

**Wednesday, November 3, 2021
2:00 - 3:15 pm**

Peer to Peer 1

**EVERYONE WANTS TO RULE THE WORLD:
QUEST FOR CONTROL IN SUPERMARKET LEASING**

Presented to

**2021 U.S. Law Conference
San Francisco Marriott Marquis
San Francisco, CA
November 3-5, 2021**

by:

Audra Esrey
Partner
Stanley, Esrey & Buckley, LLP
Promenade, Suite 2400
1230 Peachtree Street, N.E.
Atlanta, GA 30309
aesret@seblaw.com

Melissa S. Rivers
Counsel
Goulston & Storrs
400 Atlantic Avenue
Boston, Massachusetts 02110
mrivers@goulstonstorrs.com

I. INTRODUCTION

The landscape of shopping centers has been evolving for many years, but the challenges presented by COVID-19 have sent retail leasing into a spiral! During the past 18 months, we have seen retailers seek rent relief, file bankruptcy, close and halt all new store openings. It has been uncertain times. With the ongoing reemergence from the significant restrictions, retail leasing seems to be moving full speed ahead. Every deal has its own unique challenges and retailers and landlords alike are approaching negotiations with an eye toward pandemics and considering efforts to mitigate against the risks presented to us all.

On the other hand, national, regional and local supermarkets have remained active throughout this time. For the most part, supermarkets have remained open throughout the pandemic, but they faced restrictions that required significant modifications to operations. The grocery stores have also been able to use this time to their advantage and they have been seeking new locations. We are seeing many big-box vacancies and these present opportunities for grocery stores will generally want to operate in larger space.

In order to successfully negotiate a supermarket lease, it requires experience, sophistication and patience both on the side of the landlord and tenant. There is a significant investment from both parties, both in terms of capital, but also in time. Supermarket leases often have terms of 15-20 years with as many options thereafter. Such a lease requires the parties to cooperate and reach compromises to achieve their respective goals.

Supermarkets want to control the premises that they are leasing as well as the Shopping Center of which they will be a part. While this is not a new trend, the changes that COVID-19 has introduced have created new challenges for supermarket leasing. There is increased demand for uses in the common areas including short term parking spaces, outside sales, events and amenities for customers. These are also not unique to grocery uses. Small shop tenants and restaurants want similar rights. The use of the common areas creates concerns about parking, visibility and access to all spaces within the shopping center.

The desirability of the supermarket as an anchor certainly drives the rights that a landlord will grant to these tenants, but they must balance this with the rights that other anchors, junior anchors and small shops will similarly require. If the landlord is not able to satisfy the needs of all of these constituents, they will have difficulty reaching full occupancy.

II. USE/EXCLUSIVES/PROHIBITED USES

Grocery store tenants almost universally require an exclusive use provision. Over the past few decades we have seen the grocery store exclusive use provision evolve.

In the 1980's, it was not uncommon to see an exclusive simply for the operation of a grocery store. The following exclusive was found in a Memorandum of Lease recorded in 1987:

EXCLUSIVE USE

OR3860 PG

Landlord covenants that Tenant shall have the exclusive right, during the term of this lease and during the term of any extension or renewal thereof, to operate a retail type grocery supermarket, bakery, delicatessen and fish market in said shopping center and on or in the buildings now or in the future located on the lands described as "Parcel II" in Exhibit "B" hereto, and leases entered into with other tenants in said shopping center will prohibit such other tenants from selling at retail items of food for consumption off the premises. Notwithstanding the foregoing the Drug Store referred to in Section 24 of this Lease shall have the right to sell food and non-alcoholic beverage items for off premises consumption as an incidental use to its use as a drug store from nor more than two thousand (2,000) square feet of floor area within its premises and nothing herein contained shall prohibit any liquor store attached to or operated by said drug store from selling beer, wine and liquors, non-alcoholic beverages and snacks for on and/or off premises consumption.

In the 1990's, we saw a progression from an exclusive for the operation of a grocery store to an exclusive for the sale of food items. Here is an excerpt from a Memorandum of Lease recorded in 1998:

16.02 Exclusive Uses. Subject to the provisions of 16.02(c), Landlord covenants and agrees that during the Term, Tenant shall have the exclusive right within the Shopping Center to: (i) operate a grocery supermarket, bakery, delicatessen, fish market, and on-premises photo finishing facility; and (ii) engage in retail sales of items of food for "off-premises" consumption.

As the exclusive use provision broadened, so did the necessary exclusions. In the 1990's the carve-outs mainly focused upon restaurant/restaurant type users and allowing incidental sales of food products. In the same Memorandum of Lease which included the above exclusive, we find the following exceptions to the exclusive:

(c) Exceptions to Exclusive Uses. The terms and provisions of Paragraph 16.02 of this Lease, entitled "Exclusive Uses", to the contrary notwithstanding, occupants of the Shopping Center, shall not be prohibited from engaging in the operation of: (i) a restaurant offering prepared ready-to-eat food items for consumption either on or off the premises; (ii) a delicatessen or sandwich shop type restaurant (but not a bakery) which offers take out service as an incidental part of its restaurant operation, provided that at least fifty percent (50%) of the interior floor area of such restaurant (exclusive of kitchen or food preparation area) is utilized for seated dining purposes; (iii) a health food store or nutrition center, ice cream parlor or frozen yogurt store, doughnut shop (equivalent to a Dunkin' Donut or Krispy Kreme operation), candy store, a pizza pickup or delivery outlet, or bagel shop, all of which may offer the sale of food items for consumption on or off the premises; (iv) a combination gas station and convenience food store operation, provided that the floor area devoted to the sale of food and beverage products shall not exceed 1,000 square feet; and (v) a camera sales, service, and supplies business which has as a part of its business on-premises photo finishing.

It did not take long for the grocery store exclusive to be further broadened to include the more encompassing term "groceries". Here is an excerpt from a Memorandum of Lease recorded in 2010:

(a) Provided that Lessee is not in default beyond any applicable notice and cure period and Lessee is not "dark" in the Leased Premises (as defined in Section 6.2 of this Lease), Lessor agrees that it will not enter into a lease or consent to the use and occupancy of any other space within the Shopping Center by a tenant, subtenant, assignee, licensee or concessionaire ("Occupant"), except for the Leased Premises for the use or operation of a supermarket/grocery store or other store or department within a store for the sale of food, groceries, fruit, produce, dairy products, vegetables, bakery products, meats, or delicatessen products ("Exclusive Use"). Notwithstanding the

While adding the term "groceries" or "grocery products" certainly expanded the exclusive use provision, it also created confusion and debate as to what encompasses "groceries/grocery products". As seen in the multiple Winn Dixie cases, reasonable minds may differ as to whether grocery products are limited to "food items and non-alcoholic beverages" {See Federal District Court in Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc., et al., 886 F.Supp.2d 1326, 2012 (S.D. FL)} or more broadly "goods sold by a grocery" which include staple foodstuffs, household supplies, and usually meats, produce, and dairy products" {See Federal Court of Appeals in Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, U.S. App. LEXIS 4143 (11th Circuit 2014)}.

When faced with an exclusive for the sale of groceries, it helps to actually define what “groceries” mean. For example:

As used herein, “Groceries” means dairy products, food products, meats, delicatessen products sold by the pound, poultry, fish, seafood, vegetables, fruits, bakery goods and frozen foods (regardless of size, the use of computerized or electronic merchandising system for the sale of these items from off-site inventory).

Or:

As used herein, “Grocery Items” mean food and beverages, including, without limitation, any or all of the following (1) dairy products (including, without limitation, milk, cheese, ice cream, yogurt and/or any other items commonly found in a grocery store and/or dairy section of a supermarket), (2) produce (including, without limitation, fruits, vegetables and/or any other items commonly found in a grocery store and/or produce section of a supermarket), (3) coffee, tea and candies, (4) nuts, snack foods and other bulk food items, (5) bakery products (including, without limitation, fresh breads, desserts and/or any other items commonly found in a grocery store and/or bakery section of a supermarket), (6) meat (including, without limitation, beef, pork and poultry), (7) seafood (including, without limitation, fish, shellfish and crustaceans, and (8) sandwich, deli and convenient meal solution items (including, without limitation, sushi, deli meats and deli cheese).

In both (and most) examples of the definition of “groceries” and “grocery items” are limited to food items. It is no wonder then, that in our current climate, we are now seeing grocery store exclusive provisions reaching even further. The following is an excerpt from a Memorandum of Lease from 2015:

16.02 Exclusive Uses.

(a) Exclusive Uses. Landlord covenants and agrees that during the Term, Tenant shall have the exclusive right within the Project Tract, either directly or indirectly via remote distribution (e.g., ordering, processing, or delivery by internet, mail order, etc.), to:

- (i) Engage in the retail sale of groceries.
- (ii) Operate a grocery supermarket, bakery, delicatessen, and/or fish market.
- (iii) Sell or distribute drugs or other products which are required by law to be dispensed by a registered pharmacist, even though such pharmacist may not be required to be present for delivery of such products.
- (iv) Engage in retail sales of items of food for “off-premises” consumption.
- (v) Engage in retail sales of beer and wine for “off-premises” consumption.
- (vi) Engage in retail sales of distilled spirits and other alcoholic beverages for “off-premises” consumption (i.e. a liquor store).
- (vii) Engage in the sale of other products typically offered for sale in a grocery supermarket.

By including an exclusive for “products typically offered for sale in a grocery store”, the grocers have effectively avoided the confusion surrounding the definition of a “grocery” product. However, whether intended or not, the grocery store exclusive no longer just restricts competitors, but it is also restricts most other retailers. Think about it. In addition to food, most grocery stores also sell a limited amount of party supplies, cards, books, magazines, and health and beauty products. And many of the larger grocers sell school supplies, office supplies, phone accessories, small tools, batteries, gift cards (both for itself and other retailers) plus an array of seasonal and/or regional items such as holiday décor, lawn furniture, toys, sunglasses, sporting team apparel, etc.

As you are negotiating your grocery store exclusive use, in addition to the carve-outs referenced in the 1998 Memorandum of Lease above, consider the following exclusions:

- (i) beauty supply retailer, such as or similar to Ulta, Sephora, and Sally Beauty;
- (ii) hair salons, nail salons, barber shops or day spas;
- (iii) any retailer primarily selling smoothies, blended fruit beverages or fresh squeezed juices;
- (iv) a wine bar which also sells wine for off-site consumption such as The Grape;
- (v) a coffee shop or cafe which primarily sells coffee and/or tea, such as or similar to Starbucks;
- (vi) stores primarily selling vitamins and other supplements;
- (vii) a pet supplies and/or pet food store such as or similar to PetSmart or Petco;
- (viii) a nationally or regionally recognized retailer which primarily sells kitchen supplies such as or similar to Cooks Warehouse or William-Sonoma;
- (ix) a variety store, including Five Below;
- (x) an optical store;
- (xi) a dollar store, including Dollar Tree, provided the dollar store does not sell perishable food items; and
- (xii) arts and crafts store, cell phone store, jewelry store, office supply store, book store, a gift and/or card store and/or a party supply store.

If the grocery store exclusive does not specifically include the sale of pharmaceutical and/or alcohol, then the following may be applicable:

- (xiii) a nationally or regionally recognized retailer which primarily sells beer, wine, and liquor for off premises consumption, such as or similar to Total Wine.
- (xiv) a full service drug store, such as or similar to CVS and Walgreens.

Additionally, in order to allow for retailers such as Jr. Department stores, variety retailers and other retailers who sell a limited quantity of non-perishable food, it is important to include an incidental sales carve-out such as the following:

- (xv) The retail sale of groceries and other products typically sold in a grocery supermarket (exclusive of perishable goods typically sold in a grocery supermarket) by any tenant or occupant of premises of the Shopping Center consisting of not more than an aggregate of 2,000 square feet of gross leasable area, but only to the extent the sale of such groceries and other products typically sold in a grocery supermarket constitute an ancillary, and not primary, use by such tenant of its premises, and the gross leasable floor area of such premises devoted to the sale thereof shall not exceed 10% of the gross leasable floor area of such premises devoted to retail sales area (as opposed to office, storage, or other uses). For purposes of this Lease, the phrase "ancillary, and not primary, use" shall be deemed to mean a use from which not more than 10% of the dollar amount of gross sales volume of a tenant shall be derived.

Or, more simply:

- (xvi) The retail sale of grocery items or other products on an incidental basis. As used herein, "**incidental basis**" means the area dedicated to the sale of such items occupies the lesser of: (a) 500 square feet of gross leasable floor area; or (b) 10% of the sales area of the subject premises.

Increasingly, grocery stores are pushing back against a general incidental carve-out. If a landlord is not successful in negotiating a general incidental sales carve-out, then the landlord may want to try to obtain the following additional carve-outs:

- (i) junior department store or junior discount department store such as TJ Maxx, Ross, Nordstrom Rack or Marshalls as the same are typically operated as of the date of this lease;
- (ii) a home good store such as Bed Bath & Beyond, HomeGoods, or Cost Plus World Market as the same are typically operated as of the date of this lease;
- (iii) a children's store such as or similar to Babies R Us and BuyBuy Baby;
- (iv) a hardware store.

Or, another approach is to simply include a list of excluded items:

Notwithstanding the foregoing, the following items shall not be subject to Tenant's exclusive use provision: the sale of apparel; accessories; arts and crafts; beds and mattresses; bicycles and accessories; books; bridal and formal wear; carpet and flooring; cellular phones; cigars and pipes; computers and software; electronics; electronic games; smoothies or juices (including cold-pressed); farming and equestrian products; furniture; golf supplies; party supplies; greeting cards and gifts; hardware; pet store and/or pet supply store; home accessories and gifts; jewelry; kitchen wares and supplies; music; paint and related accessories; shoes and footwear; sporting goods; surf and ski equipment and apparel; appliances; books; newspapers, periodicals, and related products and services; home improvements and/hardware store; linens, textiles and fabrics; marine/boating equipment, supplies, and accessories; office equipment, furniture and accessories; or toys, games, or hobbies.

As if the grocery store tenant's exclusive is not enough to limit a landlord's ability to lease to others, grocery store tenants often require significant restrictions on a landlord's ability to lease space to third parties in general. Fortunately, many of the prohibited use provisions in grocery store leases are similar to what would be found in other anchor store leases. Grocery store anchors typically want to restrict noxious uses, as well as parking intensive users. Set forth below are examples of prohibited "noxious uses" together with **bold font** provisions that may be used for clarifications/carve-outs:

- (A) a flea market, check cashing operation, thrift shop, pawn shop, dollar-type store, second-hand store or store selling used merchandise, consignment store, or clearance center, **provided that the foregoing shall not prohibit or restrict upscale retail resale operations such as Play it Again Sports, Plato's Closet, jewelry stores or upscale antique and/or furniture stores, and operations similar to Nordstrum Rack, T.J. Maxx, Ross or Marshall's;**
- (B) a funeral home;
- (C) a facility for the sale of paraphernalia for use with illicit drugs;
- (D) a facility for the sale or display of pornographic material (as determined by community standards for the area in which the Premises is located), **provided, however, that the foregoing shall not prohibit or restrict a first class (1) full service bookstore retailer such as Barnes & Noble or Books-a-Million/2nd & Charles, or (2) electronics retailer such as Best Buy;**
- (E) an off-track betting parlor, **provided, however, that the foregoing shall not prohibit or restrict the sale of government sponsored lottery tickets;**
- (F) a carnival, amusement park or circus;
- (G) a facility for the sale or storage of new or used motor vehicles, trailers or mobile homes, **provided, however, that the foregoing shall not prohibit or restrict either (1) a showroom**

- for new motor vehicles or "green car" prototypical vehicles so long as no parking areas in the Common Area are used for the storage of vehicles on display, or (2) a new vehicle display stand in the Common Area;**
- (H) a facility for any use which is illegal or inherently dangerous or constitutes a legal nuisance;
 - (I) a marijuana dispensary or store; **provided, however the foregoing shall not prohibit a nationally recognized drug store or pharmacy from selling medical marijuana;**
 - (J) an addiction treatment clinic or a space in which meetings are conducted in connection with addictions or recovery therefrom;
 - (K) homeless shelter, soup kitchen, not-for-profit restaurant (such as Panera Cares), or such other use catering to the needs of the homeless or indigent population;
 - (L) animal raising or storage facility (except incidental to a full-line retail pet supply store);
 - (M) gun range or shooting club;
 - (N) a church or other place of worship, banquet hall, auditorium or meeting hall;
 - (O) massage parlor (**provided this restriction shall not prohibit massages in connection with a beauty salon, health club or athletic facility or a national massage chain such as Massage Envy**);
 - (P) manufacturing facility; **provided, however the foregoing shall not prohibit a micro-brewery;**
 - (Q) governmental facility (**other than a post office**), recruiting center or employment center;
 - (R) offices (**except as an incidental use to a permitted retail or commercial business**);
 - (S) a laundry or dry cleaning establishment, **provided, the foregoing restriction shall not include an establishment for dry cleaning drop-off and pick-up only, with no cleaning services being performed at the subject property;**

Grocery store tenants remain concerned about parking intensive users and the effects the same may have on the grocery store and the parking areas serving the same. Typical restrictions include the following:

- (i) restaurants;
- (ii) bar or cocktail lounge, nightclub, music hall, disco;
- (iii) health club, health spa, fitness center, yoga or pilates center, weight room, gymnasium or the like;
- (iv) salon (or other business) in excess of XXX square feet of gross leasable area that provides hair treatments (haircuts, hair coloring, permanents, etc.), manicures, facials, massages or similar services;
- (v) entertainment facilities such as bowling alley; skating rink; theater; cinema; billiard room; amusement arcade, children's play gym facility or toddler school (including those similar to "XXX", "XXX" or "XXX"), establishment catering to birthday parties (such as a "XXX" or "XXX");
- (vi) Training facilities such as beauty school; barber college; reading room; place of instruction; test prep facility.

A common theme with the above uses is that they are all service related uses. A few years back, when there was wide spread panic that retail/brick and mortar stores were dying, many landlords shifted their focus to service providers such as restaurants, nail salons, beauty salons, and small fitness facilities. These uses are often in direct conflict with grocery stores' desires to keep parking open and available for its customers. To strike a compromise, it is not unusual for landlords and grocers to agree that certain parking intensive users may be permitted in certain portions of the shopping center away from the grocery store and common areas generally

serving the grocery store. Similarly, landlords and grocers may also agree to limit the size or number of such parking intensive users. For example a landlord may agree that no restaurant/fitness facility shall be located within XX feet of the premises and/or no more than a total of XX restaurants shall be located in a specific area. As ride sharing services become more widely used (and the availability of shared electrical bicycles and scooters), restaurants and bars and other service oriented tenants may not require as many parking spaces as they have in the past. However, short term parking spaces for to-go and carry-out orders are on the rise.

Ultimately, landlords and grocery stores need to find a happy medium which allows for grocery stores to thrive and succeed, while allowing for a compatible and harmonious mix of tenants which draw-in and keep customers in (and coming back to) the center.

III. SITE CONTROL

In addition to these broad restrictions on leasing activities, supermarket leases will often include provisions will control the use of the common areas and changes to the common areas which will restrict further development and growth. These controls will appear in leases in a number of ways.

1. ***“The Site Plan, attached to the Lease as Exhibit A shall not be modified in any manner without Tenant’s consent which may be withheld or granted in Tenant’s sole discretion.”***

This is not an unusual provision to see in a lease with an anchor tenant, including a supermarket. This is about as restrictive as you can get. It will be important for landlords to consider ways to maintain flexibility, but the tenant is making such a significant investment that they will be reluctant to give up any control of the overall shopping center. They will want to ensure that the shopping center will maintain the characteristics that made it desirable to lease in the first place.

When drafting, consider using a limited no build area rather than restricting the entire site plan. This would result in the supermarket having control of some portion of the shopping center so that they can have comfort that their operations will not be impacted, but it would then allow the landlord to make modifications to the shopping center without having to get consent of the tenant. Focus on the portions of the shopping center and roadways that are most critical for the tenant's access and use of their premises. It would also be helpful to carve out *de minimis* changes to the common areas, or allow the landlord to relocate certain drive aisles to facilitate future development. In addition, it is important to expressly permit common area amenities within any no build areas (i.e. bicycle racks, benches, trash barrels, cart corrals, landscaping or items required by laws). Further, consider whether there needs to be carveouts (within the no build area) for electric car charging stations, parking spaces dedicated to customer pick-ups, outdoor seating, sidewalk sales or customer lockers or other similar pick up of merchandise area. Finally, it might be helpful to include a carveout for temporary modifications or if tenant is closed for business at the shopping center.

After the provisions are identified and drafted, the remedy will become critical. Is there are a notice and cure period? Should a second notice be required before penalties are incurred? What is the remedy for breach?

Given that a breach of many of these provisions could materially interfere with a tenant's ability to access the demised premises or operate its business in the manner anticipated, tenants will want to ensure that these provisions are tightly drafted with short cure periods and steep penalties. Of course, the landlord will try to maintain as much flexibility as possible and reduce the penalties. This will become a balancing act. The result will largely depend on the site specific conditions and timing and scoping of any redevelopment. The parties should cooperate upfront in hopes of managing the risks for both sides.

2. “No premises within the Shopping Center may be taller than the demised premises.”

What if landlord enters into a lease with a retailer that is larger than the grocery store? What if Landlord wants to put a second story on any of the existing buildings? What if an outparcel tenant will be taller than the demised premises. How is height measured? These are all questions that should be asked and provisions should be included in the lease to address these points.

3. “No tenants in the Shopping Center, other than Tenant may use the common areas for any business purposes, including the sale of any merchandise or products.”

This language would prohibit everything from sidewalk sales to short term pick up parking spaces to patio seating for a restaurant. When negotiating with the supermarket, it may be necessary to select pre-approved areas where these common areas may be used for such purposes. Maintaining the ability for other tenants to have these rights is crucial as the majority of tenants have been requesting some type of outdoor sales ability as well as short-term parking.

4. “Landlord shall maintain a parking ratio equal to the greater of (i) the number of spaces necessary to comply with applicable laws, and (ii) 5.0 spaces per 1,000 square feet of leasable floor area in the Shopping Center.”

This language would not permit the property owner get the benefit of a variance. Also, consider if parking spaces that are permitted for the exclusive use of a tenant will be included when calculating these ratios. Anchors and grocery stores may also have exclusive parking fields and these should similarly be counted when determining whether the ratio has been satisfied.

IV. **OPERATIONAL CONCERNS**

When drafting leases, be sure that there is adequate flexibility to permit future construction, staging areas, and storage of materials. Tenants will want landlords to refrain from performing construction during peak selling seasons, to limit the overall duration and to ensure that access ways and parking are not impaired by construction activities, vehicles or staging areas. In addition, ensuring that debris is properly cleaned and that noise is controlled are other items to be considered. It would be most beneficial to agree upon a specified

protected area to ensure that a landlord has flexibility to perform the development activities while not materially interfering with the business of a tenant at a shopping center.

While most of this paper assumes that this is a current lease with ongoing negotiations, there surely have been instances when the leases are old and didn't anticipate many of the evolving needs of the grocery store. Consider that a lease that is ten (10) years old may not permit things such as, short term parking spaces for grocery pick up, locker pick up, permission to install electric car charges. This does shift the leverage since the operator will most certainly want to enter into amendment to permit these types of uses in the Common Areas.

V. CONCLUSION

Supermarket tenants (particularly national and regional chains) are desirable and will often have leverage in the negotiations. On the other hand, the lease terms are often very lengthy. It important to view the lease negotiations as a long term partnership between the parties. While there have always been challenges with grocery leases, the COVID-19 pandemic has opened the door for even more complex negotiations. It is impossible to anticipate all of the needs of the parties for the total duration of the term of the lease. Even the most thoroughly negotiated lease may not contain language that is broad enough to permit the Tenant to operate consistent with how its others stores are location. The lease should contain flexibilities for both parties and methods for reasonable approvals in order to protect the changing needs of both developers and tenants.

SAMPLE PROVISIONS

It is important to remember that sample language is not going to work for your lease. Each project will have different needs based on the specifics of the ownership structure, the types of uses intended and the physical construction of the buildings and improvements. Further, the tenant make up and layout of the shopping center will play a key role in determining how provisions need to be drafted. It will be important for the drafter to consider all of the components of the project to identify the needs.

Some general drafting notes. Supermarket leases will often contain very restrictive provisions. Even if the parties successful reach compromises, there will undoubtedly be a circumstance that arises at some point in the term that the parties either didn't consider or did address, but the language doesn't allow one or the other to accomplish something that they now want to pursue. With respect to restrictions, it is more likely that the restrictive nature of the drafting will pose a problem for the property owner in the future (if they elect to make changes), but there are certainly operational changes that a supermarket may want to make that the original lease language didn't anticipate. Consider including language in the lease that provides for reasonable consent rights in the future. Landlords should also pay careful attention to the tenant's remedies in the event of a violation of the lease provisions. It is imperative to include a requirement for notice and opportunity to cure before penalties such as rent abatement or termination become applicable.

The following includes some sample provisions which can be used as a guide when drafting.

i. **Protected Areas, No Change Areas, No Kiosk Areas**

- A. Notwithstanding the foregoing, Landlord covenants that Landlord shall not install (nor shall Landlord consent to the installation of, to the extent that Landlord's consent is required) any structure, barrier or other obstruction, including, without limitation, a kiosk, pushcart or automated teller machine, within the area located within the boundaries of the demising walls of the storefront of the Leased Premises and extending to the curb line, except for seats, benches, trashcans, directional signage, light poles, landscaping under four (4) feet in height [consider striking the height limitation completely], or landscaping consistent with the master landscaping plan for the Development approved by the applicable authorities/landscaping required by governmental authorities and temporary kiosks used as part of a short term public/community event. [NOTE: Be cautious when drafting restrictions on landscaping. Often times the type and size of landscaping may be required by local authorities, but they don't always condition permits- instead it might be "strongly suggested". In addition, the size of certain landscaping is difficult to control as it matures]
- B. Landlord shall not construct or place, or allow other tenants or occupants of the Shopping Center to construct or place any carts or kiosks, automated teller machines or any obstruction within the "No Build Area" shown on Exhibit "A" annexed hereto. The foregoing, however, shall not prevent the installation by Landlord of common area amenities which, for the purposes hereof, shall mean curbs, landscaping, lighting, seating, trash receptacles, and directional signs provided the same are installed in accordance with applicable legal requirements and, to the extent reasonably possible, are installed and maintained in such a manner so as to minimize the interference with access to, or visibility of, the Premises (subject to the last sentence hereof). Notwithstanding the foregoing, in no event shall Landlord be in violation of this paragraph due to the construction or placement of any obstructions within the No Build Area by or at the direction of the City of Los Angeles provided that, to the extent Landlord has the right to consent over such construction or placement, Landlord will not consent to the installation of such obstruction in the No Build Area.
- C. Without Tenant's consent Landlord shall have the right to modify the Common Areas within Tenant's Protected Area (exclusive of the "Restricted Parking Area" as shown on Exhibit A) provided that such modification shall not (i) materially adversely affect Tenant's access to and/or from the Demised Premises (including, without limitation, delivery access) from the main Shopping Center entrance or materially adversely affect visibility of the Demised Premises or Tenant's signage from the immediately adjacent Common Areas; or (ii) reduce the number of parking spaces in the Restricted Parking Area by more than five (5) spaces; or (iii) reduce the number of parking spaces in the Common Area below that which is required by Applicable Laws.
- D. Landlord shall have the right, without Tenant's consent, to alter the number, location and configuration of parking spaces in the Common Area, to replace, reconfigure and alter the

location and dimensions of the sidewalks, curb cuts of all vehicular access ways to, from and within the Shopping Center from that shown on the Site Plan provided: (i) Landlord provides Tenant at least thirty (30) days' written notice prior to the commencement of any such alterations, replacements and/or reconfigurations which are intended to affect Tenant's Protected Area, (ii) reasonably comparable access to the Premises to that existing as of the Effective Date shall be provided continuously throughout the term hereof including the period during which any such alterations are being performed, (iii) the Common Area shall at all times contain no less parking spaces than required by the Minimum Parking Ratio, (iv) the work relating to such alterations conforms to the provisions of this Lease, (v) such alterations and the work related thereto will not materially and adversely affect Tenant's use of the Premises as provided for in this Lease including, but not limited to, Tenant's access to and/or from the Premises and/or the Shopping Center (including, without limitation, delivery access) and (vi) the Protected Access Drive (as shown on the Site Plan) shall remain in a substantially similar location to the access road that exists as of the date of this Lease.

ii. Future Construction

- A. The foregoing provisions of this paragraph shall not apply in connection with any work performed by Landlord, its agent, employees or contractors requiring scaffolding, protective barricades, and/or other aids to construction directly in front of or directly above the storefront of the Leased Premises (collectively "Construction Aids"), provided that the following shall apply: (a) in the event Landlord places scaffolding directly in front of the Leased Premises, Landlord shall provide Tenant with at least thirty (30) days' prior Notice of such activity (except in the event of an emergency, in which event only such notice as is reasonable under the circumstances shall be required); (b) at such time, and at Landlord's expense, Tenant shall have the right to place temporary signage or other store identification on that portion of the Construction Aids that are located directly in front of the Leased Premises; (c) such work shall be diligently pursued to completion and the Construction Aids removed as promptly as possible; and (d) Landlord shall be required to take all commercially reasonable measures to ensure reasonable access to the Leased Premises by customers and for delivery of merchandise, and, if requested by Tenant, to provide temporary signage identifying, and directing customers to, the Leased Premises. In the event that such Construction Aids shall remain in front of the Leased Premises for more than six (6) consecutive months, Tenant shall have the right to abate Minimum Rent due hereunder by fifty percent (50%), on a day-by-day basis, for each day after the expiration of such six (6) consecutive month period that such Construction Aids shall remain in front of the Leased Premises.
- B. Except in the event of an emergency or for routine maintenance, Landlord shall use commercially reasonable efforts not to block the entrance to the premises with scaffolding. In the event Landlord places scaffolding directly in front of the Premises, then except in the event of an emergency, Landlord shall provide Tenant with at least thirty (30) days prior written notice of such activity. At such time, and at Landlord's expense, Tenant shall have the sole right to place temporary signage or other store identification on that portion of the scaffolding that is located directly in front of the Premises, provided that such temporary signage or other store identification is approved by Landlord and in compliance with applicable law. Landlord shall use commercially reasonable efforts to remove such scaffolding in a timely manner. In no event shall any scaffolding or protective netting be installed during the months of June through September or November and December in any year, except in the event of an emergency or when such installation during such months is required by law or for safety purposes. Tenant hereby acknowledges and agrees that a typical barricade utilized for tenant construction in front of the premises adjacent to the premises is permitted at any time without prior notice to Tenant.
- C. In connection with any construction of any future construction at the Shopping Center as permitted by this Lease ("Permitted Construction"), Landlord and Tenant agree as follows:

(a) Notwithstanding anything to the contrary in this Lease, exterior construction of the Permitted Construction and any exterior staging of equipment and materials or other use of the parking areas in connection with the Permitted Construction as permitted herein, shall not occur at any time during the Construction Black Out Period. For purposes of this Lease, the "Construction Blackout Period" shall mean November 1 through January 15 of any year.

(b) In connection with any Permitted Construction, Landlord shall not interfere with the Tenant No Build Area, the Critical Access Ways or otherwise materially obstruct access (including truck access) to or visibility of the Premises. Further, during any Permitted Construction, Landlord covenants to use commercially-reasonable efforts to ensure that (i) all construction vehicles and construction personnel vehicles to park, and all equipment to be staged in an area that is located [more than three hundred (300) feet from the storefront wall of the Premises/ within the areas identified on the Site Plan attached to this Lease as "Permitted Staging Area" (the "Permitted Staging Area"); (ii) Landlord shall use commercially reasonable efforts to ensure that construction vehicles and vehicles of construction personnel accessing the Permitted Construction do not access the Permitted Construction using the main Shopping Center entrance from Main Street, (iii) all Permitted Construction and the Permitted Staging Area shall be appropriately barricaded and screened to reasonably contain construction dust and debris and to prohibit unreasonable interference with pedestrian and vehicular use of the Common Areas outside of the Permitted Staging Area, (iv) once commenced, Landlord shall diligently and continuously pursue the completion of the Permitted Construction, and (v) Landlord shall manage, and cause to be managed, such Permitted Construction in a manner consistent with best practices employed in first-class retail centers where construction is occurring while the center is open for business to the public;

(c) If Landlord breaches its covenants set forth in subsections (a) and (b) of this Paragraph 3 (which may be together referred to herein as the "Construction Controls"), then Tenant shall send written notice to Landlord which shall notice shall include a statement in bold and all capital letters "**LANDLORD'S FAILURE TO CURE THIS DEFAULT WITHIN [FIVE (5) DAYS/TWO (2) DAYS] AFTER LANDLORD'S RECEIPT OF THIS NOTICE SHALL RESULT IN RENT ABATEMENT**". If such breach remains uncured for more than five (5) days after written notice thereof is delivered from Tenant to Landlord (except such cure period shall be reduced to two (2) days relative to any second and subsequent violations), then, in addition to all other non-monetary remedies available to Tenant at law or in equity, Tenant shall deduct as liquidated damages from payments of Base Rent sums payable to Landlord under this Lease a sum equal to one (1) day of Base Rent at the then-applicable rate (said amount to be calculated at a daily rate based on a 30-day month) for each day from the date the breach first occurs until the date Landlord cures such breach. Although Landlord and Tenant recognize that the damages which will be suffered by Tenant should Landlord breach this Paragraph 3 will be difficult to determine with precision, Landlord and Tenant nevertheless covenant and agree that the liquidated damages to which Tenant is entitled hereunder are a reasonable forecast of the damages which will be suffered by Tenant by reason of Landlord's breach of this Paragraph 3.

D. Landlord may perform such demolition, remodeling, reconstruction, renovations or changes (collectively, "Construction Activities") in the buildings in the Shopping Center, other than the Premises, as Landlord may reasonably determine to be appropriate, including, without limitation, certain façade improvements to other buildings in the Shopping Center as already approved by Tenant. Prior to commencing any Construction Activities, Landlord shall submit to Tenant, for Tenant's review and approval: (1) a construction schedule, (2) barricade plans and (3) a site plan indicating a proposed construction staging area. Landlord agrees that any such Construction Activities (i) shall be undertaken and completed in a manner that shall create compatibility of appearance and architectural harmony with the balance of the Shopping Center, (ii) shall not unreasonably interfere with or impede at any time full-sized truck access to the Premises and (iii) shall not materially or adversely affect (A) pedestrian or vehicular access to or from the Premises, or the internal circulation of vehicular traffic within the Shopping Center, (B) visibility of the Premises or any permitted Tenant signage, (C) the business conducted by Tenant in the Premises or (D) the parking serving the Premises. Landlord agrees that it shall use commercially reasonable efforts to minimize the impact of Construction Activities on Tenant's business or the operation of the Shopping Center and that there shall be no Construction Activities between November 1st and the following January 15th. Landlord, during the performance of any Construction Activities, shall keep the areas subject to such activities in an orderly condition and store all construction materials and equipment from within or from an enclosed staging area approved by Tenant. The foregoing provisions shall not be deemed to prohibit the use of debris boxes in the approved staging area during such Construction Activities by Landlord in a manner that is consistent with standard practices in the state in which the Premises is located.

Parking.

The "Primary Parking Field" is approximately outlined on Exhibit "XX" hereto. The number of parking spaces and the parking ratio for the Shopping Center shall not be reduced below the numbers specified in Paragraph X of the Basic Lease Terms at any time during the Term except with Tenant's prior written approval, which Tenant may withhold in its sole but reasonable discretion. In the event Tenant determines in its reasonable judgment at any time during the Term hereof that parking is not readily available for its customers, Landlord shall implement

reasonable measures to alleviate the parking situation at Landlord's sole cost and expense (such as, time-limited parking spaces, parking lot monitors, or valet parking). No valet, ride share, carpool, charging station or other long-term parking shall be allowed in the Primary Parking Field.

No changes from that shown on Exhibit "XX" shall be made in the Primary Parking Field during the Term of this Lease, or any extension thereof, unless the prior written approval of Tenant has been obtained, which approval may be withheld in Tenant's sole and absolute discretion. Notwithstanding the foregoing, if applicable governmental authorities require changes to the Primary Parking Field such changes shall be subject to Tenant's prior approval but shall not be disapproved by Tenant if the number of parking spaces in the Primary Parking Field remains the same and remains in accordance with applicable laws and regulations. There shall in no event be located within the area extending from the storefront of the Premises into the Common Areas directly in front of the Premises any kiosk, cart, outdoor seating, bench, fountain or water feature, cell tower or site, ATM or any other improvement (except Tenant's cart storage areas and Outdoor Display Area) unless shown on Exhibit "XX" or specifically consented to by Tenant in writing, which consent shall be in Tenant's sole discretion. In the event Landlord shall fail to cure any breach of this Section XX within 30 days following notice from Tenant, said failure shall constitute a Landlord Default.

Subject to Tenant's compliance with applicable Laws, and as incidental to Tenant's use of the Premises as a business operating under the trade name "____," Tenant shall have the right to designate two (2) parking spaces (the "**Short Term Parking Spaces**") in a location mutually acceptable to Landlord and Tenant (in reasonable proximity to the Premises, but which may be relocated from time to time upon advance notice from Landlord to Tenant, to another location reasonably acceptable to Tenant) ("**Short Term Parking Space Area**") for the non-exclusive use of (i) Tenant's customers as short term parking spaces, and (ii) other tenants' customers as short term parking spaces, for the purposes of customers shopping at or picking up merchandise at the Premises. Subject to compliance with applicable Laws, Tenant may (1) install in the Short Term Parking Space Area reasonable signage designating such Short Term Parking Spaces [consider whether it can be branded or non-branded], which signage shall be first approved by Landlord (such approval not to be unreasonably withheld, conditioned or delayed). Tenant agrees that the liability insurance and indemnity provisions of the Lease shall apply with the same force and effect to Tenant's use of the Short Term Parking Spaces as they apply to the Premises and the conduct of Tenant's business therein. Any parking spaces located within the Short Term Parking Space Area (regardless of how utilized by Tenant) shall be counted for purposes of computing the required number of parking spaces under the Lease.

Sidewalk Areas:

Subject to the provisions of this Lease, Tenant shall have the right to: (i) exclusively use designated areas in the "Common Area" of the Shopping Center (as defined in Section X below) for storage of its shopping carts, as more particularly set forth in Section X below, (ii) use the area on the sidewalk immediately adjacent to the Premises for outdoor displays, as more particularly set forth in Section X below and (iii) use areas mutually agreed to by Landlord and Tenant behind the Premises for loading and unloading, storage of empty pallets and equipment and trash containers, provided that Tenant's use of the areas set out in (i), (ii) and (iii) above will not restrict or impair vehicular and pedestrian ingress, egress and access within the Common Areas of the Shopping Center and such areas will be kept in a clean and neat condition with all trash removed daily.

In addition, Tenant shall have the right to use the portions of the sidewalks adjacent to the front of the Premises (the "**Sidewalk Area**") for free standing signs, marketing, displays of merchandise, lockers or other similar short-term storage equipment intended for pick-ups of retail items sold at the Premises ("**Storage Equipment**"), food samples and presentations, outdoor seating, and special events; provided, however, (a) such use shall be subject to all Applicable Laws and the rights of existing tenants or occupants of the Shopping Center, (b) Tenant shall keep the Sidewalk Area passable for pedestrians, (c) during any periods of Tenant's use of the Sidewalk Area, Tenant shall keep the Sidewalk Area clean and free from litter and Tenant shall remove all refuse, trash and rubbish from the Sidewalk Area at the end of each day, and (d) all items placed in the Sidewalk Area by tenant shall be maintained by Tenant in a neat, clean and orderly condition. All activities by Tenant within Tenant's Sidewalk Area shall be conducted professionally in keeping with the image and quality of the Shopping Center. Tenant agrees that the liability insurance and indemnity provisions of this Lease shall apply with the same force and effect to Tenant's use of the Sidewalk Area as they apply to the Premises and the conduct of Tenant's business therein. Landlord agrees to use good faith, diligent efforts to cooperate with Tenant, at no cost to Landlord, to obtain any required permits in connection with the foregoing use of the Sidewalk Area by Tenant.