen (15) business days after written notice thereof; provided that if such breach is susceptible to being cured but cannot reasonably be cured within such fifteen (15) day period, such shall not be an Event of Default if Assignor commences to cure such breach within such fifteen (15) day period and thereafter diligently seeks to cure such breach;

7.4. A material default by Assignor under any of the Leases, which Default continues beyond any applicable cure period contained in such Lease; or



7.5. An Event of Default under any of the other Loan Documents.

8. REMEDIES UPON AN EVENT OF DEFAULT. Upon the occurrence of an Event of Default, the license granted to Assignor to collect the Rents shall be automatically and immediately revoked without further notice to or demand upon Assignor, and Assignee shall have the right, without further notice to or demand upon Assignor, and in Assignee's absolute discretion, to exercise any one or more of the following rights and remedies:

8.1. Without regard to the adequacy of any security, and with or without appointment of a receiver, Assignee may enter upon and take possession of the Property; have, hold, manage, lease and operate the same, and collect, in its own name or in the name of Assignor, and receive all Rents accrued but unpaid and in arrears as of the date of such Event of Default, as well as the Rents which thereafter become due and payable; and have full power to make from time to time all alterations, renovations, repairs or replacements to the Property as Assignee may deem proper. Assignee may notify the tenants under the Leases, or any property manager or rental agent under any Contract (as such term is defined in the Deed of Trust), to pay all Rents directly to Assignee. Assignor shall pay to Assignee on demand any Rents collected by Assignor after the revocation of the license granted to Assignor. Assignor hereby irrevocably authorizes and directs the tenants under the Leases, and any property manager or rental agent under any Contract, upon receipt of written notice from Assignee, to pay all Rents due to Assignee without the necessity of any inquiry to Assignor and without any liability respecting the determination of the actual existence of any Event of Default claimed by Assignee or any claim by Assignor to the contrary. Assignor further agrees that it shall facilitate in all reasonable ways Assignee's collection of the Rents and will, upon Assignee's request, execute and deliver a written notice to each tenant under the Leases, or any property manager or rental agent under any Contract, directing such parties to pay the Rents to Assignee. Assignor shall have no right or claim against any parties to any Lease or Contract who make payment to Assignee after receipt of written notice from Assignee requesting same.

8.2. Assignee may apply such Rents to the payment of: (i) the Liabilities, together with all costs and reasonable attorneys' fees; (ii) all taxes, charges, claims, assessments, water rents, sewer rents and any other liens which may be prior in lien or payment to the Liabilities, and premiums for insurance, with interest on all such items; and (iii) the cost of all alterations, repairs, replacements and expenses incident to taking and retaining possession of the Property and the management and operation thereof; all in such order or priority as Assignee in its sole discretion may determine, any statute, law, custom or use to the contrary notwithstanding.

8.3. Assignee may: (i) endorse as Assignor's attorney-in-fact the name of Assignor or any subsequent owner of the Property on any checks, drafts or other instruments received in payment of the Rents, and deposit the same in bank accounts, which power of attorney is coupled with an interest and shall be irrevocable; (ii) give proper receipts, releases and acquittances in relation thereto in the name of Assignor; (iii) institute, prosecute, settle or compromise any summary or legal proceedings in the name of Assignor for the recovery of the Rents, or for damage to the Property, or for the abatement of any nuisance thereon; and (iv) defend any legal proceedings brought against Assignor arising out of the operation of the Property. Any charges, expenses or fees, including reasonable attorneys' fees and costs, incurred by Assignee in connection with any of the foregoing shall be included in the Liabilities, and shall be due and payable on demand, together with interest at the Default Rate, such interest to be calculated from the date of such advance to the date of repayment thereof.

8.4. Assignee may, at its election, but shall not be obligated to: (i) perform any of Assignor's obligations under the Leases (provided, however, that Assignor shall remain liable for such obligations notwithstanding such election by Assignee); (ii) exercise any of Assignor's rights, powers or privileges under the Leases; (iii) modify, cancel or

concessions to the tenants thereto; (iv) execute new Leases for all or any portion of the Property; and (v) take such other action as Assignor may have taken with respect to the Leases.

9. **ESTOPPEL CERTIFICATES.** Assignor shall, from time to time, without charge and within ten (10) business days after requested by Assignee (but not more frequently than once per year if no Event of Default has occurred) execute, acknowledge and deliver, and use its commercially reasonable efforts to cause each tenant under the Leases to execute, acknowledge and deliver to Assignee a written statement, in form and substance reasonably satisfactory to Assignee, certifying to certain matters relating to the Leases, including without limitation: (i) the commencement and expiration dates of the Leases and the dates when any rents, charges and other sums commenced to be payable thereunder; (ii) that the Leases are unmodified and in full force and effect (or, if modified, stating the nature of such modifications and that the Leases as so modified are in full force and effect); (iii) the amount of Rents payable under the Leases and the dates to which the Rents and other charges under the Leases have been paid in advance; and (iv) whether there are any uncured defaults by Assignor or such tenant or any setoffs or defenses against enforcement of any terms or conditions under any Lease.

10. **ASSIGNEE AS CREDITOR OF TENANTS.** Notwithstanding the privilege and license granted by Assignee herein, Assignee, and not Assignor, shall be deemed to be the creditor of each tenant in respect of any assignment for the benefit of creditors, bankruptcy, reorganization, insolvency, dissolution or receivership proceedings affecting such tenant. Assignee shall have the option to have any money received by Assignee as such creditor applied to reduce the Liabilities or paid over to Assignor. Assignee shall have the right to file claims in any such proceedings and to otherwise pursue creditor's rights therein. If Assignor learns that any tenant has become the subject of such a proceeding, Assignor shall give Assignee prompt notice thereof.

11. **TERM.** Upon repayment in full of the Liabilities and the cancellation or discharge of the Deed of Trust, this Assignment shall automatically terminate and become null and void. Assignor covenants and agrees that prior to such termination, the affidavit or certificate of any representative of Assignee stating that any of the Liabilities remain unpaid shall be conclusive evidence of the validity, effectiveness and continuing force of this Assignment, and any person is hereby authorized to rely thereon.

12. **OTHER RIGHTS OF ASSIGNEE.** Assignee may, without prejudice to any of its rights under this Assignment, take or release security, release any party primarily or secondarily liable for any of the Liabilities, and grant extensions, renewals, modifications or indulgences with respect to the Note, the Deed of Trust or any other Loan Document.

13. **NO WAIVER.** The collection of Rents under the Leases, the taking of physical possession of the Property, or any other remedial action taken by Assignee shall not waive any Event of Default or waive, modify or affect any notice of default under the Loan Documents, or invalidate any act done pursuant to such notice, and the enforcement of any right or remedy by Assignee, once exercised, shall continue for so long as Assignee shall elect, notwithstanding that the collection and application of such Rents may have cured or could have resulted in a cure of an Event of Default. If Assignee thereafter elects to discontinue the exercise of any right or remedy, that or any other right or remedy under this Assignment may be reasserted at any time and from time to time following any subsequent Event of Default.

14. **MISCELLANEOUS.**

14.1. **Notices.** All notices and communications under this Assignment shall be in writing and shall be given by either (a) hand-delivery, (b) certified first class mail (postage prepaid), return receipt requested or (c) reliable overnight commercial courier (charges prepaid) to the addresses listed in the Deed of Trust. Notice shall be deemed to be given on the date of delivery.



first to occur of actual delivery or refusal to accept delivery. A party may change its address by giving written notice to the other party as specified herein.

14.2. **Remedies Cumulative.** The rights and remedies of Assignee as provided in this Assignment or in any other Loan Document shall be cumulative and concurrent, may be pursued separately, successively or together, may be exercised as often as occasion therefor shall arise, and shall be in addition to any other rights or remedies conferred upon Assignee at law or in equity. The failure, at any one or more times, of Assignee to assert the right to declare the Liabilities due, grant any extension of time for payment of the Liabilities, take additional security for the payment thereof, release any security, change any of the terms of the Loan Documents, or waive or fail to exercise any right or remedy under any Loan Document shall not in any way affect this Assignment or the rights of Assignee.

14.3. **No Implied Waiver.** Assignee shall not be deemed to have waived any of its rights or remedies hereunder unless such modification or waiver is in writing and signed by Assignee, and then only to the extent specifically set forth therein. A waiver in one event shall not be construed as continuing or as a waiver of or bar to such right or remedy on a subsequent event.

14.4. **Partial Invalidity.** The invalidity or unenforceability of any one or more provisions of this Assignment shall not render any other provision invalid or unenforceable. In lieu of any invalid or unenforceable provision, there shall be added automatically a valid and enforceable provision as similar in terms to such invalid or unenforceable provision as may be possible.

14.5. **Binding Effect.** The covenants, conditions, waivers, releases and agreements contained in this Assignment shall bind, and the benefits thereof shall inure to, the parties hereto and their respective heirs, executors, administrators, successors and assigns and are intended and shall be held to be real covenants running with the land; provided, however, that this Assignment cannot be assigned by Assignor without the prior written consent of Assignee in each instance, and any such assignment or attempted assignment by Assignor shall be void and of no effect with respect to Assignee.

14.6. **Modifications.** This Assignment may not be supplemented, extended, modified or terminated except by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

14.7. **Governing Law.** This Assignment shall be governed by and construed in accordance with the substantive laws of the State of Washington without reference to conflict of laws principles.

14.8. **Waiver of Jury Trial.** ASSIGNOR AND ASSIGNEE AGREE THAT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY ASSIGNEE OR ASSIGNOR, ON OR WITH RESPECT TO THIS ASSIGNMENT OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. ASSIGNEE AND ASSIGNOR EACH HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND INTELLIGENTLY, AND WITH THE ADVICE OF THEIR RESPECTIVE COUNSEL, WAIVE, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, ASSIGNOR WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. ASSIGNOR ACKNOWLEDGES AND AGREES THAT THIS SECTION IS



**A SPECIFIC AND MATERIAL ASPECT OF THIS ASSIGNMENT AND THAT ASSIGNEE
WOULD NOT EXTEND CREDIT TO ASSIGNOR IF THE WAIVERS SET FORTH IN THIS
SECTION WERE NOT A PART OF THIS ASSIGNMENT.**

[Balance of Page Intentionally Blank, Signature Page Follows]



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IN WITNESS WHEREOF, Assignor, intending to be legally bound, has duly executed and delivered this Assignment of Leases and Rents under seal as of the day and year first above written:

ASSIGNOR:

WITNESS:

NEWMAN DEVELOPMENT GROUP OF
BURLINGTON, LLC, a Washington limited
liability company

Pamela C. Walling
Name: *Pamela C. Walling*

By: *[Signature]* Member
Marc Newman, Member



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STATE OF NEW YORK

COUNTY OF BROOME

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: SS.
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On this, the 27th day of April, 2004, before me, the undersigned officer, personally appeared Marc Newman, who acknowledged himself to be a Member of NEWMAN DEVELOPMENT GROUP OF BURLINGTON, LLC, a Washington limited liability company, and that he as such Member executed the foregoing instrument for the purposes therein contained by signing the name of the limited liability company by himself as Member and received a true and correct copy of this instrument and of all other documents referred to therein.

Pamela C. Walling
Notary Public

PAMELA C. WALLING
Notary Public, State Of New York
No. 01WA6092883
Licensed in Broome County
My Commission Expires May 27, 2 007



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Exhibit A

Lots 2 – 11, inclusive, and Lots 13 – 15, inclusive, City of Burlington Binding Site Plan No. Burl-01-04, entitled Newman Development of Burlington, LLC, Retail/Commercial Center, approved March 8, 2004 and recorded March 15, 2004 under Skagit County Auditor's File No. 200403150156, and being a portion of Government Lot 8 and the Southeast $\frac{1}{4}$ of the Northeast $\frac{1}{4}$, Section 7, Township 34 North, Range 4 East, W.M.



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