Wednesday, October 23, 2019

2:00 PM – 3:15 PM

General Session 1

Thinking Outside the Box. Is There Anything in the Box Anymore?

Presented to

2019 U.S. Shopping Center Law Conference
Marriott Marquis San Diego Marina

San Diego, CA

October 23-25, 2019

by:

Thomas B. Cahill
Owner
Thomas B. Cahill Attorney at Law, P.C.
1155 South Washington Street,
Suite 106
Naperville, Illinois 60540
tom@tbclaw.com

Jared E. Oakes
Partner
Benesch Friedlander Coplan &
Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114
joakes@beneschlaw.com

Cristina Hendrick Stroh
Senior Counsel
JCPenney
6501 Legacy Drive
(MS 4106)
Plano, TX 75024
chstroh@jcp.com

Thinking outside the box. Is there anything in the box anymore?

When one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us. Alexander Graham Bell

Part I: The Door (or Store) That is Closing: The Impacts of Losing an Anchor Tenant.

Consider what happens when a shopping center owner (the "Developer") gets the news that an anchor retailer is closing its store at a shopping center. There can be numerous direct and indirect impacts on the property. This proposition has struck fear into Developers since the beginning of the great recession in 2008. If the anchor retailer is operating under a lease (i.e., it doesn't own its own pad), the Developer will experience the direct impact of losing the rental income and contribution to CAM, insurance and tax programs from the anchor (assuming the anchor's lease is terminated and they are not just "going dark"). Additionally, the loss of an anchor tenant could result in a loan default or trigger cash management provisions under the Developer's loan documents. As bad as that sounds, the indirect impacts of losing an anchor can be substantially more painful to the Developer than the direct consequences. The two (2) most significant indirect impacts of losing an anchor are (i) the reduction in activity and shopping traffic in the vicinity of the anchor location at the property (aka the "death spiral"), and (ii) the co-tenancy rights triggered in other leases as a result of such closure. Note: both of these issues are heavily compounded when the anchor tenant closes its store but the Developer is unable to recover the space, either because the anchor owns its own space or because the anchor is operating a lease with remaining term and simply closes the store without negotiating (or exercising) a lease termination with the Developer.

Analyzing the co-tenancy impact of losing an anchor is typically the first legal analysis conducted by a Developer when it learns that the store is in jeopardy of closing. Co-tenancy is one of the most heavily covered topics in retail leasing presentations at ICSC. This is for good reason. In many respects, co-tenancy is a "house of cards" upon which the shopping center industry is built. Co-tenancy impacts of losing an anchor can be painful for Developers in most shopping center formats, whether in power centers, lifestyle centers, malls or single or shadow anchor centers. It is worth noting, however, that in the case of the enclosed mall, co-tenancy is very important because for decades, most of the in-line tenants agreed (and paid very high rents) to come to the mall in order to be near the anchors, which historically have drawn most of the shoppers to the project. This can even be seen in relation to the rent differences at a single mall relative to proximity to the most successful anchor store at that project. However, when enclosed malls were constructed, even though anchor tenants typically had (and still have) little or no obligation to continuously operate, the mall owners felt comfortable granting strong co-tenancy rights based upon the operation of the anchor tenants, because, at the time, it was inconceivable that the department store anchors would ever cease to exist (or even close at the rapid pace that has occurred recently and which will continue to occur for the foreseeable future).

The co-tenancy analysis conducted when losing an anchor store typically includes the following key areas: (a) understanding the type of co-tenancy requirements and what causes a co-tenancy failure (e.g., required/named co-tenants, percentage of occupancy co-tenancy or a combination thereof); (b) evaluating what is required to "cure" a co-tenancy failure; and (c) identifying tenants' rights upon and during a co-tenancy failure.

In the case of co-tenancy that requires specific named anchor co-tenants or specific types of replacements for the anchor co-tenants, one needs to consider what types of re-tenanting of the anchor box would cure the co-tenancy failure. It is not that uncommon in the retail leasing industry by now to have some flexibility to divide the anchor box into some number of smaller spaces (subject to specific parameters) and for the Developer to have some discretion in the use operated by the replacement tenant, as long as the replacement(s) are regional or national retailers, and replace a large portion of the vacant box. That said, there are still many centers where the legacy leases have very stringent replacement tenant requirements. For example, by far the most challenging aspect of co-tenancy issues in enclosed malls is how the co-tenancy provisions (most of which were drafted when department stores were never expected to fall out of favor) address replacement options for the vacated anchor. There are numerous varieties of replacement requirements, some relate to the percentage of the anchor space that must be back-filled, some relate to how much (if any) the space can be subdivided and leased to multiple tenants, and some (the most dangerous in the mall context) relate to the type of use and so-called "quality"

requirements for replacement tenants. Probably the worst language for Developers is a requirement that a department store anchor can only be replaced with a similar department store tenant. Based upon this requirement, it will soon be the case that many co-tenancy conditions may never be able to be re-satisfied, and as a result there may be a perpetual co-tenancy failure. This can be very frustrating for Developers because they may still receive reduced rent (and risk lease termination) from tenants with stringent co-tenancy requirements, even if they replace a vacant department store with a tenant or tenants that produces a significantly better use mix and even drive higher revenue for the tenant availing itself of the co-tenancy rights.

When evaluating the rights of a tenant for a co-tenancy failure, it is most commonly found that tenants have two primary rights (these are often mistakenly referred to as "remedies", which is a misnomer because a co-tenancy failure really isn't a default by the landlord, rather it is a failure of a condition that causes certain rights to spring into effect) in the event of a co-tenancy failure: reduced rent and/or a right to terminate (typically after some lengthy period of failure). In many cases, there is a cure/vacation period after the commencement of the co-tenancy failure where the Developer has the right to re-satisfy the co-tenancy condition. This is logical because it is not possible to backfill a newly vacant anchor box immediately upon the closure of the vacant tenant. In the best case scenario, there will be fairly significant downtime even if the Developer was able to sign a replacement lease prior to the vacation by the prior anchor. The time to recover possession, complete a likely elaborate construction project and allow for the replacement tenant(s) to open for business will be substantial. At the same time, there are a number of powerful retailers who have negotiated for co-tenancy rights to commence immediately upon the occurrence of the co-tenancy failure. From the retailer's perspective, their traffic and sale would be impacted immediately upon the closure of the anchor, not after some period of time. This negotiating point in leases is an allocation of risk that comes down to relative negotiating strength.

There are numerous variations on the payment of alternative or reduced rent (e.g., is rent payable based upon a reduced percentage of existing base rent; is base rent replaced by a percentage rent; does the payment of alternative rent replace only base rent or are CAM, insurance, taxes and other pass-through expenses also abated?). When negotiating tenant rights upon a co-tenancy violation in the co-tenancy provisions, it is important to also consider whether the tenant must be open and operating itself in order to avail itself of its co-tenancy rights. From the Developer's perspective, this would be favored, especially as it relates to the right to pay alternative rent based upon a percentage of gross sales. One middle ground to this approach is that the tenant pays alternative rent based upon a percentage of gross sales while it is operating, but if the tenant exercises its right to "go dark", then the alternative rent changes to a reduction in the base rent amount. Another commonly negotiated point is whether the rent reverts back to full rent after some period of paying alternative rent (e.g., after X months of reduced rent, or if tenant elects to renew the lease at the end of the term) or whether reduced rent continues indefinitely if the co-tenancy requirement is not re-satisfied. These are often referred to as "fish or cut bait" provisions or "sunset provisions", and Developers will negotiate hard to include them.

Further, after a sustained period of co-tenancy failure, very often the tenant will have the right to terminate the Lease. The parties must decide if a termination right is ongoing or if tenant has to elect at some point (i.e. tenant elects to terminate 12 months, 24 months, 36 months, etc. following expiration of the cure period or Tenant loses its termination right). Some very powerful tenants have negotiated for a negative termination provision, pursuant to which the tenant pays ongoing alternative rent during the continuance of a co-tenancy failure, but the Developer may have a right after a period of time to terminate the lease unless the tenant reverts to full rent. This is somewhat of a game of chicken for the Developer, because it has to call the Tenant's bluff that it will choose to revert to full rent over losing the lease.

One final note on co-tenancy to keep in mind is that the nature of replacement tenant requirements for re-satisfying the co-tenancy requirements may impact the nature of a proposed redevelopment that might otherwise be a huge improvement for the overall shopping center. It is not uncommon for Developers or anchor retailers to plan massive redevelopments on the pad of an anchor retailer, which might include entertainment, multi-family, hotel, or other uses that could drive traffic and fulfill the dream of "experiential retail". While that concept may appear to be the dream solution to an ailing shopping center, it does no good for curing the Developer's co-tenancy failures if it has a large group of tenants with co-tenancy provisions requiring that named department store anchor co-tenant to be replaced with a "department store of equal or better quality". This does not mean the Developer should give up on a major redevelopment plan, it simply means the process will be more complicated

because it will involve negotiating lease amendments with potentially material financial implications with the tenants with co-tenancy rights.

Below, in Part II, we discuss the silver lining to the closure of a struggling anchor retailer and the ability to create value by redeveloping the pad of the anchor. This can be a redevelopment by the Developer, assuming it obtains the space back pursuant to a lease termination or purchase of the anchor's property, or by the anchor retailer (or other 3rd party transferee of the anchor retailer).

Part II: The Door that Opens: Opportunities to Create Value by Redeveloping the Anchor Store Location.

One only needs to read the headlines of current media to understand that anchor boxes are being used and re-used in a wide variety of ways. The former Sears store in the Northwest Arkansas Mall in Fayetteville, Arkansas is being redeveloped into a co-working space and event center. At the Hawthorn Mall in Vernon Hills, Illinois, the Developer is proposing to redevelop the former Sears store and former Carsons store into residential apartments and a supermarket. In McAllen, Texas a closed Wal-Mart was redeveloped into the City's main library. In one of the larger redevelopment projects, the entire second level of One Hundred Oaks Mall in Nashville, Tennessee was redeveloped into medical offices for Vanderbilt University Medical Center. Even something not as extensive as that might include replacing one or more anchor boxes with other retail, restaurant, residential, or hospitality users. Even if the anchor store remains open, it may desire to sell off a portion of its parking area for use as an outparcel.

The use and re-use of anchor boxes will affect the practice of every retail real estate attorney. These transactions involve leasing, buying, selling, lending, municipal approvals, title insurance and possibly litigation. The transaction will include a myriad of other parties such as other occupants of the shopping center, municipal authorities, lenders and the surrounding community. The client will create the vision for the project, but the attorney will have to help guide the client through the transaction. The attorney will have to identify the various stakeholders and the documents that govern the relationship between the stakeholders. That guidance will arise from reviewing the existing documents (including key leases, REAs, loan documents, development agreements, etc.) and suggesting how to memorialize the various agreements for the redevelopment.

When considering redevelopment opportunities, the Developer must scrutinize restrictions under existing governing documents and the contractual rights of other stakeholders. At the outset of a planned redevelopment, a thorough review of leases, REAs, loan documents, development agreements and a full title/survey review is recommended. REA parties and powerful tenants, particularly junior anchor and big box operators, may demand site plan controls, impose limitations on future construction and enforce prohibited uses that conflict with the Developer's vision for the future of the project.

Leases, REAs and other governing documents at shopping centers often include a number of provisions that impact potential redevelopment, including site plan controls, permissible building areas, height limitations, ring road protections, critical parking areas and protected areas. Further, most if not all sophisticated lenders will have stringent requirements on modifications to the shopping center, entering into or terminating major leases, modifications to any REAs in place at the property, etc. Accordingly, it can be assumed that if there is an existing mortgage loan, the lender's consent will be required in connection with any significant redevelopment. As a result of the various site plan control and development landmines that may be hiding out there, the Developer should scrutinize each existing lease, REA and title document when considering all potential redevelopment opportunities. This analysis can actually be one of the more "fun" and challenging parts of retail law practice. It involves piecing together a complicated puzzle to understand consent rights of various stakeholders and it is an area where a creative lawyer can add tremendous value by identifying ways that a redevelopment plan may be modified to limit the number of required consents.

Once it has been determined what the rights of the various parties are under existing contractual documents, there are a couple of different approaches to the documents involved in redeveloping an anchor box. You could amend the existing REA, restate it or enter into mini-REAs that only govern the redeveloped box and surrounding area. As you set about documenting the redevelopment of the vacant anchor box, consider that the user and owner of the vacant anchor box might be separate entities. Those entities might be related or unrelated. The

owner and user of the vacant anchor box might be separate entities from the Developer of the shopping center. As the entities multiply, the complexity of resolution and documentation grows.

One of the threshold questions is, do the original stakeholders in the existing REA even exist anymore? Are their concerns the same or have they changed? The heyday of building shopping centers ran from the 1950s to the 1990s. The names of retailers who appeared in those original shopping centers and no longer exist are many: Woolworth, WT Grant, Montgomery Wards, Diamonds and Mervyns to name just a few. Each of those retailers and the many others who have closed had individual business models and concerns with how the shopping center was run. When the mall opened with those tenants the focus was entirely on retailing and the shopping center REA might prohibit residential uses, sleeping quarters, distilling, bowling alleys, theaters, supermarkets and health clubs. Now, those uses are coveted tenants and the original tenants who sought to restrict those uses are long gone. Even if restaurants and entertainment were not prohibited altogether, the REA might limit the areas within the shopping center where restaurant and entertainment uses might be located or the total amount of leasable area those uses can occupy.

If the stakeholder still exists, do they still want to restrict what used to be considered “prohibited” uses or do they want to be part of a redeveloped shopping district that sees increased customer traffic? The existing tenant will generally want to see increased traffic, but they will not want that increased traffic come at the cost of inconvenience to their customers or a decrease in the quality of the surrounding retailers. If the stakeholder still exists, where does its interests align with the entity that wants to redevelop the vacant anchor box and where do their interests conflict?

Various stakeholders will have approval rights over the conversion of parking area or green space which was formerly common area to permissible building area. This may depend in part on whether the anchor seeking to redevelop a pad owns or ground leases its property. In some instances, anchors who lease their property are approving parties under the REA (but not full parties as to all aspects) or their leases require tenant consent to REA modifications. In other instances, both owner and lessee anchors are full parties to the REA; to some extent, this varies by geographical region. If an anchor owns its property and desires to subdivide and sell an outparcel, the other REA parties will most likely have to consent to the redevelopment (or the change in permissible building area or common area reconfiguration) under the REA, and other anchors at the center may have limited approval rights related to relocation of access points or parking easements, parking ratio changes and other ancillary matters.

Other anchors of the center and the Developer of the center may seek monetary compensation in exchange for approving the proposed redevelopment. More often, however, an in-kind exchange of approvals is negotiated. The approving party or Developer may want to trade approvals for its own outparcel development at the same center or at a different location where reciprocal approval rights exist. Or the approving party may request something entirely different in exchange, such as relief from an operating covenant at another location, new signage rights, or the like. One complication to keep in mind is that often consents are packaged, so for example, a retailer may offer its consent to the Developer’s redevelopment in return for a consent at the same property in combination with a lease extension at another property (or some variation on that theme). The issue is that often Developers own properties in joint ventures, so a concession at a different property may be more challenging for the Developer to agree to if it has an adverse effect on other third party partners or lenders.

If the local jurisdiction requires that the new outparcel be subdivided from a larger parcel in order to be conveyed and developed, this opens the door for additional approving parties to be involved and to use the subdivision process as an opportunity make requests and demands. For instance, if the subdivision requires city approval, the city may ask for additional easements (for sidewalks, public drainage facilities or similar uses) or for an expanded right of way for future roadway improvements. A city or county might also require a change in landscaping, upgraded parking lot lighting, signage, or other matters. In one recent transaction, a city demanded donation of land for conversion to a public park space. Other demands with high price tags, such as relocation or reworking of utility facilities (such as lines and transformers) and services could also come into play. Who bears the cost of these requirements will be a matter for the various parties involved to negotiate.

Some governmental authorities may be willing to treat these as post-closing matters, while others will demand that everything be in place before the plat or certified survey map is recorded. There may also be multiple rounds

of review by the governmental authorities, each with new comments, which can add seemingly endless delays to a deal. If the parties are successful in pushing the completion of these matters to after closing, they can be memorialized in variety of ways and may involve an escrow agreement holding back a portion of the sales proceeds to handle certain matters that may take longer to complete (for instance, relocation of utilities or reworking of landscaping). In addition to documentation of any easements and other concessions that may be required incident to the subdivision, many counties also require pre-payment of real property taxes for the current or succeeding tax year in order to approve an outparcel subdivision. Sometimes these can be handled through a bonding process, but in many instances, the seller will have to pay the taxes upfront and then get a proration at closing.

If there is a lender involved, through a traditional mortgage or through a sale-leaseback structure or other synthetic mortgage configuration, there may be additional parties with consent rights. Their approval processes may vary widely and require different concessions (such as partial loan repayment with proceeds from the instant transaction, payment of attorneys' fees and costs for review of the transaction documents, and so on). If the redevelopment might include creation of any outparcel, and if possible, an anchor or Developer should consider possible outparcel development at the outset of the financing relationship so that these issues can be addressed and an approval process can be put in place from the inception of the loan. Looking at the mortgage situation from the perspective of the prospective outparcel occupant, will a consent agreement or subordination agreement be necessary? This may depend on the various parties, whether a franchisor is involved, and the level of investment that the occupant plans to put into the location. If so, it will be an additional level of review and approval for the anchor or Developer to secure.

What if one party owns the anchor or Developer parcel and another party owns the anchor box to be developed? If an anchor or Developer desires to sell an outparcel for development, it is most likely not desirable or practical for the purchaser to become a party to the center-wide REA. One way to document this relationship is with a Mini-REA between anchor/seller and outparcel buyer. *See sample form document as Exhibit A to these materials*. The Mini-REA (which could also be called an Agreement of Restrictive Covenants or any number of other names) is a two-party agreement that will be recorded in the real property records against the original larger parcel of which it was a part and the new outparcel. It serves to acknowledge the center-wide REA and then provide for matters internal to the parent parcel, which will most likely still be documented as one larger parcel in the center-wide REA, and the new outparcel. It may provide for new easements for parking, access, utilities, signage, or drainage, and may also address the continuation of easements established under the center-wide REA upon the expiration or termination thereof. If the center-wide REA does not provide for perpetual easements, the new outparcel could eventually be without access to a public right of way.

This document will operate to protect the buyer as to seller's exercise of its rights as the "Controlling Party" under the center-wide REA; it can prevent the seller from approving changes to permissible building areas, signage, parking, ring road alignment, increase of CAM charges, etc. without buyer's involvement. In addition, the purchaser of the outparcel may be developing for a specific tenant/occupant. If the tenant is the actual party in interest, will be making payments or reviewing and approving things like changes to protected areas, it may make sense to the involve the tenant as a party to the Mini-REA. If the tenant is added, any involvement should only be for the term of its lease. Assignment and other terms of the lease may need to be reviewed and evaluated as well.

If there are multiple outparcels, the choice will be whether to have multiple two-party Mini-REAs layered on the property, or one multi-party agreement covering the entire parent parcel as it is divided up. Depending on the layout of the center and the outparcels and the various easements granted by the Mini REA, it may make more sense to have completely separate documents. However, if the outparcels are adjacent to each other, one integrated document could be the best way to address easements between the multiple parcels.

Cost sharing for maintenance of easement areas, such as shared driveways and drainage detention should also be addressed. These costs, as well as sharing of common area maintenance costs payable pursuant to the center-wide REA can be addressed in a separate agreement if the parties desire that it not be recorded in the real property records. Often, anchor parties are given discounted or subsidized common area maintenance cost

rates, and they may want to keep any reference thereto out of public records. *See sample form document as Exhibit B to these materials.*

There may also be use restrictions in the REA applicable to the proposed redevelopment. The use restrictions on an anchor parcel in the REA may take one of many typical forms: any lawful use, any lawful retail use, or any lawful use that is consistent and harmonious with the remainder of the shopping center or with a "first class" shopping center. Note that a "first class" shopping center may not be the best standard, as that is difficult to define. There may also be use restrictions against exclusive uses granted to other occupants of the center or against traditional "noxius" uses such as sexually oriented businesses, funeral parlors, head shops, and others. The restrictions may also include a maximum number of occupants for the anchor parcel.

Non-traditional uses have been becoming increasingly popular in mall shopping centers; these include, among others, grocery, outlet, fitness center, hotel, multi-family, religious, educational, office, and healthcare. When determining what use may be restricted, there is significant due diligence which may be undertaken by the party undertaking the redevelopment to determine the extent to which the anchor box is subject to any of the qualifying terms such as "first class" or "retail" use or any restrictions and use exclusives imposed by other occupants of the shopping center. While some restrictions imposed by an REA may be explicit and clear as to the intent, such as a restriction on movie theaters, others are often ambiguous and pose questions for both the party redeveloping the anchor box and the proposed occupant as to whether a use may be prohibited. For example, would a restriction on health clubs be interpreted to prohibit a children's swim school or karate studio? A chiropractic or massage therapy office? Or would a requirement that an occupant operate "a first class" retail use prohibit an entertainment use such an upscale bowling establishment?

The retailer who remains while the vacant anchor box is being redeveloped is going to be concerned about minimizing the disruption to its business. How will the remaining retailer's customer's access the parking field and where will they park? To avoid conflict with construction traffic the remaining retailer will want the Developer to agree to limit construction traffic to particular access roads and stage construction materials away from the remaining retailer's parcel. The remaining retailer will want to ensure that any utility interruptions are scheduled for off hours so that the remaining retailer's business is not disrupted. The remaining retailer will be concerned that the construction traffic will lead to increased common area maintenance costs and will want to limit that exposure. Finally, the remaining retailer will want the Developer to be obligated to restore any common areas once the construction is finished. *See sample language as Exhibit C to these the materials.*

If we have learned anything from the already accomplished use and re-use of anchor boxes it is that the tension between the tenant's desire to restrict the uses within the shopping center and the Developer's desire for flexibility remain as strong as ever. At the same time the concerns of the parties are often the same as the original parties, that is, easements, construction, visibility and compatible use.

Whether the existing REA is being amended, restated or supplemented with mini-REAS, what can we agree upon? We can agree that the users in the shopping center will need utilities and that they will need access to public streets. We can probably agree that the users in the shopping center will want customers to have the right to park anywhere within the shopping center. If the buildings are built to the lot line the parties will want to grant encroachment easements and construction easements to one another. How is storm water handled, do we need to continue drainage easements? Is there a shared monument sign where the retailers will need an easement to place their panel on the monument and an easement to access the sign to maintain the panel?

In the existing REA the parties probably granted to each other and to the local utility provider the right to install, operate, maintain and repair utility lines on each owner's tract. Do any of those easements need to be amended or relocated to accommodate the redevelopment of the anchor box?

Special consideration should be given to easements for stormwater drainage. Does the language prohibit altering the common areas on the burdened tract in a way that will impede the flow of stormwater from the benefitted tract?

Frequently an existing REA will already contain language allowing the burdened owner the right to relocate a utility easement. This type of language will require the burdened owner to give the benefitted owner(s) notice, not vacate

the existing utility line until the new one is ready to use and not make it more difficult for the benefitted owner(s) to use the utility line.

When reviewing the provisions of an existing REA discussing access easements, determine if the easement is tied to a specific location. If the access easements were granted over specific area, the party redeveloping the anchor box will have to obtain consent from each other owner benefitting from the easement to move the easement. Sometimes an existing REA will specify that a certain specific access road, such as an access road leading from a ring road to a public road, will be granted based upon a specific location and the access road will not be relocated without the consent of all of the other owners. If the existing REA does not tie access easements to a specific location, determine if there is language allowing the owner to relocate the easement and the requirements to relocate the easement.

As anchor boxes are developed into different uses what does that do to parking ratios? Most anchor boxes have three entrances on two levels how are those allocated amongst the new tenants? Should the Developer create a mini-mall with the new tenants having access off of a center entrance? An existing REA might have very specific language about parking easements and parking ratios. The existing REA might say that each parcel has to be self-sufficient for parking. It will generally require parking ratios of 5 spaces for each 1,000 square feet of retail space and something like 10 spaces for each 1,000 square feet of restaurant space. If an anchor box is redeveloped for a restaurant, office or residential use, it will trigger new parking ratios that have to be met and, depending on the language of the REA, will have to be met entirely on the parcel being redeveloped.

If there is a common sign such as a shopping center pylon or monument sign, and the anchor box has access to one of the panels on the sign, will the new tenant or tenants of the redeveloped anchor box have the right to use the same panel location. If the anchor box is being redeveloped into a couple of spaces, will the new users have the right to subdivide the panel? If the sign is located on the parcel of another owner, will each of the new users have to have an easement to maintain its panel, or will they appoint one party to handle the maintenance for everyone?

Besides noxious and prohibited uses, that will have to be addressed, does the REA define permissible building areas that will have to be revised to allow an enlargement or reconfiguration of the former anchor box? Does the REA require a unified architectural theme that might limit the changes that can be made to the exterior of the anchor box? If residential uses are added, the Developer will have to limit the times when deliveries can be made to the retailers so that the residential tenants are not disrupted in the middle of the night. If the existing REA is being amended or restated, consider sunset provisions on various restrictions and easements. *See sample language as Exhibit D to these materials*.

What do you do with an REA that is coming to the end of its term? We are reaching a time when many REAs that were put into place in the 1970s and 1980s are expiring naturally. Some provide that certain access, utility and other easements are perpetual and automatically continue after the expiration of the remaining terms of the REA, while others do not. In those cases, the need to address expiration is more urgent.

If the parties agree and want to continue to operate the center as an integrated whole, a simple extension document may suffice. If the parties desire to continue but the evolution of the center has made the REA obsolete, an amended and restated REA may be the best solution, but a short-term extension (or more than one such extension) may be necessary while the parties negotiate new documentation. An amended and restated REA can take years to complete when several parties are involved.

Another approach if the anchors and Developer don not agree regarding the future of the center or are not willing to commit to wholesale restrictions going forward is a pared down agreement. This can include easements, address exterior common area maintenance only (which is often the case when redevelopment of an enclosed mall is on the horizon), or address other issues such as signage and drainage or detention. If any easements are granted or maintenance by one party of another party's property is anticipated, appropriate insurance and indemnity provisions should also be included. One difficult issue in this scenario can be remedies. If one party violates the agreement by blocking access, failing to maintain common areas, or failing to pay maintenance costs, what remedies do the other parties have? These could include self-help, termination of the agreement, or

withdrawal of one party's property from the agreement, but more creative solutions may be needed depending on the specifics of the center.

If one party desires to pursue a separate development but the other anchors and the Developer intend to continue to operate the remainder of the center in a coordinated fashion, the REA may be allowed to expire and new piecemeal agreements may be negotiated for different parts of the center. This is often the case when one anchor with a dark anchor box and a large parcel of land elects to demolish the anchor box and redevelop the entire parcel as a lifestyle or power center. If there are multiple agreements in place (especially with overlapping parties and parcels), it can be difficult to determine how the agreements interact with each other, unless priority and other matters are spelled out in the documents.

Alternative use development should be considered in any new documents that are contemplated. As uses like medical, educational, residential and hotel become commonplace in shopping centers and redeveloped enclosed malls, the parties should evaluate whether it makes sense to keep any of the traditional prohibited uses and if so, which ones. Parking ratios have also changed drastically since most center-wide REAs were put into place. New phenomena such as ride sharing and municipalities desiring to have more green space and less impervious surface have led to smaller minimum parking ratios, which can help to facilitate the redevelopment of older centers.

Exhibit A to General Session Materials - Mini-REA

(Space Reserved)

THIS DOCUMENT PREPARED BY

AND AFTER RECORDING RETURN TO:

_____

_____

_____

Attn: _____

RECIPROCAL EASEMENT AGREEMENT WITH COVENANTS,

CONDITIONS AND RESTRICTIONS

THIS RECIPROCAL EASEMENT AGREEMENT WITH COVENANTS, CONDITIONS AND RESTRICTIONS [Note: Title may need to be changed, depending on whether easements granted are reciprocal.] (the "Agreement") is made and entered into this _____ day of _____, 20____ (the "Effective Date"), by and between _____, a _____ (the "Parcel A Owner"), and _____, a _____ (the "Parcel B Owner").

RECITALS

A. Parcel A Owner is the owner of that certain real property situated in the City of _____, County of _____, State of _____, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("Parcel A"), which Parcel A is part of a shopping center commonly known as _____ (the "Shopping Center") and is currently operated as a retail department store.

B. As of the date hereof, Parcel A Owner has sold and conveyed to Parcel B Owner that certain real property situated in the City of _____, County of _____, State of _____, more particularly described on Exhibit "B" attached hereto and incorporated herein by this reference ("Parcel B"), which Parcel B is part of the Shopping Center.

C. Parcel A and Parcel B are subject to that certain _____ *[insert REA title here]* _____ which was recorded on _____ in the land records of _____ County

(the "Official Records"), _____, as Document No. _____, as amended by that certain _____ *[insert amendment title here]* _____ which was recorded on _____ _____ in the Official Records, as Document No. _____ and by that certain ____ _____ *[insert amendment title here]* _____ which was recorded on _____ in the Official Records, as Document No. _____ (collectively, the "Shopping Center REA").

D. In addition to the Shopping Center REA, Parcel A Owner and Parcel B Owner wish to impose certain easements upon Parcel A and Parcel B, and to establish certain covenants, conditions and restrictions with respect to said Parcels, for the mutual and reciprocal benefit and complement of Parcel A and Parcel B and the present and future owners and occupants thereof, on the terms and conditions hereinafter set forth. **[Note: May need to revise if easements are not reciprocal.]**

NOW, THEREFORE, in consideration of the above premises and of the covenants herein contained, Parcel A Owner and Parcel B Owner hereby covenant and agree that the Parcels and all present and future Owners (as defined herein) and Permittees (defined below) of the Parcels shall be and hereby are subject to the terms, covenants, easements, restrictions and conditions hereinafter set forth in this Agreement, so that said Parcels shall be maintained, kept, sold and used in full compliance with and subject to this Agreement and, in connection therewith, the parties hereto on behalf of themselves and their respective successors and assigns covenant and agree as follows:

AGREEMENTS

1. **Definitions**. For purposes hereof:

(a) The term "Owner" or "Owners" shall mean the Parcel A Owner (as to Parcel A) and the Parcel B Owner (as to Parcel B) and any and all successors or assigns of such persons or entities as the owner or owners of fee simple title to all or any portion of the real property covered hereby, whether by sale, assignment, inheritance, operation of law, trustee's sale, foreclosure, or otherwise, but not including the holder of any lien or encumbrance on such real property.

(b) The term "Parcel" or "Parcels" shall mean each separately identified parcel of real property now constituting a part of the real property subjected to this Agreement as described on Exhibit "A", that is, Parcel A and Parcel B, and any future subdivisions thereof.

(c) The term "Permittees" shall mean the tenant(s) or occupant(s) of a Parcel, and the respective employees, agents, contractors, customers, invitees and licensees of (i) the Owner of such Parcel, and/or (ii) such tenant(s) or occupant(s).

(d) The term "Common Area" shall mean those portions of Parcel A and Parcel B that are included in the definition of "Common Area" as set forth in the Shopping Center REA. Notwithstanding any amendment, termination or expiration of the Shopping Center REA, the definition of the term Common Area shall remain as defined in the Shopping Center REA as of the date hereof unless this Agreement is amended in writing by the parties hereto. **[Note: This term should be changed to match the corresponding term in the REA, if the REA uses a term other than "Common Area".]**

(e) The term "Plot Plan" shall mean the depiction of the Parcels attached hereto as Exhibit "B" and by reference made a part hereof.

2. **Easements**.

2.1 **Grant of Reciprocal Easements**. **[May need to revise heading if easements are not reciprocal.]** Subject to any express conditions, limitations or reservations contained herein, the Owners hereby grant, establish, covenant and agree that the Parcels, and all Owners and Permittees of the Parcels, shall be benefited and burdened by the following nonexclusive, perpetual and, unless otherwise specified, reciprocal easements, which are hereby imposed upon the Parcels and all present and future Owners and Permittees of the Parcels:

(a) **Access**. An easement for access, ingress and egress over the area identified as the "Access Easement" on the Plot Plan, so as to provide for the passage of motor vehicles and pedestrians to, from and between the Parcels and abutting streets, drive aisles and rights of way furnishing access to such Parcels. The portion designated as "Access Easement" on the Plot Plan attached hereto shall not be blocked, closed, modified, altered, relocated or otherwise changed, without the prior written consent of the Owner whose Parcel is benefited by such easement. Subject to a third party being obligated to perform the following under the terms of the Shopping Center REA, the terms of another recorded (filed) agreement, or otherwise, each Owner shall operate and maintain, or cause to be operated and maintained, in clean, unobstructed, open, paved and otherwise good order, condition and repair, the Access Easement located upon its Parcel and make, or cause to be made, any and all repairs and replacements that may from time to time be required with respect thereto. **[For each Property where such easement is granted, parties to discuss cost sharing (participation) for such maintenance to the extent it is performed by party (and not Developer), or alternatively, the right of a benefitted party to perform such maintenance on the other party's parcel at its sole cost (with no reimbursement)]**

(b) **Storm Water Drainage and Detention**. An easement upon, under, over, above and across the Common Areas of the Parcels for the discharge, drainage, use, detention and retention of storm water runoff in the manner and in the locations existing as of the date hereof, and to maintain, repair and replace existing storm water collection, retention, detention and distribution lines, conduits, pipes and other apparatus under and across those portions of a burdened Parcel's Common Areas which currently serve a benefited Parcel (hereinafter called the "Water Detention and Drainage Facilities"). The easement granted herein shall include the right of reasonable ingress and egress with respect to the Water Detention and Drainage Facilities as may be required to maintain and operate the same. The Water Detention and Drainage Facilities shall not be modified, altered, relocated or otherwise changed, without the prior written consent of the prior written consent of the Parcel A Owner and the Parcel B Owner. Subject to a third party being obligated to perform the following under the terms of the Shopping Center REA, the terms of another recorded (filed) agreement, or otherwise, the terms of another recorded (filed) agreement, or otherwise, each Owner shall operate and maintain, or cause to be operated and maintained, in good order, condition and repair: (i) the Water Detention and Drainage Facilities located upon its Parcel that constitute common drainage facilities (i.e.-those serving more than one Parcel hereunder or tract within the Shopping Center) and make, or cause to be made, any and all repairs and replacements that may from time to time be required with respect thereto; and (ii) the Water Detention and Drainage Facilities located upon the other Owner's Parcel that constitute a separate drainage facilities (i.e.-those serving only the Parcel of the easement beneficiary) and make, or cause to be made, any and all repairs and replacements that may from time to time be required with respect thereto.

(c) **Utilities**. An easement under and/or across those parts of the Common Areas currently improved with common or separate utility lines and facilities serving the easement grantee's Parcel and not located within public utility easements **[alternate language: "An easement under and/or across that area identified as "_____" on the Plot Plan"]** for the continuous, uninterrupted use of such existing lines and facilities and for maintenance, repair and replacement thereof, including, without limitation, water mains, water sprinkler system lines, telephone or electrical conduits or systems, cable, gas mains and other existing utility facilities; provided that (i) the rights granted pursuant to such easements shall at all times be exercised in such a manner as not to interfere materially with the normal operation of a Parcel and the businesses conducted therein, and (ii) except in an emergency, the right of any Owner to enter upon the Parcel of another Owner for the exercise of any right pursuant to such easements shall be conditioned upon providing reasonable prior advance written notice to the other Owner as to the time and manner of entry. Subject to a third party being obligated to perform the following under the terms of the Shopping Center REA, the terms of another recorded (filed) agreement, or otherwise, each Owner shall operate and maintain, or cause to be operated and maintained, in good order, condition and repair: (i) the common utility lines and facilities (i.e.-those serving more than one Parcel hereunder or tract within the Shopping Center) located upon its owned Parcel, and make, or cause to be made, any and all repairs and replacements that may from time to time be required with respect thereto; and (ii) the separate utility lines and facilities (i.e.-those serving only the Parcel of the easement

beneficiary) located upon the other Owner's Parcel, and make, or cause to be made, any and all repairs and replacements that may from time to time be required with respect thereto.

(d) **Parking**. The Owner of Parcel A does hereby grant and convey to the Owner of Parcel B and to all Owners and Permittees of Parcel B from time to time, an easement for the parking of vehicles in the area identified on the Plot Plan as the "Parcel A Parking Easement Area" (the "Parcel A Parking Easement"). **[Optional language if Parcel B is granted parking over Parcel A:]** The Owner of Parcel B does hereby grant and convey to the Owner of Parcel B and to all Owners and Permittees of Parcel A from time to time, an easement for the parking of vehicles in the area identified on the Plot Plan as the "Parcel B Parking Easement Area" (the "Parcel B Parking Easement"; together, with the Parcel A Parking Easement, the "Parking Easements"). The Parking Easements are for customer parking in connection only with the businesses operated from time to time on Parcel B or Parcel A, as applicable. In no event shall the Parking Easements be used for delivery or truck parking, employee parking, overnight parking, storage or other similar parking purposes that shall constitute an unreasonably prolonged use of the Parking Easements.

ALTERNATE CLAUSE IN THE EVENT A SIGN EASEMENT IN FAVOR PARCEL B OWNER IS REQUIRED.(e) The Owner of Parcel A does hereby grant and convey to the Owner of Parcel B and to all Owners of Parcel B from time to time, an easement upon Parcel A in the area identified on the Plot Plan as the "Parcel B Sign Easement Area" for the operation, maintenance, repair, alteration and replacement of the sign structure **[alternate language: "of a sign panel on the pylon/monument sign"]** that exists thereon as of the Effective Date (such sign **[alternate: "panel"]** herein referred to as the "Parcel B Sign"). The easement granted herein shall include (i) the right of reasonable access over, under, upon and across Parcel A to maintain, repair, operate and replace the Parcel B Sign, and (ii) the obligation of the Parcel B Owner, at its sole cost and expense, to maintain, operate, illuminate and repair such Parcel B Sign and any related utility line in good order, condition and repair. The Parcel B Sign shall not display any content other than the identity of the business(es) then in operation on Parcel B and such business(es)' standard corporate logo or adopted branding. No signs, structures, landscaping or improvements shall be placed or maintained on Parcel A that unreasonably obstructs or impairs the visibility of the Parcel B Sign from adjacent streets and roads.

2.2 **Indemnification**. Each Owner having rights with respect to an easement granted hereunder shall indemnify, defend and hold the Owner whose Parcel is subject to the easement harmless from and against all alleged claims, liabilities and expenses (including reasonable attorneys' fees) relating to accidents, injuries, loss, or damage of or to any person or property arising from the negligent, intentional or willful acts or omissions of such Owner, its contractors, employees, agents, Permittees, or others acting on behalf of such Owner.

2.3 **Reasonable Use of Easements; Maintenance**.

(a) **No Interference**. The easements herein above granted shall be used and enjoyed by each Owner and its Permittees in such a manner so as not to unreasonably interfere with, obstruct or delay the conduct and operations of the business of any other Owner or its Permittees at any time conducted on its Parcel, including, without limitation, public access to and from said business, and the receipt or delivery of merchandise in connection therewith.

(b) **Relocation of Facilities**. The Owner of the Parcel served by Water Detention and Drainage Facilities or utilities subject to the easements set forth hereinabove in Section 2.1(b) and (c) hereby agrees to the reasonable relocation of such installations by the Owner of a Parcel where such installations are located, at such Owner's sole cost and expense, so long as Water Detention and Drainage Facilities or Utilities, as applicable, to the other Owner's Parcel are not unreasonably interrupted, the capacity of such services is not diminished.

3. **Insurance**. Throughout the term of this Agreement, each Owner shall procure and maintain, or cause to be procured and maintained, any general and/or comprehensive public liability insurance and property damage insurance (with respect to the improvements located on such Owner's Parcel) required by the Parcel A Owner

under the Shopping Center REA. In the event the Shopping Center REA expires or is otherwise terminated, each Owner shall be obligated under this Section 3 to procure and maintain the insurance required to be procured and maintained under the Shopping Center REA immediately prior to such expiration or termination.

4. **Taxes and Assessments**. Each Owner shall pay all taxes, assessments, or charges of any type levied or made by any governmental body or agency with respect to its Parcel.

5. **Shopping Center REA**. [NOTE: Prior to any closing the agreed upon pro-rata share between Parcel A and Parcel B and the applicable sharing of Common Area Costs shall be agreed upon by the parties and memorialized in an unrecorded agreement, which agreement shall be referenced in the Assignment and Assumption of Operating Agreement.]

5.1 **Notices and Consents Under the Shopping Center REA**. To the extent not otherwise delivered to the Parcel B Owner, the Owner of Parcel A shall use its good faith, commercially reasonable efforts to promptly deliver to the Parcel B Owner copies of all notices, demands, reconciliations, budgets, requests for consents or estoppels under, or modifications or termination to, the Shopping Center REA, given to or received from other owners of real property subject to the Shopping Center REA and/or any third party administrator under the Shopping Center REA. Additionally, to the extent not otherwise delivered to the Parcel B Owner, the Owner of Parcel A shall promptly deliver to the Parcel B Owner copies of all notices, demands, reconciliations, budgets, requests for consents or estoppels under, or modifications or termination to, the Shopping Center REA, given to or received from other owners of real property subject to the Shopping Center REA and/or any third party administrator under the Shopping Center REA, which materially and adversely impact or otherwise affect Parcel B. The Owner of Parcel A shall not give any consent or estoppel under, or modify or terminate the Shopping Center REA, without the prior written consent of the Owner of Parcel B, if such consent, estoppel, modification or termination would (a) materially reduce or eliminate the availability, reasonableness, directness or capacity of paved and appropriately lit access, necessary utilities, drainage, parking and/or signage serving Parcel B, or (b) cause the addition of approval rights, an increase in cost, a change in permitted/prohibited uses, or a change in permissible building areas, building height, parking requirements or sign restrictions affecting Parcel B.

5.2 **REA Parties.** Notwithstanding anything contained herein to the contrary, while Parcel B will remain subject to the REA, the Parcel B Owner will not become a party thereto, all consent and other rights granted to Parcel A Owner as _____ *[insert REA defined term such as Major Occupant, Anchor, (anchor's name)]* under the REA will be retained by the Parcel A Owner.

6. **Future Development.** If Parcel A Owner elects to develop one or more additional outparcels or other permissible building area on Parcel A (the "Future Development"), the consent of Parcel B Owner will not be required hereunder unless such development will: (a) materially reduce or eliminate the availability, reasonableness, directness or capacity of paved and appropriately lit access, necessary utilities, drainage, parking and/or signage serving Parcel B, or (b) cause the addition of approval rights, an increase in cost, a change in permitted/prohibited uses, or a change in permissible building areas, building height, parking requirements or sign restrictions affecting Parcel B. If a Future Development is undertaken, Parcel A Owner and Parcel B Owner will execute any necessary documentation incident to such development (provided the same is in form and substance reasonably acceptable to both parties) related to the location of Common Areas, sharing of Common Area Costs or other matters.

7. **Remedies and Enforcement**.

7.1 **All Legal and Equitable Remedies Available**. In the event of a breach or threatened breach by any Owner or its Permittees of any of the terms, covenants, restrictions or conditions hereof, the other Owner(s) shall be entitled forthwith to full and adequate relief by injunction and/or all such other available legal and equitable remedies from the consequences of such breach, including payment of any amounts due and/or specific performance. During the continuance of the Lease, and thereafter for obligations, defaults or liabilities which arose during the continuance of the Lease, the obligations and liabilities of Parcel B Owner hereunder shall be joint and several with Parcel B Owner.

7.2 **Self-Help**. In addition to all other remedies available at law or in equity, upon the failure of a defaulting Owner to cure a breach of this Agreement within thirty (30) days following written notice thereof by an Owner (unless, with respect to any such breach the nature of which cannot reasonably be cured within such 30-day period, the defaulting Owner commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion), any Owner shall have the right to perform such obligation contained in this Agreement on behalf of such defaulting Owner and be reimbursed by such defaulting Owner upon demand for the reasonable costs thereof together with interest at the prime rate as announced from time to time in the Wall Street Journal, plus two percent (2%) (not to exceed the maximum rate of interest allowed by law).

7.3 **Remedies Cumulative**. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity.

7.4 **No Termination For Breach**. Notwithstanding the foregoing to the contrary, no breach hereunder shall entitle any Owner to cancel, rescind, or otherwise terminate this Agreement. No breach hereunder shall defeat or render invalid the lien of any mortgage or deed of trust upon any Parcel made in good faith for value, but the easements, covenants, conditions and restrictions hereof shall be binding upon and effective against any Owner of such Parcel covered hereby whose title thereto is acquired by foreclosure, trustee's sale, or otherwise.

7.5 **Irreparable Harm**. In the event of a violation or threat thereof of any of the provisions of Section 2 of this Agreement, each Owner agrees that such violation or threat thereof shall cause the nondefaulting Owner and/or its Permittees to suffer irreparable harm and such nondefaulting Owner and its Permittees shall have no adequate remedy at law. As a result, in the event of a violation or threat thereof of any of the provisions of Section 2 of this Agreement, the nondefaulting Owner, in addition to all remedies available at law or otherwise under this Agreement, shall be entitled to injunctive or other equitable relief to enjoin a violation or threat thereof of Section 2 of this Agreement.

8. **Term**. The easements, covenants, conditions and restrictions contained in this Agreement shall be effective commencing on the Effective Date and shall remain in full force and effect thereafter in perpetuity, unless this Agreement is modified, amended, canceled or terminated by the written consent of all then record Owners of Parcel A and Parcel B in accordance with paragraph 8.2 hereof.

9. **Miscellaneous**.

9.1 **Attorneys' Fees**. In the event an Owner institutes any legal action or proceeding for the enforcement of any right or obligation herein contained, the prevailing party after a final adjudication shall be entitled to recover its costs and reasonable attorneys' fees incurred in the preparation and prosecution of such action or proceeding.

9.2 **Amendment**. The parties agree that the provisions of this Agreement may be modified or amended, in whole or in part, or terminated, only by the written consent of all record Owners of Parcel A and Parcel B, evidenced by a document that has been fully executed and acknowledged by all such record Owners and recorded in the Official Records.

9.3 **Consents**. Wherever in this Agreement the consent or approval of an Owner is required, unless otherwise expressly provided herein, such consent or approval shall not be unreasonably withheld or delayed. Any request for consent or approval shall: (a) be in writing; (b) specify the section hereof which requires that such notice be given or that such consent or approval be obtained; and (c) be accompanied by such background data as is reasonably necessary to make an informed decision thereon. The consent of an Owner under this Agreement, to be effective, must be given, denied or conditioned expressly and in writing.

9.4 **No Waiver**. No waiver of any default of any obligation by any party hereto shall be implied from any omission by the other party to take any action with respect to such default.

9.5 **No Agency**. Nothing in this Agreement shall be deemed or construed by either party or by any third person to create the relationship of principal and agent or of limited or general partners or of joint venturers or of any other association between the parties.

9.6 **Covenants to Run with Land**. It is intended that each of the easements, covenants, conditions, restrictions, rights and obligations set forth herein shall run with the land and create equitable servitudes in favor of the real property benefited thereby, shall bind every person having any fee, leasehold or other interest therein and shall inure to the benefit of the respective parties and their successors, assigns, heirs, and personal representatives.

9.7 **Grantee's Acceptance**.The grantee of any Parcel or any portion thereof, by acceptance of a deed conveying title thereto or the execution of a contract for the purchase thereof, whether from an original party or from a subsequent owner of such Parcel, shall accept such deed or contract upon and subject to each and all of the easements, covenants, conditions, restrictions and obligations contained herein. By such acceptance, any such grantee shall for himself and his successors, assigns, heirs, and personal representatives, covenant, consent, and agree to and with the other party, to keep, observe, comply with, and perform the obligations and agreements set forth herein with respect to the property so acquired by such grantee.

9.8 **Separability**. Each provision of this Agreement and the application thereof to Parcel A and Parcel B are hereby declared to be independent of and severable from the remainder of this Agreement. If any provision contained herein shall be held to be invalid or to be unenforceable or not to run with the land, such holding shall not affect the validity or enforceability of the remainder of this Agreement. In the event the validity or enforceability of any provision of this Agreement is held to be dependent upon the existence of a specific legal description, the parties agree to promptly cause such legal description to be prepared. Ownership of both Parcels by the same person or entity shall not terminate this Agreement nor in any manner affect or impair the validity or enforceability of this Agreement.

9.9 **Time of Essence**. Time is of the essence of this Agreement.

9.10 **Entire Agreement**. This Agreement contains the complete understanding and agreement of the parties hereto with respect to all matters referred to herein, and all prior representations, negotiations, and understandings are superseded hereby. This Agreement may be executed in two or more counterparts and each counterpart shall be deemed to be one and the same agreement.

9.11 **Notices**. Notices or other communication hereunder shall be in writing and shall be sent certified or registered mail, return receipt requested, or by other national overnight courier company, or personal delivery. Notice shall be deemed given as of the date of such mailing or transmittal. An Owner may change from time to time their respective address for notice hereunder by like notice to the other Owner. The notice addresses of the Parcel A Owner and the Parcel B Owner are as follows:

Parcel A Owner: _____

_____

_____

Attn: _____

Parcel B Owner: _____

_____

_____

Attn: _____

9.12 **Governing Law**. The laws of the State in which the Parcels are located shall govern the interpretation, validity, performance, and enforcement of this Agreement.

9.13 **Estoppel Certificates**. Each Owner, within thirty (30) day of its receipt of a written request from the other Owner, shall from time to time provide the requesting Owner, a certificate binding upon such Owner stating: (a) to the best of such Owner's knowledge, whether any party to this Agreement is in default or violation of this Agreement and if so identifying such default or violation; and (b) that this Agreement is in full force and effect and identifying any amendments to the Agreement as of the date of such certificate.

9.14 **Bankruptcy**. In the event of any bankruptcy affecting any Owner or Permittee of any Parcel, the parties agree that this Agreement shall, to the maximum extent permitted by law, be considered an agreement that runs with the land and that is not rejectable, in whole or in part, by the bankrupt person or entity.

9.15 **Mortgage Subordination**. Any mortgage or deed of trust that becomes effective after the Effective Date and affects any portion of any Parcel (each, a "Subordinate Mortgage") shall at all times be subject and subordinate to the terms of this Agreement, and any party foreclosing any such Subordinate Mortgage, or acquiring title by deed in lieu of foreclosure or trustee sale in connection with such Subordinate Mortgage, shall acquire title subject to all the terms and conditions of this Agreement. Except in those instances where an Owner's loan documents, in effect as of the date hereof, provide that the terms and provisions such as those set forth in this Agreement would be subordinate to the mortgage or deed of trust affecting such Owner's Parcel (or otherwise a permitted exception or encumbrance relative to such mortgage or deed of trust), such Owner covenants and agrees to cause the holder of such existing mortgage or deed of trust affecting such Owner's Parcel to consent to this Agreement and subordinate its rights to the terms and provisions of this Agreement.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

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

PARCEL A OWNER:

_____,
a _____

By: _____
Name: _____
Title: _____

PARCEL B OWNER:

_____,
a _____

By: _____
Name: _____
Title: _____

[DRAFT NOTE: ADD NOTARY ACKNOWLEDGEMENT, WITNESSESS, ETC. TO COMPLY TO WITH APPLICABLE RECORDING REQUIREMENTS.]

Exhibit “A” - Legal Descriptions of Parcels A and B.

Exhibit “B” - Plot Plan. Identify Parcels A and B, the Protected Areas (by cross-hatching), and Access Openings.

Exhibit “A”

Legal Descriptions of Parcels A and B

Exhibit B to General Session Materials - CAM Allocation Agreement

CAM ALLOCATION AGREEMENT

THIS CAM ALLOCATION AGREEMENT (the "Agreement") is made and entered into this _____ day of _____, 20___ (the "Effective Date"), by and between _____, a _____ (the "Parcel A Owner"), and _____, a _____ (the "Parcel B Owner").

RECITALS

A. Parcel A Owner is the owner of that certain real property situated in the City of _____, County of _____, State of _____, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("Parcel A"), which Parcel A is part of a shopping center commonly known as _____ (the "Shopping Center") and is currently operated as a _____.

B. As of the date hereof, Parcel A Owner has sold and conveyed to Parcel B Owner that certain real property situated in the City of _____, County of _____, State of _____, more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference ("Parcel B"), which Parcel B is part of the Shopping Center.

C. Parcel A and Parcel B are subject to that certain _____ which was recorded on _____ in the land records of _____ County (the "Official Records"), _____, as Document No. _____ at Page _____ (as amended from time to time, the "Shopping Center REA").

D The Shopping Center REA is supplemented by that that certain _____ (as amended from time to time, the "Supplemental Agreement").

E. Pursuant to the Supplemental Agreement, Parcel A and Parcel B are deemed to be a single tract for purposes of the Operator's (defined herein) obligation to perform certain maintenance to the Common Area and other areas (as applicable) on Parcel A and Parcel B in exchange for the Parcel A Owner's Allocable Share of the Maintenance Costs and Enclosed Mall Operation and Maintenance Expense (as defined in the Shopping Center REA) (hereinafter the "Allocable Share").

F. Parcel A Owner and Parcel B Owner wish to continue to benefit from such Common Area and other maintenance, and to establish reimbursement processes and other agreement relative to such maintenance, on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the above premises and of the covenants herein contained, Parcel A Owner and Parcel B Owner hereby covenant and agree that the Parcels and all present and future Owners (as defined herein) of the Parcels shall be and hereby are subject to the terms, covenants, and conditions hereinafter set forth in this Agreement, and, in connection therewith, the parties hereto on behalf of themselves and their respective successors and assigns covenant and agree as follows:

AGREEMENTS

1. **Definitions**. For purposes hereof:

(a) The term "Common Area" shall mean those portions of Parcel A and Parcel B that are included in the definition of "Common Area" as set forth in the Shopping Center REA. Notwithstanding any amendment, termination or expiration of the Shopping Center REA, the definition of the term Common Area shall remain as

defined in the Shopping Center REA as of the date hereof unless this Agreement is amended in writing by the parties hereto.

(b) The term “Operator” shall mean the person or entity which, pursuant to the Shopping Center REA and/or Supplemental Agreement, performs certain maintenance to the Common Area and other areas (as applicable) on Parcel A and Parcel B in exchange for Parcel A Owner’s Allocable Share and/or collects Parcel A Owner’s Allocable Share from the Parcel A Owner.

(c) The term "Owner" or "Owners" shall mean the Parcel A Owner (as to Parcel A) and the Parcel B Owner (as to Parcel B) and any and all successors or assigns of such persons or entities as the owner or owners of fee simple title to all or any portion of the real property covered hereby, whether by sale, assignment, inheritance, operation of law, trustee's sale, foreclosure, or otherwise, but not including the holder of any lien or encumbrance on such real property.

(d) The term "Parcel" or "Parcels" shall mean each separately identified parcel of real property now constituting a part of the real property subjected to this Agreement as described on Exhibit “A”, that is, Parcel A and Parcel B, and any future subdivisions thereof.

(e) The term “Parcel B Owner’s Share (CAM)” shall mean an annual amount equal to the result of multiplying Parcel A Owner’s Allocable Share (as defined in the Shopping Center REA) by a fraction, the numerator of which is the Floor Area of the improvements constructed on Parcel B and the denominator of which is the aggregate Floor Area of the improvements constructed on Parcel A and Parcel B, collectively. The Owners agree that, as of the Effective Date, such fraction is equal to ____%

(f) The term “Floor Area” shall mean the number of square feet of floor area at each level or store of any building on a Parcel (including mezzanines, other than those used for storage purposes, and basements) lying within the exterior faces of exterior walls; excluding, however (i) penthouses or other physically separate areas used exclusively for mechanical, electrical or other operating equipment, and (ii) loading dock areas.

2. **Cost Sharing**.

(a) Throughout the term of this Agreement, Parcel A Owner shall be responsible for paying Parcel A Owner’s Allocable Share prior to the due dates thereof. Parcel B Owner shall remit Parcel B Owner’s Share (CAM) to Parcel A Owner no later than twenty (20) days after demand therefor.

(b) Parcel A Owner shall indemnify, defend and hold Parcel B Owner harmless of and from any loss, cost, liability or expense arising from the failure of Parcel A Owner to pay Parcel A Owner’s Allocable Share to the Operator. Parcel B Owner shall indemnify, defend and hold Parcel A Owner harmless of and from any loss, cost, liability or expense arising from the failure of Parcel B Owner to pay Parcel B Owner’s Share (CAM) to Parcel A Owner.

(c) So long as: (i) Parcel A Owner’s Allocable Share is not increased; or (ii) the Operator’s obligation to perform certain maintenance to the Common Area and other areas (as applicable) on Parcel A or Parcel B, or the scope and/or standard(s) as to which such maintenance is to be performed, pursuant to Shopping Center REA and/or the Supplemental Agreement are not reduced in any manner, either Parcel A Owner or Parcel B Owner shall have the right and option to seek separate billing of the Allocable Share for Parcel A and Parcel B, and if either Owner does so, such Owner shall provide the other Owner, with written notice thereof. Parcel B Owner shall have the right to require an audit of Parcel A Owner’s Allocable Share if permitted thereunder, and Parcel A Owner, at Parcel B Owner’s request, shall reasonably assist in procuring access to the appropriate records.

3. **Notices and Consents Under the Shopping Center REA**. To the extent not otherwise delivered to the Parcel B Owner, Parcel A Owner shall promptly deliver to the Parcel B Owner copies of all notices, demands, reconciliations, budgets, audits, or other statements relating to Parcel A Owner’s Allocable Share, given to or

received from other owners of real property subject to the Shopping Center REA and/or any third party administrator under the Shopping Center REA. The Parcel A Owner shall not give any consent under or modify the Shopping Center REA or the Supplemental Agreement, without the prior written consent of the Parcel B Owner, if such consent or modification would: (i) increase Parcel A Owner's Allocable Share; or (ii) terminate (or remove) Operator's obligation to perform that certain maintenance to the Common Area and other areas (as applicable) on Parcel A and Parcel B in exchange for Parcel A Owner's Allocable Share.

4. **Remedies and Enforcement**.

4.1 **All Legal and Equitable Remedies Available**. In the event of a breach or threatened breach by any Owner or its Permittees of any of the terms, covenants, restrictions or conditions hereof, the other Owner(s) shall be entitled forthwith to full and adequate relief by injunction and/or all such other available legal and equitable remedies from the consequences of such breach, including payment of any amounts due and/or specific performance.

4.2 **Self-Help**. In addition to all other remedies available at law or in equity, upon the failure of a defaulting Owner to cure a breach of this Agreement within thirty (30) days following written notice thereof by an Owner (unless, with respect to any such breach the nature of which cannot reasonably be cured within such 30-day period, the defaulting Owner commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion), any Owner shall have the right to perform such obligation contained in this Agreement on behalf of such defaulting Owner and be reimbursed by such defaulting Owner upon demand for the reasonable costs thereof together with interest at the prime rate as announced from time to time in the Wall Street Journal, plus two percent (2%) (not to exceed the maximum rate of interest allowed by law).

4.3 **Default of Operator.** Notwithstanding any provision herein to the contrary, Parcel A Owner shall have no obligation to pursue and/or prosecute any remedy available (including without limitation those under the Shopping Center REA and/or the Supplemental Agreement) in the event the Operator fails to perform certain maintenance to the Common Area and other areas (as applicable) on Parcel A and/or Parcel B in which the Parcel A Owner's Allocable Share is intended to reimburse (partial or otherwise) (an "Operator Default"). Furthermore, nothing herein shall be deemed a waiver by either Parcel A Owner or Parcel B Owner of any right or remedy either Owner may have (including without limitation those under the Shopping Center REA and/or the Supplemental Agreement) in the event of an Operator Default.

4.4 **Lien Rights**. Any claim for reimbursement, including interest as aforesaid, and all costs and expenses including reasonable attorneys' fees awarded to any Owner in enforcing any payment in any suit or proceeding under this Agreement shall be assessed against the defaulting Owner in favor of the prevailing party and shall constitute a lien (the "Assessment Lien") against the Parcel of the defaulting Owner until paid, effective upon the recording of a notice of lien with respect thereto in the Office of the County Recorder of the County in which the Parcel is located; provided, however, that any such Assessment Lien shall be subject and subordinate to (i) liens for taxes and other public charges which by applicable law are expressly made superior, (ii) all liens recorded in the Office of the County Recorder of the County in which the Parcel is located prior to the date of recordation of said notice of lien, and (iii) all leases entered into, whether or not recorded, prior to the date of recordation of said notice of lien. All liens recorded subsequent to the recordation of the notice of lien described herein shall be junior and subordinate to the Assessment Lien. Upon the timely curing by the defaulting Owner of any default for which a notice of lien was recorded, the party recording same shall record an appropriate release of such notice of lien and Assessment Lien.

4.5 **Remedies Cumulative**. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity.

4.6 **No Termination For Breach**. Notwithstanding the foregoing to the contrary, no breach hereunder shall entitle any Owner to cancel, rescind, or otherwise terminate this Agreement. No breach hereunder shall defeat or render invalid the lien of any mortgage or deed of trust upon any Parcel made in good faith for value, but the covenants hereof shall be binding upon and effective against any Owner of such Parcel covered hereby whose title thereto is acquired by foreclosure, trustee's sale, or otherwise.

5. **Term**. The covenants and obligations contained in this Agreement shall be effective commencing on the Effective Date and shall remain in full force and effect thereafter in so long as (a) the Operator's obligation to perform that certain maintenance to the Common Area and other areas (as applicable) on Parcel A and Parcel B in exchange for Parcel A Owner's Allocable Share is in effect and/or (b) the Shopping Center REA requires Parcel A Owner to pay the Allocable Share for both Parcel A and Parcel B to Operator or another party, unless this Agreement is modified, amended, canceled or terminated by the written consent of all then record Owners of Parcel A and Parcel B in accordance with paragraph 6.2 hereof.

6. **Miscellaneous**.

6.1 **Attorneys' Fees**. In the event an Owner institutes any legal action or proceeding for the enforcement of any right or obligation herein contained, the prevailing party after a final adjudication shall be entitled to recover its costs and reasonable attorneys' fees incurred in the preparation and prosecution of such action or proceeding.

6.2 **Amendment**. The parties agree that the provisions of this Agreement may be modified or amended, in whole or in part, or terminated, only by the written consent of all record Owners of Parcel A and Parcel B, evidenced by a document that has been fully executed and acknowledged by all such record Owners and recorded in the Official Records. Notwithstanding anything contained herein to the contrary, no termination of this Agreement, and no modification or amendment of this Agreement shall be made nor shall the same be effective unless the same has been expressly consented to in writing by the Parties.

6.3 **Consents**. Wherever in this Agreement the consent or approval of an Owner is required, unless otherwise expressly provided herein, such consent or approval shall not be unreasonably withheld or delayed. Any request for consent or approval shall: (a) be in writing; (b) specify the section hereof which requires that such notice be given or that such consent or approval be obtained; and (c) be accompanied by such background data as is reasonably necessary to make an informed decision thereon. The consent of an Owner under this Agreement, to be effective, must be given, denied or conditioned expressly and in writing.

6.4 **No Waiver**. No waiver of any default of any obligation by any party hereto shall be implied from any omission by the other party to take any action with respect to such default.

6.5 **No Agency**. Nothing in this Agreement shall be deemed or construed by either party or by any third person to create the relationship of principal and agent or of limited or general partners or of joint venturers or of any other association between the parties.

6.6 **Covenants to Run with Land**. It is intended that each of the covenants, rights and obligations set forth herein shall run with the land and create equitable servitudes in favor of the real property benefited thereby, shall bind every person having any fee, leasehold or other interest therein and shall inure to the benefit of the respective parties and their successors, assigns, heirs, and personal representatives.

6.7 **Grantee's Acceptance**. The grantee of any Parcel or any portion thereof, by acceptance of a deed conveying title thereto or the execution of a contract for the purchase thereof, whether from an original party or from a subsequent owner of such Parcel, shall accept such deed or contract upon and subject to each and all of the covenants and obligations contained herein. By such acceptance, any such grantee shall for himself and his successors, assigns, heirs, and personal representatives, covenant, consent, and agree to and with the other party, to keep, observe, comply with, and perform the obligations and agreements set forth herein with respect to the property so acquired by such grantee.

6.8 **Separability**. Each provision of this Agreement and the application thereof to Parcel A and Parcel B are hereby declared to be independent of and severable from the remainder of this Agreement. If any provision contained herein shall be held to be invalid or to be unenforceable or not to run with the land, such holding shall not affect the validity or enforceability of the remainder of this Agreement. In the event the validity or

enforceability of any provision of this Agreement is held to be dependent upon the existence of a specific legal description, the parties agree to promptly cause such legal description to be prepared. Ownership of both Parcels by the same person or entity shall not terminate this Agreement nor in any manner affect or impair the validity or enforceability of this Agreement.

6.9 **Time of Essence**. Time is of the essence of this Agreement.

6.10 **Entire Agreement**. This Agreement contains the complete understanding and agreement of the parties hereto with respect to all matters referred to herein, and all prior representations, negotiations, and understandings are superseded hereby. This Agreement may be executed in two or more counterparts and each counterpart shall be deemed to be one and the same agreement.

6.11 **Notices**. Notices or other communication hereunder shall be in writing and shall be sent certified or registered mail, return receipt requested, or by other national overnight courier company, or personal delivery. Notice shall be deemed given as of the date of such mailing or transmittal. An Owner may change from time to time their respective address for notice hereunder by like notice to the other Owner, as applicable. The notice addresses of the Parcel A Owner and the Parcel B Owner are as follows:

Parcel A Owner: _____

_____

_____

_____

Parcel B Owner: _____

_____

_____

_____

6.12 **Governing Law**. The laws of the State in which the Parcels are located shall govern the interpretation, validity, performance, and enforcement of this Agreement.

6.13 **Estoppel Certificates**. Each Owner, within thirty (30) day of its receipt of a written request from the other Owner, shall from time to time provide the requesting Owner, a certificate binding upon such Owner stating: (a) to the best of such Owner's knowledge, whether any party to this Agreement is in default or violation of this Agreement and if so identifying such default or violation; and (b) that this Agreement is in full force and effect and identifying any amendments to the Agreement as of the date of such certificate.

6.14 **Bankruptcy**. In the event of any bankruptcy affecting any Owner or Permittee of any Parcel, the parties agree that this Agreement shall, to the maximum extent permitted by law, be considered an agreement that runs with the land and that is not rejectable, in whole or in part, by the bankrupt person or entity.

6.15 **Mortgage Subordination**. Any mortgage or deed of trust that becomes effective after the Effective Date and affects any portion of any Parcel (each, a "Subordinate Mortgage") shall at all times be subject and subordinate to the terms of this Agreement, and any party foreclosing any such Subordinate Mortgage, or acquiring title by deed in lieu of foreclosure or trustee sale in connection with such Subordinate Mortgage, shall

acquire title subject to all the terms and conditions of this Agreement. Except in those instances where an Owner's loan documents, in effect as of the date hereof, provide that the terms and provisions such as those set forth in this Agreement would be subordinate to the mortgage or deed of trust affecting such Owner's Parcel (or otherwise a permitted exception or encumbrance relative to such mortgage or deed of trust), such Owner covenants and agrees to cause the holder of such existing mortgage or deed of trust affecting such Owner's Parcel to consent to this Agreement and subordinate its rights to the terms and provisions of this Agreement.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

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

PARCEL A OWNER:

_____,
a _____

By: _____
Name: _____
Title: _____

PARCEL B OWNER:

_____,
a _____

By: _____
Name: _____
Title: _____

Exhibit A

Parcel A:

Parcel B:

Exhibit C to General Session Materials - Sample Construction Provision

Special Restrictions Regarding Construction. Developer and Anchor acknowledge and agree that the construction of the Anchor Store (the "Anchor Construction") may commence prior to the commencement of construction of certain buildings and other improvements on portions of Developer's Parcel included in Phases One and Two (the construction on Developer's Parcel is herein referred to as the "Developer's Subsequent Construction"), and that all or portions of Developer's Subsequent Construction may occur at times when the Anchor Store may be open for business. Also construction on the Developer's Parcel ("Developer's Construction") may commence prior to the commencement of construction of the Anchor Store ("Anchor's Subsequent Construction"), and that portions of Anchor's subsequent Construction may occur at times when stores are open for business on the Developer's Parcel. Because the development of the Center may be conducted in phases, the Center shall be subject to the following additional restrictions, which shall be binding on Developer and Anchor and each of its tenants, occupants, employees, agents and invitees:

(a) Pursuant to the easements granted in this Agreement, Anchor and Developer shall at all times have free and unobstructed access to and from its Parcel over, through and across such easement areas.

(b) Prior to the commencement of any Subsequent Construction, the constructing party shall deliver to the other at least thirty (30) days prior written notice of such commencement accompanied by a certificate of insurance evidencing the coverage required in this Agreement for such work. All construction traffic engaged in any of Developer's Subsequent Construction shall use only the northernmost curb cut on 1st Street for access to and from Developer's Parcel as designated on the Site Plan. All construction traffic engaged in any of Anchor's Subsequent Construction shall use only the curb cut on Main Street for access to and from Anchor's Parcel as designated on the Site Plan.

(c) All Subsequent Construction shall be performed according to all Government Requirements and shall not: (i) cause any increase in the cost of constructing upon another party's Parcel; (ii) materially interfere with construction work being performed on any other part of the Center; (iii) materially interfere with the use, occupancy or enjoyment of any part of the remainder of the Center by any other party or occupant; or (iv) cause any building located on another Parcel to be in violation of any Governmental Requirement. Once Subsequent Construction has commenced, such construction shall be diligently and continuously pursued to completion. Developer agrees that it shall procure the prior written approval of Anchor of any connections into or modifications of the utility lines, systems or facilities serving the Center not specifically approved by Anchor hereunder and the plans and specifications for such work, all of which shall comply with all Governmental Requirements. Developer shall: (A) make at its sole expense all improvements necessary or required to increase the capacity of any such lines, systems or facilities to adequately serve such benefited areas, and (B) procure all permits, licenses and approvals as are required to make any such modifications or improvements.

(d) If Anchor has opened the Anchor Store for business when any of Developer's Subsequent Construction commences (or intends to open the Anchor Store for business prior to the estimated completion date of any of Developer's Subsequent Construction), Developer shall, upon the written request of Anchor, erect such fences or other devices which Anchor may reasonably require to ensure the safety of Anchor and its employees, agents, licensees, customers, invitees, sublessees, concessionaires, successors and assigns, or as may be otherwise required by applicable law, regulation, ordinance, order or decree. Similarly, if a store has opened for business on the Developer's Parcel when any of Anchor's Subsequent Construction commences (or Developer intends to open a store on its Parcel for business prior to the estimated completion date of any of Anchor's Subsequent Construction), Anchor shall, upon the written request of Developer, erect such fences or other devices which Developer may reasonably require to ensure the safety of Developer and its employees, agents, licensees, customers, invitees, sublessees, concessionaires, successors and assigns, or as may be otherwise required by applicable law, regulation, ordinance, order or decree.

(e) No staging and/or storage area for Subsequent Construction shall be located within one hundred (100) feet of the other party's Parcel unless located within the Permissible Building Area shown on the Site Plan.

(f) For any Subsequent Construction, all storage of materials and the parking of construction vehicles, including vehicles of workers, shall occur only on the Parcel of the party performing the Subsequent Construction, and all laborers, suppliers, contractors and others connected with such construction shall use only those permitted access points described in subsection (b) above, and subject at all times to the terms of Subsection (a) above. When any such Subsequent Construction is completed, the party performing the Subsequent Construction shall at its cost restore any affected accessways, parking areas and other common areas to a condition equal to or better than the condition thereof existing prior to the commencement of such Subsequent Construction. Any other provision of this Agreement to the contrary notwithstanding, there shall be no access for Subsequent Construction or any related purpose on or across any portion of the other party's Parcel other than in the areas otherwise denoted on the Site Plan.

(g) Subject to the provisions of Subsection (f), Developer and Anchor each hereby grants and conveys to the other and to their respective contractors, materialmen and laborers a temporary license for access and passage over and across the common areas of the granting party's Parcel as shall be reasonably necessary to construct upon, and maintain the other party's Parcel (including, without limitation, the Anchor Construction, the Developer Construction and the Subsequent Construction); provided, however, that (i) such license shall be in effect only during periods when construction or maintenance is actually being performed, and (ii) the use of such license shall not unreasonably interfere with the use, operation and enjoyment of the common areas by those entitled thereto. Prior to exercising such license, the licensee party shall first provide to the licensor party a written statement describing the need for such exercise, accompanied by a certificate of insurance establishing that any contractors retained by the licensee party for the work to be performed has obtained and maintains in force the insurance coverage required in this Agreement. The licensee party shall promptly pay all costs and expenses associated with the work being performed, shall diligently complete such work as quickly as possible, and shall promptly clean, restore and repair all affected portions of the common areas to a condition equal to or better than the condition thereof existing prior to the commencement of such work. The foregoing provisions to the contrary notwithstanding, if a dispute exists or arises between any contractors, laborers, suppliers or others regarding such work, each party shall have the right to prohibit the contractors, laborers, suppliers or others from using those portions of the common areas on such party's Parcel.

Exhibit D to General Session Materials - Sample Provision Regarding Extinguishment of Restrictions

Extinguishment of Restrictions.

A. Any of the restrictions imposed in this Agreement may be released, extinguished, amended, waived or modified by instrument, in recordable form, executed by each of the Parties whose Tracts are benefitted or burdened by the respective restrictions.

B. One or more of the restrictions may be terminated by Developer at any time after _____ _____.

C. Developer shall also have the right to terminate one or more of the restrictions under the following circumstances:

(i) Two of the four Majors cease to operate their respective stores for a period in excess of six (6) consecutive months for reasons other than remodeling, casualty, condemnation or force majeure; or

(ii) Sixty percent (60%) of the mall tenants cease to operate their respective stores for a period in excess of six (6) consecutive months for reasons other than remodeling, casualty, condemnation or force majeure.

The termination by the Developer shall take effect within ninety (90) days after Developer notifies the Parties by United States certified mail, return receipt requested or via overnight courier that the Developer is terminating the restriction as allowed in Subsections B or C above.