

**Thursday, October 24, 2019  
8:00 AM – 9:15 AM**

**Workshop 11**

**Environmental Terms in Leases –  
What Does a Landlord or Tenant Really Need?**

**Presented to**

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## **Introduction**

Environmental considerations may exist in each phase of the landlord-tenant relationship: leading up to commencement/possession; during the lease term; and following expiration/termination. In negotiating for the first phase (not to be confused with “Phase I” – enviro lawyer’s humor), the issues of import include the defining the premises, describing the condition of the premises, permissible (and prohibited) uses of the premises, and due diligence. The focus of negotiations for the second phase is the allocation of responsibilities between the landlord and tenant, including compliance with environmental laws and regulations, as well as standard concerns such as alteration of the premises, and indemnity. Finally, the prescient lawyer will take care to negotiate the “tail” issues; i.e., who has responsibility for what after the lease expires or terminates.

### **1. Overview - Environmental Liability**

Liability under environmental laws and regulations flows from a person’s status not as landlord or tenant, but as “owner” or “operator”; as “generator” of hazardous materials (in its broadest sense) or “arranger” of the disposal of such materials. Except perhaps in the rare triple-net lease scenario, a landlord almost always will satisfy the requirements of “owner,” and therefore be in the chain of liability, not only for its own acts, but also for the acts (and omissions) of its tenants. The extent of a tenant’s control of the leased premises will be a factor in determining whether a tenant may be deemed an owner for purposes of environmental liability. “Control,” an undefined and imprecise term, is the primary consideration, making it imperative to focus on the description of the premises, and the how the lease language divides responsibilities for the premises (including CAM!) between the landlord and tenant.

### **2. Basic Principles**

#### **a. Status of Site**

A foundational question is the status of the site vis-à-vis environmental regulators. For example, is any part of the site contaminated by historical uses, and is the site already on the radar screen of regulatory agencies. Does it qualify as a brownfield site under applicable state law? As a Superfund site? Is it really a clean greenfield site, or is it a former farm that suffers from historically applied pesticides (HAP)? These issues are among those that should be raised and resolved during due diligence. These issues are important not only in a vacuum, but also in terms of whether the landlord directly, and the tenant derivatively, may claim the benefit of defenses to liability, such as the so-called “innocent landowner/purchaser” or “bona fide prospective purchaser” defenses.

#### **b. Description of Premises**

It’s no news to state describing the premises subject to the lease is rather elemental. It may be news to hear the description of the premises may impact environmental liability exposure for the landlord and/or tenant. For example, to the demised premises include use of areas other than its business operations (such as parking areas)? If a tenant has bargained for exclusive use of such areas, has the tenant unwittingly taken on responsibility for environmental issues arising in them? (Answer: probably, as the “operator” of such areas.) If the lease makes the tenant responsible for contributing to the cost of CAM (and which lease doesn’t?) without any qualification, is the tenant now proportionately responsible for the cost of remediating environmental problems created in common areas by others? (Answer: possibly.)

#### **c. Condition of Premises**

From an environmental perspective, a landlord always wants to invoke – and a tenant always wants to avoid – the “AS-IS” language to address the condition of the premises. Assuming the landlord lacks the lopsided power to insist upon such language, issues to be addressed include: prior uses of the premises; presence of asbestos, lead paint, mercury (florescent bulbs), and PCBs; and mold/leaks/HVAC. These issues should be addressed through reps and warranties made by the landlord.

#### **d. Due Diligence**

Often assumed to be a concern only of tenants, landlords too may benefit from due diligence. Does local law impose an obligation on the landlord to disclose environmental issues to a tenant? If so, a landlord should investigate its own space(s). Separately, what should the landlord know about the prospective tenant’s history (if any) of storing, using, selling, or disposing of hazardous materials? Is environmental insurance valuable?

Tenant due diligence is more common, and more obvious. But does the standard set of due diligence questions prove sufficient for environmental issues? Likely not. Due diligence may help reveal latent environmental conditions. Or, for example, in multi-tenant facilities, a tenant may want to investigate the activities of other tenants to assess the possibility of a present or future environmental condition.

#### **e. Permitted Uses**

The “permitted uses” clause of a lease may enhance the landlord’s ability to protect itself against environmental liability. It should be crafted to exclude, to the extent practical, the presence of hazardous materials in the demised premises, regardless whether the tenant introduced the materials.

A cautionary note here about a “rights of entry and inspection” clause: if a landlord bargains for (or insists upon) such a right, but then fails to exercise it, the landlord may be deemed through its own negligence to have permitted the presence of hazardous materials. The question becomes whether the *right* gives rise to a corresponding *duty* to enter and inspect from time to time.

Tenants, by contrast, need to push back against permitted use clauses that contain total bans on hazardous materials. Cleaning supplies, for example, often contain such materials. Some retail products do as well. The permitted use clause should allow the use or sale of such materials that appear in commercially-available products.

#### **f. Prohibited Uses**

The flip side of the “permitted use” coin is prohibited use. And no, including both is not redundant. The prohibited use clause, for example, may constrain tenant from using specific hazardous materials otherwise permitted by law because such materials are prohibited by the landlord’s lender and/or insurer. A schedule of such prohibited materials should be annexed to the lease.

More broadly, the prohibited use clause may be used to constrain not only uses, but activities. For example, if the premises sit atop a former brownfield (say a gas station), and there is an “environmental easement” prohibiting disturbance of the soil or the slab, the prohibited use clause may be used to preclude any activity that would run afoul of those restrictions.

### **3. Compliance**

#### **a. Landlord O&M**

Landlords rarely are in a position to create environmental conditions, but they are able to prevent environmental conditions through proper O&M. Mold prevention may be the most obvious example, achieved through proper HVAC maintenance; roof and water/sewage-line maintenance (all to prevent leaks); and custodial activities. Other examples include maintenance of existing encapsulations of asbestos containing materials (ACMs) or lead paint. If the site is a prior brownfield, there may be an environmental easement and a corresponding site management plan; if so, the landlord may have obligations to address (see below).

#### **b. Tenant O&M**

Many lease forms now include language requiring a tenant to comply with environmental laws and regulations, and some even include a laundry list of alphabet-soup laws. These boilerplate provisions, however, may prove insufficient in dealing with the division of risk and responsibility between landlord and tenant, especially when dealing with alteration of the leased premises. Some courts, for example, have rejected a landlord’s reliance on such provisions to shift to a tenant the costs of remediating ACMs “discovered” during a tenant buildout.

#### **c. Environmental Easements/Site Management Plans**

In the 1990s, the concept of environmental remediation changed dramatically, from “only pristine is clean” to risk-based standards of clean, with the latter focusing on the intended use of the property post-remediation. Consequently, for many if not most commercial buildings (including multifamily residential and schools), it is possible to perform a cleanup that leaves residual contamination in the ground. In such circumstances, the regulators often impose “institutional controls” (think deed or use restrictions) and/or “engineering controls” (think sub-slab vapor venting systems), and the corresponding laws or regulations require the fee owner/developer to adopt and implement a site management plan (SMP) to operate and maintain the ICs/ECs, and to grant an “environmental easement” to the regulators to ensure compliance with the SMP. Where applicable, the lease should address these issues directly. (See also Prohibited Uses above re tenants’ compliance obligations.)

#### **d. Green Building Certification**

Much like the need to know the legal requirements of the state and municipality in which one is leasing property, so too it is critical to know the certification requirements of the organization determining whether, and to what level, a building is considered “green.” Generally speaking, however, the focus is on construction and O&M.

A consumer-facing tenant striving to prove its environmental chops may bargain for landlord’s compliance with green construction and HVAC standards. Where construction is involved, another issue to be negotiated is cost sharing (including tenant’s contribution to capital expenditures). Where a tenant is asked to contribute, it would be proper for the tenant to share also in the benefits, such as income, savings or tax credits realized by the landlord. Similarly, a landlord with a green building may require the tenant to comply, for example, with recycling programs, use certain types of lighting fixtures, and/or allow sub-metering of utilities to monitor tenant compliance with certification requirements/objectives. Use restrictions, including prohibitions on the use of “non-green” cleaning supplies, are common ways for landlords to ensure tenant compliance. Some leases include penalty provisions for tenant’s failure to comply.

#### **4. Expiration/Termination**

##### **a. Condition of Premises**

Many standard leases require a tenant to return the premises in the original condition, “normal wear and tear excepted.” From the environmental perspective, such language may prove problematic for both landlord and tenant.

The landlord needs to ensure the “normal wear and tear excepted” language does not relieve tenant of responsibility for remediating an incidentally-created environmental condition. Conversely, a tenant needs to protect itself from stepping into liability for inadvertently exposing pre-existing environmental conditions.

Furthermore, the landlord and tenant both will benefit from an environmental “audit” prior to surrender of the premises. Much as is the case prior to move in, neither party wants to find itself ignorant of environmental conditions: the late discovery of such conditions undermines a landlord’s claim they were caused by the tenant, and leaves the tenant without armor against claims asserted by the landlord.

An interesting legal question arises when an environmental condition remains uncured at the time a lease expires or is terminated: May the tenant surrender the premises, and is a landlord obligated to accept the surrender? An argument has been developed asserting the environmental condition is a “squatter” created by the tenant, and long-standing case law in some jurisdictions holds a tenant may not surrender the premises until the squatter is removed.

##### **b. Survival of Reps, Warranties & Covenants**

Given the potential cost associated with environmental remediation, a landlord should try to negotiate the broadest, and longest-lasting, survival provisions applicable to environmental reps, warranties, and covenants. The tenant, by contrast, not only wants to limit the length of the survival period, but also focus the survival language to the tenant’s specific acts or omissions. As a trade for a landlord-sided survival clause, it may be beneficial to the tenant (from a cost perspective) to bargain for the right (but avoid the obligation) to perform any post-surrender remediation. (If included, additional issues arise, including right of access, union/non-union/prevaling wage, qualifications of personnel, insurance, etc.) Before agreeing to such provisions, the prudent landlord will make sure they do not conflict with any lender or insurer requirements/prohibitions.

#### **5. Releases/Indemnifications**

Let’s be clear at the outset about one thing: releases and indemnification provisions may operate effectively between landlord and tenant, but they are meaningless as between third parties (including governmental agencies) and either landlord or tenant. Environmental insurance, particularly “Pollution Legal Liability” policies, are a good backstop for most bodily injury, property damage, and natural resource damage claims, regardless of claimant.

Indemnity provisions need to be written so as to be consistent with other relevant lease clauses, including the “use” provisions, the “compliance” provisions, and the O&M provisions. Failure to coordinate these provisions could open the door to an unintended expansion or narrowing of a tenant’s liability.

#### **6. Traps for the Unwary (Mentioned above, and to be discussed at the Workshop, so be sure to attend!)**

##### **a. Common Area**

- b. **Parking Area**
- c. **Storage Area**
- d. **Waste Disposal/Removal**

***Sample Lease Provisions***

**LANDLORD FORM LEASE – SHOPPING CENTER – NEW JERSEY ISSUES**

**WARRANTY OF USE; COMPLIANCE WITH LAWS**

11.1 Definitions

(a) Contaminants. “Contaminants” shall mean any regulated substance, toxic substance, hazardous substance, hazardous waste, pollution, pollutant or contaminant, as defined or referred to in the New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq.; the New Jersey Spill Compensation and Control Act, N.J.S.A. 26:2C-1 et seq.; the Hazardous Substance Discharge: Reports and Notices Act, N.J.S.A. 13:1K-15 et seq.; the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq.; The Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq.; The Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 9601 et seq.; the Water Pollution and Control Act, 33 U.S.C. 1251 et seq.; the “Tank Laws” as defined below; and any regulations promulgated therefrom, together with any substitutions thereof, as well as words of similar purport or meaning referred to in any other federal, state, county or municipal environmental statute, ordinance, rule or regulation.

(b) Discharge. “Discharge” shall mean the releasing, spilling, leaking, leaching, disposing, pumping, pouring, emitting, emptying or dumping of Contaminants at, into, onto or from the Demised Premises or the threat thereof, regardless of whether the result of an intentional or unintentional action or omission.

(c) Disposal. “Disposal” shall mean not only the Discharge or placing of waste into or on any land or water, through the initial introduction of Contaminants onto the Demised Premises, but also the spreading, moving, dispensing and releasing of existing Contaminants at the Demised Premises due to any subsequent activity at the Demised Premises.

(d) Environmental Documents. “Environmental Documents” shall mean all environmental documentation in the possession or under the control of the producing party concerning the Demised Premises or its environs, including, without limitation, all sampling plans, cleanup plans, preliminary assessment plans and reports, site investigation plans and reports, remedial investigation plans and reports, remedial action plans and reports, or the equivalent, sampling results, sampling result reports, data, diagrams, charts, maps, analyses, conclusions, quality assurance/quality control documentation, correspondence to or from the NJDEP or any other Governmental Authority, submissions to the Licensed Site Remediation Professional (“LSRP”), NJDEP or any other Governmental Authority, and directives, orders, approvals, including any No Further Action letter (“NFA”) or Response Action Outcome (“RAO”), and disapproval’s issued by the NJDEP, any LSRP, or any other Governmental Authority, and all environmental consultant’s reports.

(f) Governmental Authority. “Governmental Authority” shall mean the federal, state, county or municipal government, or any department, agency, bureau or other similar type body obtaining authority therefrom or created pursuant to any Laws.

(g) ISRA. “ISRA” shall mean the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., the regulations promulgated thereunder and any amending and successor legislation and regulations.

(h) Law or Laws. “Law” or “Laws” shall mean each and every applicable federal, state, county or municipal statute, ordinance, rule, regulation, order, directive or requirement, currently or hereafter existing, together with all successor statutes, ordinances, rules, regulations, orders, directives or requirements, of any Governmental Authority, including, without limitation, Laws in any way related to Contaminants, and the common law.

(i) NJDEP. “NJDEP” shall mean the New Jersey Department of Environmental Protection or its

successor.

(j) Notices. "Notices" shall mean, in addition to its ordinary meaning, any communication of any nature, whether in the form of correspondence, memoranda, orders, directives or otherwise.

(k) Remediate or Remediation. "Remediate" or "Remediation" shall have the meaning ascribed to such term under N.J.S.A. 13:1K-8 et seq., of the laws of the State of New Jersey, and shall include, without limitation: environmental investigation, monitoring and sampling; installation, maintenance and removal of monitoring wells; storage of excavated materials; and installation, maintenance, storage and removal of machinery and equipment used in connection with the Remediation.

(l) Tank Laws. "Tank Laws" shall mean the New Jersey Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., and the federal underground storage tank law, Subtitle I of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 et seq., together with any amendments thereto, regulations promulgated thereunder and all substitutions thereof, and successor legislation and regulations.

(m) Tenant's Representatives. "Tenant's Representatives" shall mean any shareholder, officer, director, member, partner, employee, agent, licensee, invitee, assignee or sublessee of Tenant, or any other third party other than Landlord.

(n) Underground Storage Tanks. "Underground Storage Tanks" shall have the meaning ascribed to such term under the Tank Laws, as well as unregulated underground storage tanks used to store Contaminants.

#### 11.2 Tenant's Environmental Compliance

(a) ISRA Compliance. Tenant shall, at Tenant's own expense, comply with ISRA. Tenant shall, at Tenant's own expense, make all submissions to, provide all information to, and comply with all requirements of the NJDEP, if applicable, or those required by the designated LSRP, whichever are stricter. Tenant's obligations under this subparagraph shall arise if there is a closing of operations, a transfer of ownership or operations, or a change in ownership at or affecting the Demised Premises pursuant to ISRA, whether triggered by Landlord or Tenant. Provided this Lease is not previously canceled or terminated by either party or by operation of law, Tenant shall commence its submission to the NJDEP, if applicable, or to the designated LSRP in anticipation of the end of the Term, no later than six (6) months prior to the expiration of the Term. Should Tenant's operations at the Demised Premises be outside of those industrial operations covered by ISRA, Tenant shall, at Tenant's own expense, provide an opinion as to the applicability of ISRA to the leasehold, prior to the expiration or earlier termination of the Term.

(b) Information to Landlord. At no expense to Landlord, Tenant shall promptly provide all information requested by Landlord, the LSRP, or NJDEP for preparation of any submission made by Landlord to NJDEP, and shall promptly sign such affidavits and submissions when requested by Landlord, the selected LSRP, or NJDEP.

(c) Tenant Audit. Upon belief of a discharge by Tenant or from the Demised Premises, Landlord shall have the right, during the lease term, and upon the expiration of the lease term, to require that Tenant hire, and in such event, Tenant shall at Tenant's own expense hire, an environmental consultant satisfactory to Landlord to undertake sampling at the Demised Premises sufficient to determine whether Contaminants have been Discharged during the Term.

(d) Landlord Audit. Tenant shall permit Landlord and Landlord's agents, representatives and employees, including without limitation, legal counsel and environmental consultants and engineers, including any selected LSRP, access to the Demised Premises, from time to time, during the lease term, for purposes of conducting an environmental assessment, inspection and sampling, during regular business hours, or during other hours either by agreement of the parties or in the event of an environmental emergency. Tenant shall not restrict access to any part of the Demised Premises, and shall not impose any conditions to access. Landlord shall use reasonable efforts to avoid unreasonably interfering with Tenant's use of the Demised Premises, and upon completion of Landlord's assessment, investigation and sampling, shall, to the extent reasonably practicable, repair and restore the affected areas of the Demised Premises from any damage caused by the assessment, investigation and sampling. From time to time, Landlord may authorize access to the common areas at the Shopping Center to the United States Environmental Protection Agency ("USEPA") and/or NJDEP and/or,

their contractors, agents, and responsible parties to sample, survey, test, and monitor the subsurface conditions at the Shopping Center.

(e) Tenant Remediation. Should the assessment, investigation or sampling performed pursuant to subparagraphs (c) or (d) above, or any other assessment, investigation or sampling, reveal the existence of: (x) a Discharge of Contaminants; or (y) a Discharge of any material other than sanitary waste to the Sewerage System; then, in addition to being in default under this Lease and Landlord having all rights available to Landlord under this Lease and by law by reason of such default, Tenant shall, at Tenant's own expense, hire an LSRP and undertake all Remediation required by Landlord, a designated LSRP, and any Governmental Authority, including, without limitation, promptly: (i) preparing and submitting to the appropriate Governmental Authority, through its designated LSRP, all required assessment, investigation, sampling and remedial action plans and reports; (ii) implementing, to the satisfaction of Landlord, the designated LSRP, and the appropriate Governmental Authority, the approved assessment, investigation, sampling and remedial action plans and reports; (iii) removing from the Demised Premises all such Contaminants to the satisfaction of Landlord, the designated LSRP, and the appropriate Governmental Authority; (iv) establishing a Remediation funding source, which funding source shall be satisfactory to Landlord and the appropriate Governmental Authority, or certified by the designated LSRP; and (v) obtaining and delivering to Landlord an unconditional No Further Action Letter or RAO.

(f) Nature of Tenant's Remediation. Notwithstanding anything to the contrary set forth in this paragraph, in no event shall Tenant's remedial action involve engineering controls, including, without limitation, capping, fencing or other physical barrier, institutional controls, including without limitation, a deed notice or other institutional control notice to pursuant to N.J.S.A. 58:10B-1 et seq., a groundwater classification exception area or well restriction area, and notwithstanding NJDEP's requirements or approvals, or any other Governmental Authority's or LSRP's requirements or approvals, Tenant's Remediation shall meet the most stringent published or unpublished Remediation standards for soil, surface water, groundwater and drinking water. During the course of the remediation, Tenant shall immediately inform the Landlord, in writing, should Tenant receive any notice from NJDEP or an LSRP that Tenant has become, or may become, subject to direct oversight by the Department. Tenant must complete the Remediation in accordance with any and all timeframes established under SRRA and its corresponding regulations, and any timeframe established by any other applicable Environmental Law.

(g) Tenant's Restoration. Promptly upon completion of all Remediation, Tenant shall at Tenant's own expense, restore the affected areas of the Demised Premises from any damage or condition caused by the Remediation, including, without limitation, closing, pursuant to Law, any wells or piezometers installed by or on behalf of Tenant at the Demised Premises.

(h) Hold-over Tenancy. If prior to the expiration or earlier termination of the Term, Tenant either: (i) fails to deliver to Landlord one of the following: (A) an affidavit to Landlord's satisfaction stating that Tenant's operations throughout the Term were not subject to the provisions of ISRA; (B) a de minimus quantity exemption, (C) an unconditional No Further Action Letter ("NFA Letter") or Response Action Outcome ("RAO") pursuant to ISRA (the "ISRA Clearance"); or (ii) fails to Remediate all Contaminants pursuant to subparagraph (f) above, and deliver to Landlord an unconditional NFA Letter or RAO (the "Final Remediation Document"); then upon the expiration or earlier termination of the Term, Landlord shall have the option either to consider the Lease as having ended or to treat Tenant as a hold-over tenant in possession of the Demised Premises. If Landlord considers the lease as having ended, then Tenant shall nevertheless be obligated to promptly obtain and deliver to Landlord the ISRA Clearance or the Final Remediation Document, as the case may be, and otherwise fulfill all of the obligations or Tenant set forth in this paragraph. If Landlord treats Tenant as a hold-over tenant in possession of the Demised Premises, then Tenant shall pay, monthly to Landlord, double the regular and additional monthly rent which Tenant would otherwise have paid under the lease, until such time as Tenant delivers to Landlord the ISRA Clearance or the Final Remediation Document, as the case may be, and otherwise fulfills its obligations to Landlord under this paragraph, and during the holdover period, all of the terms of this lease shall remain in full force and effect.

(i) Environmental Questionnaire. Contemporaneously with the signing and delivery of this Lease, and thereafter, annually on the anniversary date of the commencement of the Term, Tenant shall complete, execute and deliver to Landlord an environmental questionnaire which shall be in the form and shall contain such terms and provisions, as Landlord may, from time to time, submit to Tenant. In the event Tenant's response to the environmental questionnaire indicates, in the Landlord's reasonable determination, a potential environmental issue, then Tenant shall, at Tenant's own expense, undertake in accordance with Law, all environmental assessment and Remediation as Landlord deems appropriate.

(j) Environmental Documents. During the Term of this Lease and subsequently, promptly upon completion or receipt by Tenant or Tenant's consultants, LSRP or counsel, Tenant shall deliver to Landlord all Environmental Documents concerning or generated by or on behalf of Tenant, whether currently or hereafter existing.

(k) Attendance at Meetings. Tenant shall notify Landlord in advance of all meetings scheduled between Tenant or Tenant's representatives and NJDEP, its designated LSRP or any other Governmental Authority pertaining to the Demised Premises, and Landlord and Landlord's agents, representatives and employees, including, without limitation, legal counsel and environmental consultants and engineers, shall have the right, without the obligation, to attend and participate in all such meetings.

(l) Liens. Tenant shall promptly notify Landlord of any liens threatened or attached against the Demised Premises pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the regulations promulgated thereunder, and any amending or successor legislation or regulations, or any other laws. In the event that such a lien is filed against the Demised Premises as a result of the actions or omissions of Tenant or a Tenant's Representative, then Tenant shall be deemed in default under this Lease and, in addition to Landlord having all rights available to Landlord under this Lease and by Law by reason of such default, Tenant shall, at Tenant's own expense, within thirty (30) days from the date that the lien is filed against the Demised Premises, and in any event prior to the date any Governmental Authority commences proceedings to execute on the lien, either: (i) pay the claim and remove the lien from the Demised Premises; or (ii) deliver to Landlord either (A) a bond in an amount and with a surety satisfactory to Landlord in Landlord's sole and absolute discretion, or (B) a cash deposit in the amount of the lien, plus any interest that may accrue thereon. The foregoing shall not constitute a consent or agreement by Landlord to permit such a lien to attach to the Demised Premises, nor shall the foregoing be deemed a waiver by Landlord of a default by Tenant under this lease.

(m) Landlord's Consent for Tenant's Investigation. In no event shall Tenant, nor anyone on Tenant's behalf, including an LSRP, undertake any environmental assessment or Remediation of the Premises without prior written notice to, and the prior written consent of Landlord. In the event Landlord consents to an environmental assessment or Remediation, then prior to undertaking any assessment or Remediation, Tenant shall, or shall cause Tenant's engineers and consultants, as the case may be, to provide Landlord with a protocol outlining in detail the nature, scope and location of all assessment or Remediation to be undertaken, and shall receive Landlord's written consent to such Remediation. Landlord and Landlord's consultants, engineers and representatives shall have the right, without the obligation, to be present during such assessment or Remediation, and shall have the right, at no expense to Landlord, to split all samples taken by Tenant or Tenant's consultants or engineers.

(n) Landlord's Right to Perform Tenant's Obligations. Notwithstanding anything to the contrary set forth in this lease, in the event, pursuant to this lease, Tenant is required to undertake any assessment or Remediation with respect to the Demised Premises, then, at Landlord's discretion, Landlord shall have the right, without the obligation, from time to time, during such assessment or Remediation activities, to perform such assessment or Remediation activities at Tenant's expense, and all sums incurred by Landlord shall be paid by Tenant, as additional rent, upon demand.

(o) Indemnity. Tenant shall indemnify, defend and hold harmless Landlord, and Landlord's officers, directors, shareholders, members, partners, and each of their employees, agents and personal or legal representatives from and against any and all claims, liabilities, losses, damages, penalties and costs, foreseen or unforeseen, including, without limitation, counsel, engineering and other professional or expert fees, which an indemnified party may incur, resulting directly or indirectly, wholly or partly from Tenant's actions or omissions with regard to Tenant's obligations under this Article 11 .

(p) Survival. This paragraph shall survive the expiration or earlier termination of this Lease. Tenant's failure to abide by the terms of this paragraph shall be restrainable, or enforceable, as the case may be, by injunction.

(q) Condition Precedent. As a condition precedent to Tenant's right to sublet the Demised Premises in whole or in part, or to assign this Lease, (if applicable) Tenant shall, at Tenant's own expense, first comply with ISRA and fulfill all of Tenant's environmental obligations under this paragraph which arose during Tenant's Term and/or arises upon termination of Tenant's Term. If this condition shall not be satisfied, then notwithstanding anything to the contrary set forth in this Lease, Landlord shall have the right to withhold consent to a sublease or assignment.



(r) Interpretation. The obligations imposed upon Tenant under subparagraphs (a) through (q) above are in addition to and are not intended to limit, but to expand upon, the obligations imposed upon Tenant under Section 11.4 of this Lease.

### Section 11.3

Landlord represents that upon the Delivery of Possession, the Demised Premises shall be free of all orders or notices of violation of any public or quasi-public authorities, and that, upon the Rent Commencement Date, Landlord's Work in connection with the construction of the Demised Premises shall comply with all applicable statutes and ordinances and with all applicable regulations, orders and requirements of all governmental authorities having jurisdiction. Landlord shall, at its expense, make any and all alterations or changes to the Demised Premises of a capital nature (determined in accordance with generally accepted accounting principles consistently applied) required by any of the aforesaid statutes, ordinances, regulations, rules, orders or requirements, and any amounts so expended by Landlord shall be included in Common Area Costs under Section 4.2(a) hereof; provided, however, that the cost of any such alterations or changes of a capital nature required solely by reason of Tenant's particular use or method of operation in the Demised Premises shall not be included in Common Area Costs and shall be paid by Tenant.

Section 11.4 During the Term hereof, subject to the provisions of the last sentence of Section 11.3 hereof, Tenant, at Tenant's expense, shall comply with all applicable statutes, ordinances, regulations, orders and requirements, foreseen and unforeseen, ordinary as well as extraordinary, of all governmental authorities having jurisdiction, and Tenant shall make any repairs or alterations to the Demised Premises required by any such applicable statutes, ordinances, regulations, orders or requirements. If Tenant shall fail, for a period of thirty (30) days after written notice to it, to comply with any such statute, ordinance, regulations, order or requirement with which it is obligated by this section to comply (or to commence to effect compliance therewith within such period and thereafter diligently continue its efforts to effect such compliance until completion thereof), Landlord shall have the right (but not the obligation) to do all things necessary to comply therewith. In the event of such compliance by Landlord, Tenant shall, on the first day of the calendar month next succeeding the calendar month in which such compliance shall have been completed by Landlord, pay to Landlord, as additional rent, the amount expended by Landlord in effecting such compliance, together with interest at the Lease Interest Rate from the time of such expenditure.

Section 11.5 After the Effective Date of this Lease, Landlord shall indemnify and hold Tenant, its agents and employees, harmless from Damages incurred by Tenant as a result of any adverse effect which results from the presence of any Hazardous Substance in/or about the Demised Premises as a result of the actions or omissions of Landlord or were pre-existing prior to the Effective Date of this Lease.

## **INDUSTRIAL BUILDING – USED FOR RETAIL WAREHOUSE DISTRIBUTION** **INSTITUTIONAL LANDLORD - ENVIRONMENTAL CLAUSE**

### **Hazardous Substances.**

**Reportable Uses Require Consent.** The term “**Hazardous Substance**” as used in this Lease shall mean any product, substance, or waste whose presence, use, manufacture, disposal, transportation, or release, either by itself or in combination with other materials expected to be on the Premises, is now or at any time hereafter, either: (i) potentially injurious to the public health, safety or welfare, to the environment, the Premises or the Project, (ii) regulated or monitored by any governmental authority, or (iii) a basis for potential liability of Lessor to any governmental agency or third party pursuant to any applicable statute or common law theory. Hazardous Substances shall include, but not be limited to, solvents, hydrocarbons, petroleum, gasoline, and/or crude oil or any products, by-products or fractions thereof and any substance that falls within the definition of “hazardous substance”, “hazardous material”, “pollutant”, “contaminant”, “toxic substance” or “hazardous waste” under any statute, ordinance or regulation applicable to the Premises. Lessee shall not engage in any

activity in or on the Premises which constitutes a Reportable Use of Hazardous Substances without the express prior written consent of Lessor which may be given or withheld in Lessor's sole and absolute discretion and timely compliance (at Lessee's expense) with all Applicable Requirements. "**Reportable Use**" shall mean (A) the installation or use of any above or below ground storage tank, (B) the generation, possession, storage, use, transportation, or disposal of a Hazardous Substance that requires a permit, license or certification from, or with respect to which a report, notice, registration or business plan is required to be filed with, any governmental authority, (C) any Hazardous Substance present in a concentration, total aggregate quantity, or container size that is not available to the public on a retail basis, and/or (D) the presence at the Premises of a Hazardous Substance with respect to which any Applicable Requirements requires that a notice be given to or personal protective equipment worn by persons entering or occupying the Premises or neighboring properties. Notwithstanding the foregoing, Lessee may use any ordinary and customary materials reasonably required to be used in the normal course of the Agreed Use, so long as such use is in compliance with all Applicable Requirements, is not a Reportable Use, and does not expose the Premises or neighboring property to any material risk of contamination, exposure or damage or expose Lessor to any liability therefor. Lessee will provide to Lessor copies of all Hazardous Substance manifests, Material Safety Data Sheets, Right to Know Surveys, inspection reports, permits and notices of violation from all government authorities. In addition, Lessor may condition its consent to any Reportable Use upon receiving such additional assurances as Lessor deems necessary in Lessor's sole and absolute judgment to protect itself, the public, the Premises, the Project and/or the environment against damage, contamination, injury and/or liability, including, but not limited to, the installation (and removal on or before Lease expiration or termination) of protective modifications (such as concrete encasements) and/or increasing the Security Deposit.

**Duty to Inform Lessor.** If Lessee knows, or has reasonable cause to believe, that a Hazardous Substance has come to be located, disposed of, generated, spilled, discharged or released in, on, under or about the Premises, and/or any part of the Project, other than as previously consented to by Lessor, Lessee shall immediately give written notice of such fact to Lessor, and provide Lessor with a copy of any report, notice, claim or other documentation which it has concerning the presence of such Hazardous Substance. In furtherance of the foregoing and not in limitation thereof, Lessee agrees to deliver a completed Environmental Questionnaire in the form set forth on Exhibit F within thirty (30) days following Lessee's execution of this Lease and at any time during the Term within thirty (3) days following request therefore.

**Lessee Remediation.** Lessee shall not cause or permit any Hazardous Substance to be discharged, spilled or released in, on, under, or about the Premises (including, without limitation, through the plumbing or sanitary sewer system) and/or any part of the Project and shall promptly, at Lessee's expense, take all necessary or reasonably recommended investigatory and/or remedial action, whether or not formally ordered or required, for the cleanup of any resultant contamination of, and for the maintenance, security and/or monitoring of the Premises, the Project or neighboring properties, that was caused or contributed to by Lessee, or pertaining to or involving any Hazardous Substance brought onto the Premises shall be conducted in compliance with Applicable Requirements during the Term, by or for Lessee, or any third party. Any remediation or cleanup of any Hazardous Substance hereunder shall not include the use of Engineering Controls or Institutional Controls (e.g., deed notices) as those terms are defined under N.J.S.A. 58:10C-1 et seq. or any other Applicable Requirements.

**Lessee Indemnification.** Lessee shall indemnify, protect, defend (with counsel satisfactory to Lessor) and hold Lessor, its officers, directors, members, managers, partners, employees, agents, contractors, invitees, lenders and master or ground lessor, if any, (each, a "**Lessor Party**" and collectively, the "**Lessor Parties**") harmless from and against any and all loss of rents and/or damages, losses, liabilities, liens, judgments, claims, costs, expenses, penalties, attorneys' and consultants' fees, and expert witness fees ("**Claims**") arising out of or involving either directly or indirectly any Hazardous Substance brought, discharged, spilled or released in, on, under or about the Premises and/or any part of the Project by or for Lessee, or any Lessee Party. Lessee's obligations shall include, but not be limited to, the effects of any contamination or injury to person, property or the environment created or suffered by Lessee, and the cost of investigation, removal, remediation, restoration and/or abatement, and shall survive the expiration or termination of this Lease. No expiration, termination or cancellation of this Lease and no release agreement entered into by Lessor and Lessee shall release Lessee from its obligations pursuant to this Lease with respect to Hazardous Substances, which obligations shall specifically survive the expiration or earlier termination of this Lease.

**ISRA (New Jersey).** Without limiting anything hereinabove contained in this Section 5.2, Lessee expressly covenants and agrees to fully comply with the provisions of the New Jersey Industrial Site Recovery Act (N.J.S.A. 13:1K-6, et seq.) hereinafter referred to as "**ISRA**," and all regulations promulgated thereto (or under its predecessor statute, the New Jersey Environmental Cleanup Responsibility Act) prior to the expiration or earlier

termination of this Lease or at any time that any action of Lessee triggers the applicability of ISRA. In particular, Lessee agrees that it shall comply with the provisions of ISRA in the event of any "closing, terminating or transferring" of Lessee's operations, as defined by and in accordance with the regulations which have been promulgated pursuant to ISRA. In the event evidence of such compliance is not delivered to Lessor prior to surrender of the Premises by Lessee to Lessor, it is understood and agreed that Lessee shall be liable to pay to Lessor an amount equal to two times the annual Base Rent then in effect, prorated on a monthly basis, together with all applicable additional Rent from the date of such surrender until such time as evidence of compliance with ISRA has been delivered to Lessor, and together with any costs and expenses incurred by Lessor in enforcing Lessee's obligations under this Section 5.2. Evidence of compliance, as used herein, shall mean: (A) a certification from a "licensed site remediation professional" ("LSRP") (as that term is defined at N.J.S.A. 58:10B-1) approved by Lessor certifying that Lessee's operations are not applicable to ISRA or a similar exemption from ISRA-compliance applies, (B) an approved unconditional "no further action letter" (as that term is defined at N.J.S.A. 58:10B-1) for the entire Premises issued by the New Jersey Department of Environmental Protection, hereinafter referred to as "NJDEP"; or (C) a "response action outcome" (as that term is defined at N.J.S.A. 58:10B-1) for the entire Premises issued by a LSRP approved by Lessor. Evidence of compliance shall be delivered to Lessor, together with copies of all submissions made to, and received from, the NJDEP, including all environmental reports, test results and other supporting documentation. In addition to the above, Lessee hereby agrees that it shall cooperate with Lessor in the event of the termination or expiration of any other lease affecting the Property, or a transfer of any portion of the Property, or any interest therein, which triggers the provisions of ISRA. In such case, Lessee agrees that it shall fully cooperate with Lessor in connection with any information or documentation which may be requested by the LSRP or NJDEP. Lessee hereby represents and warrants that its North American Industrial Classification System ("NAICS") No. is \_\_\_\_\_, and that Lessee shall not generate, manufacture, refine, transport, treat, store, handle or dispose of Hazardous Materials, as above defined. Lessee hereby agrees that it shall promptly inform Lessor of any change in its NAICS number or the nature of the business to be conducted in the Premises. The within covenants shall survive the expiration or earlier termination of the Term.

**Asbestos Notice.** Both state and federal Applicable Requirements require disclosure of asbestos-containing construction materials ("**ACM**") in the Building. This notification is being given to provide the information required pursuant to such legislation in order to help Lessee avoid any unintentional contact with the ACMs, and to assist Lessee in making appropriate disclosures to Lessee's employees and others, as required by Applicable Requirements.

Lessee acknowledges that Lessor has advised Lessee that Lessor has no actual knowledge that the Building contains ACMs, but that Lessee has satisfied itself as to the presence or absence of ACMs in the Building.

If the box above is not checked, Lessee acknowledges that Lessor has advised Lessee that the Building contains ACMs. Lessor has made available to Lessee, Lessor's asbestos management plan or other relevant data concerning same. However, Lessee has satisfied itself as to the completeness and accuracy of same. If Lessee undertakes any Alterations or repairs to the Premises (to the extent permitted pursuant to Section 6.3), Lessee shall, in addition to complying with the requirements of Section 6.3, undertake the Alterations or repairs at Lessee's sole cost and expense and in a manner that avoids disturbing any ACMs present in the Building, if any. If ACMs exist in the Building and are likely to be disturbed in the course of such work, Lessee shall comply with all Applicable Requirements pertaining to such ACMs, including but not limited to retaining a licensed asbestos abatement contractor to encapsulate or remove the ACMs, if any, at Lessee's sole cost and expense and in accordance with an approved asbestos-removal plan and otherwise in accordance with all applicable environmental laws, including giving all notices required by the Applicable Requirements.

If a Hazardous Substance Condition (defined in Section 8.1(e)) occurs during the Term (unless Lessee is responsible therefor pursuant to this Lease, in which case Lessee shall make the investigation and remediation thereof required by the Applicable Requirements and this Lease shall continue in full force and effect, but subject to Lessor's rights pursuant to this Section 6 and Paragraph 12), Lessor may, at Lessor's option, either (i) investigate and remediate such Hazardous Substance Condition, if and to the extent required, as soon as reasonably possible at Lessor's expense, in which event this Lease shall continue in full force and effect, or (ii) if the estimated cost to remediate such condition exceeds twelve (12) times the then monthly Base Rent or one hundred thousand dollars (\$100,000), whichever is greater, give written notice to Lessee, within thirty (30) days after receipt by Lessor of knowledge of the occurrence of such Hazardous Substance Condition, of Lessor's desire to terminate this Lease as of the date sixty (60) days following the date of such notice. In the event Lessor elects to give a termination notice, Lessee may, within ten (10) days thereafter, give written notice to Lessor of

Lessee's commitment to pay the amount by which the cost of the remediation of such Hazardous Substance Condition exceeds an amount equal to twelve (12) times the then monthly Base Rent or one hundred thousand dollars (\$100,000), whichever is greater. Lessee shall provide Lessor with said funds or satisfactory assurance thereof within thirty (30) days following such commitment. In such event, this Lease shall continue in full force and effect, and Lessor shall proceed to make such remediation as soon as reasonably possible after the required funds are available. If Lessee does not give such notice and provide the required funds or assurance thereof within the time provided, this Lease shall terminate as of the date specified in Lessor's notice of termination.

**Lessee's Compliance with Applicable Requirements.** Except as otherwise provided for in this Lease, Lessee shall, at Lessee's sole expense, fully, diligently and in a timely manner, materially comply with all Applicable Requirements, the requirements of any applicable fire insurance underwriter or rating bureau, and the recommendations of Lessor's engineers and/or consultants which relate in any manner to the Premises, without regard to whether said requirements are now in effect or become effective after the Commencement Date. Lessee shall, within ten (10) days after receipt of Lessor's written request, provide Lessor with copies of all permits and other documents, and other information evidencing Lessee's compliance with any Applicable Requirements specified by Lessor, and shall immediately upon receipt, notify Lessor in writing (with copies of any documents involved) of any threatened or actual claim, notice, citation, warning, complaint or report pertaining to or involving the failure of Lessee or the Premises to comply with any Applicable Requirements.

**Inspection; Compliance.** Lessor and Lessor's Lender (as defined in Section 29.1 below), if any, and consultants shall have the right to enter into Premises at any time, in the case of an emergency, and otherwise at reasonable times, for the purpose of inspecting the condition of the Premises and for verifying compliance by Lessee with this Lease. The cost of any such inspections shall be paid by Lessor, unless a violation of Applicable Requirements or a Hazardous Substance Condition is found to exist or be imminent, or the inspection is requested or ordered by a governmental authority. In such case, Lessee shall promptly upon request reimburse Lessor for the cost of such inspections, so long as such inspection is reasonably related to the violation or contamination.

**Safety and Health.** Lessee, at Lessee's sole cost and expense, covenants at all times during the Term to comply with the requirements of the Occupational Safety and Health Act of 1970, 29 U.S.C. Subsection 65, et seq., and any similar legislation in the state wherein the Premises is located (hereinafter, the "**Act**"), to the extent that the Act applies to the Premises and any activities thereon. Without limiting the generality of the foregoing, Lessee covenants to maintain all working areas, all machinery, structures, electrical facilities, and the like, at the Premises in a condition that fully complies with the requirements of the Act, including such requirements as would be applicable with respect to agents, employees or contractors of Lessee who may, from time to time, be present upon the Premises, and Lessee agrees to indemnify and hold Lessor and the Lessor Parties harmless from and against any liability, claim or damages, arising as a result of a Default of the foregoing covenant and from all costs, expenses, and charges arising therefrom, including without limitation, attorneys' fees, expert and consultant fees, and other costs, incurred by Lessor and/or Lessor Parties in connection therewith, which indemnity shall survive the expiration or termination of this Lease.

**RETAIL SHOPPING CENTER**  
**INSTITUTIONAL LANDLORD - ENVIRONMENTAL CLAUSE #1**

Tenant shall not use or suffer the Demised Premises to be used in any manner so as to create an environmental violation or hazard, nor shall Tenant cause or suffer to be caused any chemical contamination or discharge of a substance of any nature which is noxious, offensive or harmful or which under any law, rule or regulation of any governmental authority having jurisdiction constitutes a hazardous substance or hazardous waste. As used herein, the term "Hazardous Materials" means and includes all potentially hazardous materials, including, without limitation, radon, harmful radiation, asbestos, and asbestos containing materials. Tenant covenants and agrees that at any and all times during the Term it shall be responsible for compliance with any federal, state, county, local, or municipal law, statute, ordinance, code, regulation or administrative recommendation pertaining to Hazardous Materials (including, without limitation, any requirements pertaining to the clean-up, removal, and/or encapsulation of any Hazardous Materials that may be in the Demised Premises or may have emanated therefrom). Tenant shall, at its sole cost and expense, undertake any and all steps which may be required for compliance as aforesaid regardless of whether Tenant had installed said Hazardous

Materials or that same existed at the Demised Premises prior to Tenant's occupancy of same. Tenant shall be solely responsible for restoring and repairing any damage to the Demised Premises caused by or resulting from such compliance, e.g. the replacement of any ceiling tiles or insulation with comparable products not containing any Hazardous Materials.

**RETAIL SHOPPING CENTER**  
**INSTITUTIONAL LANDLORD - ENVIRONMENTAL CLAUSE #2**

- A. Tenant shall, at its sole cost and expense, procure and maintain all licenses and permits legally necessary for the operation of Tenant's business at the Demised Premises. At all times after the execution of this Lease, Tenant shall comply with all ground and underlying leases, and with all governmental laws, codes, orders and regulations affecting the Demised Premises and the use thereof, including, without limitation, environmental laws and regulations relating to hazardous substances (as hereinafter defined). Tenant shall make all repairs, alterations and improvements required to place the Demised Premises in compliance.
- B. If Tenant fails to comply with the requirements of the foregoing Paragraph A, Landlord or its agents may enter the Demised Premises after ten (10) days' notice in order to effectuate compliance at Tenant's expense, whereupon Tenant shall reimburse Landlord for all costs incurred. The notice required in this Paragraph shall not apply in an emergency. Further, if Tenant's failure to comply results in the issuance of a violation or similar notice from a governmental entity or ground lessor requiring an action and/or appearance by Landlord's representatives at a hearing or payment of a fine, then in addition to all other remedies available to Landlord under this Lease Tenant shall pay, as Additional Rent, an administrative fee of Seven Hundred Fifty ((750.00) Dollars plus all costs, fines, and expenses incurred for the time spent by Landlord's agents and attorneys at hearings (including time spent by in-house counsel).
- C. The term "hazardous substances" as used in this Lease means....
- D. Tenant shall indemnify, defend and hold the Landlord harmless from fines, claims, losses and expenses (including legal and consultant's fees) of every kind arising out of or in connection with the storage or handling of, or the occurrence of spills or discharges of hazardous substances or wastes at the Demised Premises. Tenant shall furnish Landlord and the appropriate governmental agencies with information required in connection with environmental laws and if a cleanup plan must be prepared and a cleanup undertaken, Tenant shall prepare, submit and implement same and shall grant Landlord access to the Demised Premises to supervise Tenant's performance of such work. Tenant's liability under this Paragraph shall survive expiration of the Lease Term.

**RETAIL SHOPPING CENTER**  
**INSTITUTIONAL LANDLORD - ENVIRONMENTAL CLAUSE #3**

1. Tenant shall not cause or permit any Hazardous Materials to be generated, used, released, stored or disposed of at or about the Shopping Center; however, Tenant may use and store "de minimus" quantities of standard cleaning materials as may be reasonably necessary for Tenant to conduct normal operations in the Premises for the Permitted Use, provided all of the foregoing are handled, stored and disposed of in strict accordance with all Legal Requirements and Insurance Requirements. Upon Tenant's surrender of the Premises to Landlord, the Premises shall be free of Hazardous Materials and in compliance with all environmental Legal Requirements. "Hazardous Materials" shall be defined as any substance that is then defined or listed in, or otherwise classified pursuant to, any Legal Requirement, as a "hazardous substance," "hazardous material," "hazardous waste," "infectious waste," "toxic substance," "toxic pollutant" or any other formulation intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, or reproductive toxicity; and any other substance whose presence could be detrimental to the Shopping Center or hazardous to human health or the environment.

2. Tenant shall indemnify, defend and hold harmless Landlord and Landlord's Agents from and against any Claims (including litigation costs and attorneys' fees) in any way relating (directly or indirectly, in whole or in part) to the presence or removal of any Hazardous Material generated, used, released, stored or disposed of: (a) at or about the Premises during Tenant's and Tenant's Agents' occupancy of the Premises, and (b) at or about the Premises, the Shopping Center or the Shopping Center by Tenant or Tenant's Agents, whether before or after the Commencement Date. Tenant shall give Landlord immediate verbal and follow-up written notice of any actual or threatened release, spill or discharge of a Hazardous Material on or from the Premises or

the Shopping Center or any environmental condition requiring responsive or remedial action, or any emergency environmental condition, and in any such case Tenant shall cure same in accordance with all Legal Requirements and to the reasonable satisfaction of Landlord. Upon the occurrence of any of the foregoing events, Landlord may, but shall not be obligated to, immediately enter the Premises to supervise and approve any actions taken by Tenant to address such occurrence, at Tenant's sole cost and expense, and, if Tenant fails to immediately address same to Landlord's reasonable satisfaction, to perform, at Tenant's sole cost and expense, any lawful action necessary to address same. Promptly upon request, Tenant shall execute from time to time affidavits, representations and similar documents concerning Tenant's best knowledge and belief regarding the presence of Hazardous Materials at the Premises or the Shopping Center. Tenant's indemnification obligations set forth in this Article [ ] shall survive the Expiration Date or earlier termination of this Lease.

3. (a) In the event Landlord reasonably believes that Tenant's operations at the Premises could cause the Premises to be subject to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., (as same may be amended, together with all rules, regulations, etc. promulgated thereunder, being hereinafter collectively referred to as "ISRA"), then not later than sixty (60) days prior to "closing, terminating or transferring operations" (as defined in ISRA) in the Premises Tenant shall, at its sole cost and expense, provide Landlord with either a true copy of a Letter of Non-Applicability (or similar document) from the New Jersey Department of Environmental Protection ("DEP"), stating that ISRA does not apply to Tenant's use of the Premises, or any one of the following, as approved by the DEP: (i) a De Minimis Quantity exemption, (ii) a Negative Declaration; or (iii) a Remedial Action Workplan. Any failure to comply with the provisions of this Section 25.3(a) shall constitute an immediate Event of Default.

(a) If Tenant fails to fully comply with the requirements of ISRA or any other environmental Legal Requirement as of the Expiration Date or earlier termination of this Lease, then Landlord shall have the right, at its sole option, to treat Tenant as a holdover tenant pursuant to Section 27.1 hereof, until such time as Tenant so fully complies.

4. Tenant represents that its NAICS number as set forth in Article I does not subject the Premises to ISRA applicability. Any change by Tenant to an operation with an NAICS number which is subject to ISRA shall require Landlord's prior written consent, request for which must be submitted to Landlord at least sixty (60) days in advance, and Landlord may deny such consent in its sole judgment. The foregoing shall not be deemed to permit Tenant to change its Permitted Use, even to one which would not subject the Premises to ISRA applicability, unless and to the extent consented to by Landlord.

**NATIONAL BIG-BOX RETAILER**  
**TENANT'S FORM LEASE ENVIRONMENTAL CLAUSE #1**

For the purposes of this Article, the following terms shall have the meanings set forth below:

(i) "CERCLA" shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601 *et seq.*, and any other amendments now or hereafter enacted.

(ii) "Damages" shall mean all damages, and includes, without limitation, punitive damages, liabilities, costs, losses, diminutions in value, fines, penalties, demands, claims, cost recovery actions, lawsuits, administrative proceedings, orders, response action costs, compliance costs, investigation expenses, consultant fees, attorneys' and paralegals' fees and expenses and litigation expenses.

(iii) "Environmental Claim" shall mean any investigation, notice, violation, demand, allegation, action, suit, injunction, judgment, order, consent decree, penalty, fine, lien, proceeding or claim, (whether administrative, judicial or private in nature) arising: (a) pursuant to, or in connection with, an actual or alleged violation of, any Environmental Law; (b) in connection with any Hazardous Material or actual or alleged Hazardous Material Activity; (c) from any abatement, removal, remedial, corrective, or other response action in connection with a Hazardous Material Environmental Law or other order of a Governmental Authority; or (d) from any actual or alleged damage, injury, threat, or harm to health, safety, natural resources or the environment.

(iv) "Environmental Law" shall mean any current or future Legal Requirement pertaining to: (a) the protection of health, safety and the indoor or outdoor environment; (b) the conservation, management, or use of natural resources or wildlife; (c) the protection or use of surface water and groundwater; (d) the management,

manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, Release, threatened Release, abatement, removal, remediation or handling of, or exposure to any Hazardous Material; or (e) pollution (including any Release to air, land, surface water and groundwater), and includes, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601 *et seq.*, Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6901 *et seq.*, Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, Clean Air Act of 1966, as amended, 42 U.S.C. 7401 *et seq.*, Toxic Substances Control Act of 1976, 15 U.S.C. 2601, *et seq.*, Hazardous Materials Transportation Act, 49 U.S.C. 1801 *et seq.*, Occupational Safety and Health Act of 1970, as amended 29 U.S.C. 651 *et seq.*, Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq.*, National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300(f) *et seq.*, any similar, implementing or successor law, and any amendment, rule, regulation, order or directive issued thereunder.

(v) "Environmental Record" shall mean any document, correspondence, pleading, report, assessment, analytical result, Governmental Approval, or other record concerning a Hazardous Material, compliance with an Environmental Law, an Environmental Claim, or other environmental subject.

(vi) "Governmental Approval" shall mean any permit, license, variance, certificate, consent, letter, clearance, closure, exemption, decision or action or approval of a Governmental Authority.

(vii) "Governmental Authority" shall mean any international, foreign, federal, state, regional, county, or local person or body having or asserting governmental or quasi-governmental authority or jurisdiction or any department or sub-division thereof.

(viii) "Hazardous Material" shall mean any substance, chemical, compound, product, solid, gas, liquid, waste, byproduct, pollutant, contaminant, or material which is hazardous or toxic, and includes, without limitation: (a) asbestos, polychlorinated biphenyls, and petroleum (including crude oil or any fraction thereof); and (b) any such material classified or regulated as "hazardous" or "toxic" pursuant to an Environmental Law.

(ix) "Hazardous Material Activity" shall mean any activity, event, or occurrence involving a Hazardous Material, including, without limitation, the manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, Release, threatened Release, abatement, removal, remediation, handling of or corrective or response action to any Hazardous Material.

(x) "Legal Requirement" shall mean any treaty, convention, statute, law, regulation, ordinance, Governmental Approval, injunction, judgment, order, consent, decree, or other requirement of any Governmental Authority.

(xi) "Material Adverse Effect" shall mean any changes or effects that individually or in the aggregate are or are reasonably likely to be materially adverse to: (a) the assets, business, operations, income or condition (financial or otherwise) of Landlord or Tenant; (b) transactions contemplated by this agreement; or (c) the ability of Landlord or Tenant to perform their respective obligations under this Lease; or (d) the condition or fair market value of the Shopping Center or the Demised Premises.

(xii) "Pre-Existing Conditions" shall mean the conditions of the Demised Premises and the Shopping Center as of the date Landlord delivers the Demised Premises to Tenant, including without limitation the presence of any Hazardous Material, whether in compliance with Legal Requirements or not.

(xiii) "Post-Existing Conditions" shall mean the conditions of the Demised Premises and the Shopping Center which are not Pre-Existing Conditions and which arise after the date Landlord delivers the Demised Premises to Tenant.

(xiv) "RCRA" shall mean the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6901 *et seq.*, and any amendments now or hereafter enacted.

(xv) "Release" shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the indoor or outdoor environment, including,

without limitation, the abandonment or discarding of barrels, drums, containers, tanks, and other receptacles containing or previously containing any Hazardous Material.

B. Landlord represents and warrants as of the Commencement Date that:

(i) the Shopping Center complies in all material respects with any applicable Environmental Law;

(ii) Landlord has obtained all Governmental Approvals required for the Shopping Center by any applicable Environmental Law;

(iii) Landlord has not, and has no knowledge of any other person who has, caused any Release, threatened Release, or disposal of any Hazardous Material at the Shopping Center; the Shopping Center is not adversely affected by any Release, threatened Release, or disposal of a Hazardous Material originating or emanating from any other property;

(iv) the Shopping Center does not contain and has not contained any: (a) underground storage tank; (b) asbestos-containing building material; (c) any landfills or dumps; (d) hazardous waste management facility as defined pursuant to RCRA or any other comparable state law; or (e) site on or nominated for the National Priority List promulgated pursuant to CERCLA or any state remedial priority list promulgated or published pursuant to any comparable state law;

(v) Landlord has used no Hazardous Material in violation of any Environmental Law and has conducted no Hazardous Material Activity at the Shopping Center;

(vi) Landlord is not subject to, has no notice or knowledge of, and is not required to give any notice of any Environmental Claim involving the Shopping Center; there are no conditions or occurrences at the Shopping Center which could form the basis for an Environmental Claim against Landlord or the Shopping Center;

(vii) the Shopping Center is not subject to any, and Landlord has no knowledge of any imminent, restriction on the ownership, occupancy, use or transferability of the Shopping Center in connection with any: (a) Environmental Law; or (b) Release, threatened Release, or disposal of a Hazardous Material;

(viii) there are no conditions or circumstances at the Shopping Center which pose a risk to the environment or the health or safety of persons; and,

(ix) Landlord has provided or otherwise made available to Tenant any Environmental Record concerning the Shopping Center which Landlord possesses or could reasonably have obtained.

C. Tenant represents and warrants as of the Commencement Date that Tenant intends to use no Hazardous Material in violation of any Environmental Law.

D. Landlord shall:

(i) within ten (10) business days notify Tenant in writing of and provide any reasonably requested documents upon learning of any of the following which arise in connection with the Shopping Center:

(a) any liability for response or corrective action, natural resource damage, or other harm pursuant to CERCLA, RCRA, or any comparable state law;

(b) any Environmental Claim;

(c) any violation of an Environmental Law or Release, threatened Release, or disposal of a Hazardous Material;

(d) any restriction on the ownership, occupancy, use or transferability arising pursuant to any: (i) Release, threatened Release, or disposal of a Hazardous Material; or (ii) Environmental Law; or,



(e) any environmental natural resource, health or safety condition which could materially impair the condition of the Shopping Center or could have a Material Adverse Effect;

(ii) cure to the reasonable satisfaction of Tenant any violation of applicable Environmental Laws at the Shopping Center at the expense of Landlord which are Pre-Existing Conditions or Post Existing Conditions (except Post-Existing Conditions which are violations caused by the negligence or willful misconduct of Tenant, or its employees, agents or contractors); and,

(iii) conduct in accordance with any applicable Environmental Law any investigation, study, sampling, testing, abatement, clean-up, removal, remediation, or other response action ("Response Action") necessary to remove, remediate, clean up, or abate any Release, threatened Release, or disposal of a Hazardous Material at Landlord's expense to the extent such Response Action is attributable to events or conditions which are Pre-Existing Conditions or Post-Existing Conditions (except Post-Existing Conditions caused by the negligence or willful misconduct of Tenant, or its employees, agents or contractors).

E. Tenant shall:

(i) maintain the Demised Premises in compliance in all respects with any applicable Environmental Law and be responsible for making any notification or report concerning the Demised Premises to a Governmental Authority required to be made by any applicable Environmental Law;

(ii) if Landlord fails to cure legal violations, have the right to cure to the reasonable satisfaction of Tenant any violation of applicable Environmental Laws at the Demised Premises: (a) at the expense of Landlord to the extent such violation is attributable to events or conditions which are Pre-Existing Conditions; and (b) at its own expense to the extent such violation is attributable to Post-Existing Conditions caused by the negligence or willful misconduct of Tenant or its employees, agents or contractors;

(iii) not create or operate at the Demised Premises any: (a) landfill or dump; or (b) hazardous waste management facility or solid waste disposal facility as defined pursuant to RCRA or any comparable state law;

(iv) not manufacture, use, generate, transport, treat, store, Release, dispose, or handle any Hazardous Material at the Demised Premises except in the ordinary course of its business as of the Rent Commencement Date;

(v) if Landlord fails to conduct Response Actions, have the right to conduct to the reasonable satisfaction of Tenant and in accordance with any applicable Environmental Law any Response Action necessary to remove, remediate, clean up, or abate any Release, threatened Release, or disposal of a Hazardous Material from the Demised Premises: (a) at Landlord's expense to the extent such Response Action is attributable to events or conditions which are Pre-Existing Condition or a Post-Existing Condition (except a Post-Existing Condition caused by the negligence or willful misconduct of Tenant or its employees, agents or contractors); and (b) at Tenant's expense to the extent such Response Action is attributable to events or conditions which are a Post-Existing Condition caused by the negligence or willful misconduct of Tenant or its employees, agents or contractors;

(vi) allow Landlord or its representatives from time to time upon reasonable notice and at Landlord's expense to inspect the Demised Premises and conduct an environmental assessment (including invasive soil or groundwater sampling), including without limitation, to facilitate any other sale or lease of the Shopping Center;

(vii) remove from the Demised Premises at its expense by the termination date any Hazardous Materials or equipment to manufacture, generate, transport treat, store, Release, dispose, or handle any Hazardous Material used by Tenant or in the course of Tenant's business; and

(viii) have the right to terminate this Lease as a result of any environmental, health, or safety events or conditions which Tenant did not know existed before the Rent Commencement Date and could reasonably be expected to cause a Material Adverse Effect.

F. (i) Landlord shall indemnify, defend, and hold Tenant harmless, and hereby waives any claim for contribution against Tenant for any Damages to the extent they arise from:

(a) Pre-Existing Conditions or Post-Existing Conditions not caused by the negligence or willful misconduct of Tenant or its employees, agents or contractors, and which relate to:

- at the Shopping Center;
- (1) any Release, threatened Release, or disposal of any Hazardous Material
  - (2) the operation or violation of any Environmental Law at the Shopping Center; or,
  - (3) any Environmental Claim in connection with the Shopping Center;

(b) the inaccuracy or breach of any representation or warranty by Landlord in this Article of this Lease.

(ii) Tenant shall indemnify, defend, and hold Landlord harmless, and hereby waives any claim for contribution against Landlord for any Damages to the extent they arise from:

(a) Post-Existing Conditions caused by the negligence or willful misconduct of Tenant or its employees, agents or contractors, and relate to:

- at the Demised Premises;
- (1) any Release, threatened Release, or disposal of any Hazardous Material
  - (2) the operation or violation of any Environmental Law at the Demised Premises;
  - (3) any Environmental Claim in connection with the Demised Premises; or,

(b) the inaccuracy or breach of any representation or warranty by Tenant in this Article of this Lease.

(iii) These indemnifications and waivers shall be binding upon successors and assigns of Landlord and Tenant and inure to the benefit of Landlord, Tenant, their respective directors, officers, employees and agents, and their successors and assigns and shall survive the expiration or sooner termination of the Term of this Lease.

(iv) Landlord shall have supplied to Tenant an environmental report certified to Tenant, prepared by an environmental consultant licensed in the state or territory where the Demised Premises are located disclosing any and all Hazardous Materials, including items listed in Exhibit "D" attached hereto and prior to the execution of this Lease. In the event that the environmental report discloses any Hazardous Material, Tenant shall have the option to terminate this Lease unless Landlord, as part of Landlord's Work, remediates such Hazardous Material.

**NATIONAL BIG-BOX RETAILER**  
**TENANT'S FORM LEASE ENVIRONMENTAL CLAUSE #2**

Landlord will maintain the Shopping Center and conduct its business thereon in compliance with all federal, state or local laws and regulations relating to pollution control, hazardous or toxic wastes, substances and constituents, including hydrocarbonic substances (collectively, "Hazardous Substances"), and other environmental and ecological matters, including but not limited to the Federal Water Pollution Control Act (33 U.S.C. Sect. 1251 et seq.), Resource Conservation & Recovery Act (42 U.S.C. Sect. 6901 et seq.), Safe Drinking Water Act (42 U.S.C. Sect. 300f et seq.), Toxic Substances Control Act (15 U.S.C. Sect. 2601 et seq.), the Clean Air Act (42 U.S.C. Sect. 7401 et seq.), Comprehensive Environmental Response of Compensation and Liability Act (42 U.S.C. Sect. 9601, et seq.), and other comparable state laws (the "Environmental Laws"). If Landlord shall receive: (a) any notice of any violation or administrative or judicial complaint or order having been filed or about to be filed against Landlord, the Shopping Center or the Demised Premises alleging violations of any federal, state or local environmental law or regulation or requiring Landlord to take any action in connection with the release of any Hazardous Substances, into the environment, or (b) any notice from a federal, state or local governmental agency or private party alleging that Landlord may be liable or responsible for costs associated with a response or cleanup of a release of any Hazardous Substances into the environment or any damages caused

by that release, Landlord shall, within fifteen (15) days of receipt thereof, provide Tenant with a copy of such notice and thereafter Landlord shall at Landlord's sole cost diligently proceed to take all actions necessary to correct such violation, and shall have the right to contest the imposition of liability and defend itself against such claims. Landlord agrees to indemnify and hold Tenant harmless from and against all causes, claims, demands, losses, liabilities, costs and expenses (including without limitation attorneys' fees) (hereinafter "Damages") incurred, directly or indirectly, by Tenant as a result of or in connection with (i) Landlord's failure to comply with any of the provisions of this Paragraph 13, and (ii) without limiting the generality of Subsection (i) any environmental condition in violation of any Environmental Law (including any resolution or settlement thereof with appropriate authorities), resulting from or associated with the matters disclosed in the Environmental Report (defined in Section 1.2 of this lease). The provisions of this Paragraph 13 shall not apply to any such claims, demands, etc. resulting from the acts or omissions of Tenant, its contractors, agents or employees.

14. Tenant will maintain the property which the Tenant is obligated to maintain under the provisions of this lease and conduct its business in the Demised Premises in compliance with all Environmental Laws. If Tenant shall receive: (a) any notice of any violation or administrative or judicial complaint or order having been filed or about to be filed against Tenant with respect to the Demised Premises or the property which the Tenant is obligated to maintain under the provisions of this lease alleging violations of any Environmental Law or requiring Tenant to take any action in connection with the release of any toxic or hazardous substance, waste or constituent, including any hydrocarbon substance, into the environment with respect to the Demised Premises or, or (b) any notice from a federal, state or local governmental agency or private party alleging that Tenant may be liable or responsible for costs associated with a response or cleanup of a release of toxic or hazardous substance, waste or constituent, including any hydrocarbon substances, into the environment or any damages caused by that release with respect to the Demised Premises (or outside of the Demised Premises if such release is by Tenant or its employees, agents or contractors) or, Tenant shall, within thirty (30) days of receipt thereof, provide Landlord with a copy of such notice and thereafter Tenant shall at Tenant's sole cost diligently proceed to take all actions necessary to correct such violation. Tenant agrees to indemnify and hold Landlord harmless from and against all causes, claims, demands, losses, liabilities, costs and expenses (including without limitation attorney's fees) incurred, directly or indirectly, by Landlord as a result of or in connection with Tenant's failure to comply with any of the provisions of this Paragraph 14. The provisions of the immediately preceding sentence shall not apply to any such claims, demands, etc., resulting from any acts or omissions of Landlord, its contractors, agents or employees, or for any environmental contamination or condition in existence prior to the Delivery Date.

*Lease Form Handles Asbestos Issues in the Attached Exhibit*

**ASBESTOS SURVEY AND REMOVAL**

Landlord shall retain the services of an asbestos inspector accredited pursuant to 15 U.S.C. §§2646(b) and (c) of the Asbestos Hazard Emergency Response Act ("AHERA") (EPA 40 CFR Part 763) to complete an assessment as to the presence of asbestos-containing material ("ACM") at the Demised Premises. Such inspector shall submit to Tenant a survey report indicating the locations and condition of all ACM identified or if there is no ACM present at the Demised Premises such report shall state such fact ("Negative Certification Report"). Landlord shall be responsible for removal of all ACM identified including without limitation, the roof, all beams, columns and overspray and all chiller supply elbows and all such assessment and removal shall be at Landlord's sole cost and expense. Any removal work will be conducted by a qualified asbestos contractor properly accredited and licensed in the state in which the removal procedure will occur, who shall be independent of the asbestos inspector.

Prior to undertaking any work at the Demised Premises, all environmental consultants, asbestos inspectors, contractors or subcontractors engaging in asbestos testing, consulting or removal procedures must submit to Tenant an insurance certificate written by an insurance carrier acceptable to Tenant providing occurrence based professional liability insurance coverage with at least One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) of aggregate coverage. All such policies shall name Tenant as an additional insured and must contain coverage for asbestos related claims. Tenant reserves the right to request a payment and performance bond for any asbestos related work to be conducted at the Demised Premises.

Prior to undertaking any work, all approved asbestos contractors or subcontractors (collectively, "Asbestos Contractors") must submit to Tenant their corporate OSHA protocol written "Hazard Communication Program" and their OSHA Form 200 outlining all accidents which occurred during the past year. Such material shall be in form and substance acceptable to Tenant.

All asbestos removal procedures shall conform to the OSHA 3096 1996 (revised) Asbestos Standard for the Construction Industry and all other applicable legal requirements. All inspection, assessment, sampling, analysis, and removal of ACM within the Demised Premises will be conducted in accordance with EPA regulations codified at 40 CFR Part 763, §763.85 to §763.88, as amended from time to time, and all other applicable legal requirements.

Ambient air sampling will be conducted during all asbestos removal procedures. In addition, post-abatement clearance sampling will be conducted upon the completion of remedial activities. All air samples will be analyzed pursuant to procedures at 40 C.F.R. §763.87, including analysis via the EPA recommended method of Phase Contrast Microscopy at a laboratory accredited pursuant to AHERA.

Upon the completion of all removal activities, the Landlord shall supply to Tenant for Tenant's approval a final asbestos removal summary report describing the work and including the properly signed laboratory analysis, quality assurance/quality control data, properly signed asbestos waste manifests and all air sample data which report states that all asbestos has been removed from the Demised Premises ("Negative Certification Report"). Landlord shall indemnify, defend and hold Tenant harmless from any liability, loss, cost, damage, claim or expense associated with any asbestos assessment and removal work within the Demised Premises, including, without limitation, any liabilities or clean-up costs associated with the off-site disposal or release of any ACM originating from the Demised Premises.

Tenant's obligations under this lease to accept the Demised Premises shall be contingent upon the performance by Landlord and its Contractors, inspectors and consultants of their obligations under this Schedule H to Tenant's satisfaction.

#### **LANDLORD-FRIENDLY FORM LANGUAGE**

Environmental Laws: means all federal, state or local laws, ordinances, statutes, orders, directives and decrees, and all orders, directives, rulings, rules, regulations and decisions of a governmental or quasi-governmental authority, or any regulatory or quasi-regulatory body, relating to Hazardous Materials or the pollution, contamination, regulation, monitoring, cleansing or protection of the environment, including any which relate to (i) air emissions, (ii) water discharges, (iii) noise emissions, (iv) air, water or ground pollution or (v) any other environmental or health matter, including without limitation those Environmental Laws specified in the definition of "Hazardous Materials".

Hazardous Material(s): means all pollutants, contaminants, explosives, flammable materials, compressed materials, corrosives, petroleum-based products, diesel fuel, paints, solvents, lead and toxic, radioactive and hazardous materials, and all other substances, the use, containment, existence, monitoring, transporting, maintenance prevention and/or removal of which is monitored, restricted, prohibited or penalized by an Environmental Law, and shall include, but is not limited to: (i) any "hazardous substance" as that term is defined under the Comprehensive Environmental Response Compensation and Liability Act of 1980 as amended as of the date of this Agreement (CERCLA); (ii) a "chemical substance" as that term is defined under the Toxic Substance Control Act (15 U.S.C. Sec. 2601 et seq.); (iii) a "hazardous waste" as defined under Resource Conservation and Recovery Act (41 U.S.C. Sec. 6901 et. seq.); (iv) "hazardous material" as defined by the Hazardous Transportation Act, as amended (49 U.S.C. Section 1801, et seq.); (v) asbestos, polychlorinated biphenyls, or mold; or (vi) any other material considered to be regulated, unsafe or otherwise capable of causing any type of pollution or otherwise deemed a hazardous substance under any federal, state or local law, rule or regulation.

#### Hazardous Materials Use.

(a) Tenant shall not cause, permit or allow the generation, use, treatment, storage, emission, spill, release, discharge, installation, introduction or disposal of Hazardous Materials (each, a "Hazardous Materials Event") on or about the Premises or the Shopping Center. Notwithstanding such prohibition, Tenant may use, store and sell (provided Tenant is permitted to sell such items in accordance with its Permitted Use) consumer products containing small quantities of Hazardous Materials which products are: (i) necessary and customary in the conduct of Tenant's business; and (ii) of a type customarily utilized in or by retail stores and households (such as aerosol cans containing insecticides, paints, cleaning supplies, etc.), provided that Tenant complies with all Environmental Laws applicable to such Hazardous Materials, including, but not limited to, Environmental Laws concerning the handling, use, storage, sale and disposal of Hazardous Materials. Tenant shall not cause, permit or allow any Hazardous Materials to contaminate the Premises, Shopping Center or the environment.

(b) Tenant shall not install any underground or above-ground storage tanks in or about the Premises.

(c) Landlord or its designee may enter upon the Premises to assess the environmental condition and Tenant's compliance with this Section [ ]. Tenant shall not conduct any sampling, testing or drilling to locate any Hazardous Materials in, under or about the Premises without Landlord's Approval thereof and Landlord's Approval of the contractors or other parties to be utilized by Tenant to conduct any sampling, testing or drilling.

(d) If Tenant or any of Tenant's Parties breaches any of the duties and obligations under this Section [ ], or if contamination of the Premises, Building or Shopping Center or the atmosphere occurs through a Hazardous Materials Event (unless and only to the extent that Tenant can establish that the event in question was caused by a party other than Tenant or Tenant's Parties), then Tenant shall pay, defend, indemnify and hold harmless Landlord from any and all claims, causes of action, losses, liabilities, fines, penalties, damages, cost and expenses (collectively, "Environmental Claims") resulting from such breach or contamination, including all costs of investigation, remediation, cleanup, or detoxification and preparation of any plans, studies or reports required in connection therewith, compelled or required by governmental authority.

(e) Tenant will notify Landlord immediately of: (i) a Hazardous Materials Event; (ii) any discovery of Hazardous Materials on or near the Premises; or (iii) any notice of a governmental authority or private party alleging or suggesting that a Hazardous Materials Event may have occurred.

(f) If there occurs a Hazardous Material Event, Tenant shall not, without Landlord's Approval, undertake the abatement, containment or treatment of such Hazardous Materials. Landlord reserves the right to perform any abatement, containment, remediation or removal of Hazardous Materials and to perform the cleanup on behalf of and at the expense of Tenant. In such event, Landlord will submit copies of all invoices related to such work to Tenant and Tenant will reimburse Landlord, as Additional Rent, for the full costs within thirty (30) days after demand therefor. In the event that the cleanup extends beyond the Expiration Date, Tenant's obligation to pay Rent pursuant to the other provisions of this Lease will continue until the cleanup is completed and a final site closure letter from the applicable governmental authority indicating that no further action is required in connection with the environmental condition has been received by Landlord. Rent during such holdover period will be at the rate of Rent paid by Tenant immediately preceding the Expiration Date. No disturbance or interference with Tenant's use of the Premises resulting from the activities conducted pursuant to this Section [ ] will constitute an actual or constructive eviction of Tenant from the Premises or entitle Tenant to an abatement of Rent due pursuant to this Lease.

### **ENCLOSED MALL – NATIONAL RETAILER**

#### **3.8 Hazardous Substances**

(A) Landlord warrants and represents that it has not used or placed, and covenants that it shall not use or place, any Hazardous Substances in the Covered Areas, including the construction thereof, and further warrants and represents that, to the best of Landlord's knowledge, there are no Hazardous Substances in the Covered Areas.

(B) "Hazardous Substances" means asbestos and asbestos-containing material (regardless of its condition); any chemical, material or substances at a time defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "extremely hazardous waste", "biohazardous waste", "pollutant", "toxic pollutant", "contaminant", "restricted hazardous waste", "acutely hazardous waste", "radioactive waste", "infectious waste", "toxic substances", or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity or words of similar import) under any Legal Requirement; any oil, petroleum, petroleum fraction or petroleum derived substances; urea formaldehyde foam insulation; mold; and electrical equipment which contains any oil or dielectric fluid containing polychlorinated biphenyls. Hazardous Substances shall not include the foregoing substances to the extent such substances are in compliance with Legal Requirements, do not require monitoring by governmental authorities or others and are typically found in use in similar quantities in comparable first class shopping centers. Notwithstanding the foregoing sentence, asbestos and asbestos-containing material (collectively "ACM") and mold shall constitute Hazardous Substances regardless of their condition and whether at levels in compliance with Legal Requirements.

(C) "Covered Areas" means the Premises, any utility system or other facility which serves the Premises (whether located in the Premises or in other portions of the Shopping Center), and the Shopping Center, but, with respect to the Shopping Center, only to the extent that the presence of Hazardous Substances on the Shopping Center adversely affects the Premises or Tenant's ability to conduct its typical business activities from the Premises.

(D) If Hazardous Substances are discovered in the Covered Areas, (without regard to whether Landlord caused such Hazardous Substances to be installed therein) prior to Delivery of Possession, then Landlord, at its sole cost and expense, shall remove or remediate in place (other than ACMs and mold which must be removed regardless of quantity or condition) the Hazardous Substances and deliver to Tenant (1) a clearance certificate from the applicable governmental jurisdiction (or, if no governmental jurisdiction issues such certificate, then from a state-certified asbestos consultant or state-licensed industrial hygienist) certifying as to the complete removal thereof and (2) a clean air certificate from a state-certified asbestos consultant or state-licensed industrial hygienist certifying that the ambient air in the Premises is within all applicable regulatory levels for use without protective measures (collective, "Abatement Work") at least ten (10) days prior to Delivery of Possession.

(E) If Hazardous Substances are discovered in the Covered Areas after Delivery of Possession but prior to the Commencement Date and such Hazardous Substances were not placed therein by Tenant or Tenant's Agents, then Tenant shall have the right to cease all work therein and the remove itself from the Premises and Landlord shall, at its sole cost and expense, promptly perform all Abatement Work and repair or replace all improvements damaged by the Abatement Work. The Construction Period shall be tolled and the Commencement Date and Tenant's obligation to pay Rent shall be postponed from the date on which the Hazardous Substances are discovered until the date on which the Abatement Work is complete and all damaged improvements are repaired or replaced but only in the event the Abatement Work requires Tenant to cease its performance of Tenant's Work or would prevent Tenant from performing Tenant's Work in such Covered Area without having to take extraordinary precautions (such as wearing hazardous material protective suits).

(F) If Hazardous Substances are discovered in the Covered Areas on or after the Commencement Date and such Hazardous Substances were not placed therein by Tenant or Tenant's Agents, then Tenant shall have the right to vacate the Premises and Landlord shall, at its sole cost and expense, promptly perform all Abatement Work and repair or replace all improvements damaged by the Abatement Work. All Rent shall abate from the date on which the Hazardous Substances are discovered until the date on which the Abatement Work is complete and all damaged improvements are repaired or replaced but only in the event that Abatement Work requires Tenant to cease operations within the Premises or would prevent Tenant from operating in the Premises or accessing other portions of the Covered Area without having to take extraordinary precautions (such as wearing hazardous material protective suits).

(G) Landlord shall indemnify, defend and hold Tenant and Tenant's Agents harmless from and against any and all indemnified Costs relating to any Hazardous Substance used or placed or located at the Shopping Center by Landlord and any Abatement Work related thereto, provided that such Hazardous Substances were not placed thereon by Tenant or Tenant's Agents. Landlord shall be solely responsible for and shall comply with all Legal Requirements with respect to Hazardous Substances on the Shopping Center, provided that such Hazardous Substances were not placed thereon by Tenant or Tenant's Agents. Notwithstanding the foregoing, if the same were not placed thereon by Landlord or Tenant, Landlord shall cause the responsible party to promptly clean up or to abate, if required by Legal Requirements.

(I) Tenant shall indemnify, defend and hold Landlord and Landlord's Agents harmless from and against any and all indemnified Costs relating to any Hazardous Substances placed in the Premises or Covered Areas by Tenant or Tenant's Agents and any Abatement Work related thereto. Tenant shall be solely responsible for and shall comply with all Legal Requirements with respect to Hazardous Substances placed in the Premises or Covered Areas by Tenant or Tenant's Agents.

## **BIG-BOX ANCHOR – DEPARTMENT STORE**

**SECTION 16.2.** Landlord, at Landlord's sole cost, has delivered to Tenant an environmental assessment report for the Premises and the balance of the Shopping Center Land analyzing the existence or likelihood of existence of any Hazardous Materials and compliance by such land with all Environmental Regulations (the "Environmental Report"). The Environmental Report shall (i) be certified to Tenant, and (ii) updated to a date after the Effective Date of this Lease, and (iii) comply with the U.S. EPA's final rule defining "all appropriate inquiry" for environmental due diligence necessary to allow Tenant to qualify for the defenses to liability in CERCLA, which may be satisfied by compliance with the terms and provisions of ASTM Standard 1527-05 (or the most current ASTM Standard 1527 then in effect and which is expressly acknowledged by the U.S. EPA's final rule to satisfy its "all appropriate inquiry" due diligence standard. Tenant hereby acknowledges receipt of the Environmental Report. Landlord represents and covenants to Tenant that, to the best of Landlord's knowledge, the Premises and balance of the Developer Tract do not contain any Hazardous Materials (except as may be disclosed in the Environmental Report and that Landlord's Work does not and shall not contain any Hazardous Materials and that all requirements with respect to Environmental Regulations have been and will be complied with and satisfied in connection with Landlord's Work. If it is determined at any time during the Terms that there are Hazardous Materials on, upon or within the Shopping Center or any other environmental conditions not caused by Tenant or its agents, contractors or employees, in violation of any Environmental Regulations or which result in action by either local, state or federal environmental agencies, then, if in Tenant's good faith business judgment such violation and/or action materially impairs Tenant's ability to conduct business upon the Premises and Tenant ceases to operate from the Premises as a direct result thereon, all rent and charges payable by Tenant hereunder shall abate during such period as Tenant's ability to so operate is materially impaired. Landlord will have the right to remediate at its sole cost and expense in accordance with all applicable government laws and regulations provided however that in the event such remediation is not completed within nine months after the date the Hazardous Material is discovered, then, provided Tenant was entitled to cease to operate from the Premises and did in fact cease to operate from the Premises pursuant to the immediately preceding sentence for such nine-month period, Tenant shall have the right terminate all of its rights and obligations hereunder by giving 30 days written notice to Landlord at any time after the expiration of such nine-month period and so long as such condition continues and provided further that Tenant shall have the right but not the obligation to complete any required remediation in accordance with all applicable laws and regulations and Landlord will reimburse Tenant the cost therefor in which case Tenant shall not have the right to terminate this Lease as set forth herein.

**SECTION 16.3.** Except for Excluded Materials (hereinafter defined), Tenant shall not, without the prior written consent of Landlord, cause or permit knowingly or unknowingly, any Hazardous Materials to be brought or remain upon, kept, used, discharged, leaked, or emitted in or about, or treated at the Premises or the Shopping Center. As used in this Lease, the term "Excluded Materials" shall mean Hazardous Materials that meet all of the following four criteria:

- (a) the storage, disposal or presence of such Hazardous Materials on, in or under the Premises or any part of the Shopping Center does not constitute a violation of applicable laws or regulations;
- (b) the Hazardous Materials are present in (i) paints, glues, photocopy equipment, supplies, photographic chemicals and supplies, building materials, maintenance supplies, cleaning agents and solvents, (ii) inventory held for sale at retails, (iii) oil, gasoline or other fluid deposits released from passenger cars or maintenance vehicles parked at the Shopping Center, or (iv) fertilizer, herbicides, insecticides, and pesticides applied by Tenant within the Premises;
- (c) the Hazardous Materials are in quantities commonly stored, found or maintained for similar uses by Tenants in retail shopping centers; and
- (d) the Hazardous Materials are not used for manufacturing purposes.

Should Landlord consent in writing to Tenant brining, using, storing or treating any Hazardous Material(s) in or upon the Premises or the Shopping Center or if Tenant is allowed to bring, use, store or treat hazardous Materials in or upon the Premises pursuant to this Section, Tenant at its sole cost and expense shall strictly obey and adhere to any and all Environmental Regulations, which in any way regulate, govern or impact Tenant's possession, use, storage, treatment or disposal of said Hazardous Material(s).

**SECTION 16.4.** Landlord shall forever defend, completely indemnify and hold harmless Tenant, its mortgagees, affiliates and their respective directors, shareholders, officers, and agents (the "Tenant Indemnitees") from and against, and shall reimburse Tenant and the Tenant Indemnitees for, any and all liabilities, losses, costs, damages, demands, fines, expenses, suits, judgments, injunctive relief, claims, injuries to person, property or natural resources, actions or causes of action arising in connection with the release of Hazardous Materials by any person or source within or otherwise affecting the Shopping Center other than from a Tenant Contamination Source (i.e., Hazardous Materials brought on the Premises by a Tenant Indemnitee) whether foreseeable or unforeseeable, known or unknown, material or immaterial, regardless of when such release shall have occurred or when the presence of any Hazardous Materials shall have been discovered. The environmental indemnity of Landlord under this Section includes, without limitation: (a) all costs of removal, remediation of any kind and disposal of Hazardous Materials; (b) all costs of determining whether the Premises are in compliance, and of causing the Premises to be in compliance, with all applicable federal, state or local laws, rules, ordinances or regulations governing Hazardous Materials; (c) all costs associated with claims for damages to persons, property or natural resources arising from a release of Hazardous Materials which Landlord is responsible for under this Section; and (d) the Tenant Indemnitees' attorneys' and consultants' fees arising from a release of Hazardous Materials for which the Landlord is responsible under this Section. The obligations of the Landlord hereunder shall survive the termination of this Lease. The rights of Tenant hereunder shall be in addition to any other rights and remedies of Tenant at law, in equity or by statute.

Tenant shall forever defend, completely indemnify and hold harmless Landlord, its mortgagees, affiliates and their respective directors, shareholders, officers, and agents (the "Landlord Indemnitees") from and against, and shall reimburse Landlord and the Landlord Indemnitees for, any and all liabilities, losses, costs, damages, demands, fines, expenses, suits, judgments, injunctive relief, claims, injuries to person, property or natural resources, actions or causes of action arising in connection with the release of Hazardous Materials by Tenant or its contractors or agents or employees whether foreseeable or unforeseeable, known or unknown, material or immaterial, regardless of when such release shall have occurred or when the presence of any Hazardous Materials shall have been discovered. The environmental indemnity of Tenant under this Section includes, without limitation: (a) all costs of removal, remediation of any kind and disposal of Hazardous Materials; (b) all costs of determining whether the Premises are in compliance, and of causing the Premises to be in compliance, with all applicable federal, state or local laws, rules, ordinances or regulations governing Hazardous Materials; (c) all costs associated with claims for damages to persons, property or natural resources arising from a release of Hazardous Materials which Landlord is responsible for under this Section; and (d) the Landlord Indemnitees' attorneys' and consultants' fees arising from a release of Hazardous Materials for which the Tenant is responsible under this Section. The obligations of the Tenant hereunder shall survive the termination of this Lease. The rights of Landlord hereunder shall be in addition to any other rights and remedies of Landlord at law, in equity or by statute.

#### **BIG-BOX GROUND LEASE**

(a) Landlord warrants and represents that, to Landlord's actual knowledge, and based solely on any environmental site assessments in Landlord's possession and delivered to Tenant and except for matters disclosed in any environmental site assessments or reports in Tenant's possession or any matters otherwise known to Tenant, the Premises, including, but not limited to, the land, the soil, groundwater and soil vapor in, on, under, at, upon or about the Premises and the remainder of the Shopping Center (collectively, the "Property") does not now nor has it ever contained any hazardous, toxic materials, Tanks or polychlorinated biphenyls or Hazardous Substances or any other substances defined by the appropriate governmental authority as a hazardous waste in violation of applicable law. Landlord shall not cause or permit such substances (included, but not limited to, Hazardous Substances) or the contents of any Tanks to be release, discharged or deposited onto or within the bounds of the Property in violation of applicable law. Landlord warrants and represents that, to Landlord's actual knowledge, except as set forth in this Section and except for matters disclosed in any environmental site assessments or reports in Tenant's possession or any matters otherwise known to Tenant: (i) the Property does not contain any Hazardous Substances in violation of applicable law or in excess of concentrations applicable to the Premises (as this term is hereinafter defined) or Tanks; (ii) Landlord is not subject to any existing, pending or threatened investigation by any governmental authority under any applicable federal, state or local law, regulation or ordinance pertaining to air and water quality, the handling, transportation, storage, treatment, usage, or disposal of Hazardous Substances, air emissions, and other environmental matters; (iii) any handling, transportation, storage, treatment, or use of Hazardous Substances that has occurred in, on, under or upon the Property to date has been in compliance with all applicable federal, state, and local laws, regulations



and ordinances; and (iv) no leak, spill, release, discharge, emission, or disposal of Hazardous Substances has occurred in, on, under or upon the Property to date.

(c) Landlord further warrants and represents that, to Landlord's actual knowledge no Hazardous Substance or Tanks will be present in, on, under or upon the Property in violation of applicable law from and after the date of this Lease or otherwise used or permitted by Landlord to be used in, on, under or upon the Property by Landlord, except as provided in subsection (d), below and except for matters disclosed in any environmental site assessments or reports in Tenant's Possession, or any matters otherwise known to Tenant.

If during the Inspection Period Hazardous Substances to Tanks are determined to be present on the Property other than as set forth in subsection (d) below, or in compliance with applicable law, then Landlord and Tenant shall enter into a mutually acceptable agreement regarding the removal or other lawful remediation of such Hazardous Substances or Tanks, provided, however, if the parties have not entered into such agreement either Landlord or Tenant may terminate this Lease upon written notice to the other party received before the expiration of the Inspection Period and this Lease shall be of no further force or effect. If Tenant does not terminate the Lease upon written notice to the Landlord received before the expiration of the Inspection Period, then Tenant shall be deemed to have accepted the Premises in its present "as is" condition as to Hazardous Substances only.

The provisions of this Article shall survive the expiration or earlier termination of this Lease.

(d) The parties acknowledge and agree that Tenant handles certain environmentally regulated substances as part of their intended operations. Tenant shall handle, transport, store, and dispose of such substances in strict compliance with all governmental regulations related to same and shall hold Landlord harmless from any action or claim related to such substances.

(e) Prior to any termination or expiration of this Lease, or to any financing or sale of the Shopping Center, Landlord, or any prospective or existing secured lender with a lien on the Shopping Center, or any prospective buyer of the Shopping Center, shall be permitted to enter the Premises to obtain an environmental assessment of the Premises at its sole cost and liability to determine whether any Hazardous Substances have been released or spilled by Tenant, or otherwise exist at, under, in, or on the Premises, or emanate therefrom, in violation of any applicable laws. Tenant agrees that in the event that during the Term of this Lease, any Hazardous Substances shall be released upon the Premises, or the Shopping Center by Tenant, or by Tenant's agents, servants, employees, contractors or suppliers ("Release"), to notify Landlord immediately of any such Release or claim of Release, and after consultation and reasonable approval by Landlord, Tenant shall be responsible for the cleanup of the Release, as required by, and in full compliance with, applicable statutes, regulations and standards. No consent or approval of Landlord of any such cleanup, removal or remediation by Tenant shall in any way be construed as imposing upon Landlord any liability for the means, methods or manner of removal, containment or other compliance with applicable law for and with respect to the Release. All of the foregoing work is to be performed at Tenants' sole cost and expense in a good and workmanlike manner and otherwise in compliance with Section 2.2 hereof.

(f) Tenant shall indemnify and hold Landlord, its subsidiaries and affiliates, as well as any and all of the agents, servants, employees, members, or managers of any of them, harmless from and against any and all actions, petitions, orders, claims or demands made, brought or instituted by any and all private parties and/or any and all public agencies or authorities, together with any and all expenses, including attorney's fees, costs, losses, demands, liabilities or penalties assessed against or incurred by any of them, arising solely out of or in any way connected with any loss or damaged to person(s) or property resulting or claimed to result from the Release anywhere on the Shopping Center or on the Premises, by, for or on behalf of Tenant. This agreement shall extend to and be enforceable by Landlord's public liability, health disability and work's compensation insurer(s). In connection with Tenant's indemnification hereunder: (i) Tenant agrees to defend any such claim or demand brought, or any action, petition or order filed, against Landlord, its subsidiaries or affiliates, or against any or all of the agents, servants, employees, officers, directors, partners, members, beneficiaries or trustees of any of them, or in which any of the same may be impleaded, at its sole cost and expense, and (ii) Tenant shall pay, satisfy and discharge any final judgments, liens, orders or decrees from a court or administrative body of competent jurisdiction which may be recovered or filed against Landlord, its subsidiaries or affiliates, or any or all of the agents, servants, members, managers or employees of any of them, arising out of any such successful claim, demand, action, petition or order.

(g) Landlord shall indemnify and hold Tenant, its subsidiaries and affiliates, as well as any and all of the agents, servants, employees, members, or managers of any of them, harmless from and against any and all actions, petitions, orders, claims or demands made, brought or instituted by any and all private parties and/or any and all public agencies or authorities, together with any and all expenses, including attorney's fees, costs, losses, demands, liabilities or penalties assessed against or incurred by any of them, arising solely out of or in any way connected with any loss or damaged to person(s) or property resulting or claimed to result from the Release anywhere on the Shopping Center or on the Premises, by, for or on behalf of Landlord or arising out of the action of any prospective or existing secured lender, or any prospective buyer of the Shopping Center's entrance onto the Premises. This agreement shall extend to and be enforceable by Tenant's public liability, health disability and work's compensation insurer(s). In connection with Landlord's indemnification hereunder: (y) Landlord agrees to defend any such claim or demand brought, or any action, petition or order filed, against Tenant, its subsidiaries or affiliates, or against any or all of the agents, servants, employees, officers, directors, partners, members, beneficiaries or trustees of any of them, or in which any of the same may be impleaded, at its sole cost and expense, and (z) Landlord shall pay, satisfy and discharge any final judgments, liens, orders or decrees from a court or administrative body of competent jurisdiction which may be recovered or filed against Tenant, its subsidiaries or affiliates, or any or all of the agents, servants, members, managers or employees of any of them, arising out of any such successful claim, demand, action, petition or order.

## CASE STUDIES

### Case Study #1

#### SHOPPING CENTER GROCERY STORE LEASE Landlord provided pad, tenant constructed building Contamination to be placed under building pad

## DEMISED PREMISES

### **1.6. Conditions Precedent to Lease and Acceptance by Tenant of the Demised Premises.**

This Lease and the rights and obligations of the parties hereunder are contingent upon the following:

....

#### **(b) Environmental and Geotechnical Assessments.**

(i) The results of the Environmental Assessments (as defined below) shall be acceptable to Tenant in its sole discretion.

(ii) Tenant shall have the right to perform environmental soil assessments of the Demised Premises at Tenant's sole cost and expense, the results of which shall be acceptable to Tenant in its sole discretion. Tenant may, at reasonable times and upon prior notice to Landlord, enter upon the Demised Premises prior to the expiration of the Environmental Review Period to examine the Demised Premises, take soil samples and conduct water, air and other tests necessary to conduct and complete environmental assessments of the Demised Premises, including, but not limited to, a Phase I assessment (collectively, the "**Environmental Assessments**"). Only after receiving a written request by Landlord, Tenant shall cause a copy of any Phase I assessment to be delivered to Landlord at the same time that such assessment is delivered to Tenant. Tenant shall have ninety (90) days from the execution of this Lease to conduct its Environmental Assessments (the "**Environmental Review Period**"). In the event that after diligent and good faith efforts, Tenant is not able to complete the Environmental Assessments within the time frames set forth above, but Tenant is making progress toward the completing the same, Landlord shall, after receipt of written notice from Tenant requesting the same, provide Tenant with an additional thirty (30) days (the "**Environmental Extended Review Period**") in which to complete the Environmental Assessments. If the results of the Environmental Assessments or soil, water or air tests are not satisfactory to Tenant in its sole discretion, then Tenant may terminate this Lease upon written notice to Landlord, provided such termination notice is provided to Landlord within sixty (60) days following the expiration of the Environmental Review Period or the Extended Environmental Review Period as the case may be. In the event that Tenant shall fail to exercise its termination right within the foregoing 60-day period, Landlord shall send Tenant a notice (the "**Environmental Termination Reminder Notice**"), which shall state in bold letters that Tenant shall have ten (10) business days from receipt of the Environmental Termination Reminder Notice to exercise its termination right set forth in this Section 1.6(b)(ii). Should Tenant fail to exercise its termination right within such 10-day period after receipt of the Environmental Termination Reminder Notice, Tenant shall be deemed to have waived its termination right set forth in this Section 1.6(b)(ii).

(iii) Tenant acknowledges that it is entering into this Lease with full knowledge of the conditions described in the Remedial Action Plan ("**RAP**") set forth in Exhibit D-I. Notwithstanding anything contained in this Lease to the contrary, Landlord shall implement the RAP set forth in Exhibit D-I.

(iv) Tenant shall have the right to perform geotechnical soil assessments (the "**Geo-technical Assessments**" and with the Environmental Assessments, the "**Assessments**") of the Demised Premises at Tenant's sole cost and expense, the results of which shall be acceptable to Tenant in its sole discretion. Tenant may, at reasonable times and upon prior notice to Landlord, enter upon the Demised Premises prior to the expiration of the Geo-Technical Review Period to examine the Demised Premises, take soil samples and conduct other tests necessary to conduct and complete the Geo-technical Assessments. Tenant shall have ninety (90) days from the execution of this Lease to conduct Geo-technical Assessments (the "**Geo-technical Review Period**"). So long as Tenant commenced the performance of the Geo-technical Assessments within the Geo-technical Review Period, but after diligent and good faith efforts, is not able to complete the assessments and determine the results of the same, Landlord shall, after receipt of written

notice from Tenant requesting the same, provide Tenant with an additional thirty (30) day period (the "**Geo-technical Extended Review Period**") in which to complete the Geo-technical Assessments. If the Geo-technical Assessments indicate, among other things, that the soils cannot support the improvements that Tenant seeks to construct on the Demised Premises using Tenant's standard building foundation design or are otherwise unacceptable to Tenant in its sole discretion, then Tenant may terminate this Lease upon written notice to Landlord, provided such termination notice is provided to Landlord within thirty (30) days following the expiration of the Geo-technical Review Period or the Geo-technical Extended Review Period, as the case may be. In the event that Tenant shall fail to exercise its termination right within the foregoing 30-day period, Landlord shall send Tenant a notice (the "**Geo-technical Termination Reminder Notice**"), which shall state in bold letters that Tenant shall have ten (10) business days from receipt of the Geo-technical Termination Reminder Notice to exercise its termination right set forth in this Section 1.6(b)(iv). Should Tenant fail to exercise its termination right within such 10-day period after receipt of the Geo-technical Termination Reminder Notice, Tenant shall be deemed to have waived its termination right set forth in this Section 1.6(b)(iv).

(v) (A) Tenant shall utilize an environmental consultant to perform the Environmental Assessments who is not a Licensed Site Remediation Professional ("**LSRP**") and shall keep all materials or information provided by Landlord to Tenant and all materials obtained or developed by or for Tenant pursuant to Tenant's inspections confidential unless otherwise required by Legal Requirements, and shall not (except as specifically required by Legal Requirements) disclose same to any person, entity or party other than to Tenant's own officers, directors, attorneys, accountant, insurance brokers and lenders, or to prospective investors, partners, and insurers, for the sole purpose of evaluating this transaction (and then only if Tenant uses commercially reasonable efforts to ensure that all such persons comply with the confidentiality provisions hereof). Notwithstanding the foregoing, copies of all final materials obtained or developed by or for Tenant pursuant to Tenant's inspections, shall, upon request be provided to \_\_\_\_\_. The provisions of this Section (A) shall survive the termination of this Lease.

(B) Notwithstanding anything contained in this Lease to the contrary, in no event shall the Tenant undertake, cause or permit any intrusive activities, including a Phase II Environmental Assessment or any sampling, unless such sampling is reasonably required or commercially reasonable, based on findings set forth in the Phase I Environmental Assessment obtained by the Tenant with respect to the Demised Premises. Without disclosing the reasons therefore, unless specifically requested by Landlord, the Tenant shall give the Landlord at least three (3) business days' prior written notice of its intention to perform any sampling. The Landlord shall have the right, either itself or through representatives, to be present during any sampling.

(C) Except as otherwise provided in this Lease, upon at least three (3) business days' advance notice to Landlord (by telephone or otherwise), reasonable access to the Demised Premises will be provided to Tenant during the Due Diligence Period to permit Tenant to perform its Environmental Assessments and Geo-Technical Assessments, and Tenant and its authorized agents, representatives, consultants and engineers will coordinate their access to the Demised Premises with Landlord so as to minimize interference with the operations being conducted on the Demised Premises. Landlord shall have the right (whether itself or through a representative), at its election, to be present during all inspections. All inspections shall be done at Tenant's sole cost and expense, and shall be performed during normal business hours and in accordance with all applicable laws, ordinances and regulations.

(D) (1) Prior to entering onto the Demised Premises, Tenant shall provide, or shall cause each of its agents and contractors to provide, Landlord with a certificate of insurance (with respect to commercial general liability insurance, automobile coverage and workers compensation) naming Landlord as an additional insured by endorsement. In addition, prior to and as a condition of performing any intrusive activities, including sampling or Geo-technical Assessments, Tenant shall cause the contractors whom Tenant has retained to perform such work to provide Landlord with a certificate of insurance covering errors and omissions and pollution coverage. The policies shall be written by an insurance carrier authorized to do business in the State of New Jersey having a Best rating of A-VII or better. The commercial general liability insurance policy shall be in an amount not less than \$1,000,000 per occurrence, whether involving bodily injury liability, or death resulting therefrom or Demised Premises damage liability or a combination thereof, with a minimum aggregate limit of \$3,000,000. The automobile coverage shall be in an amount not less than \$1,000,000, and the workers compensation shall be for the statutory amount. The errors and omissions coverage shall not be less than \$2,000,000 per occurrence and the contractor's pollution coverage shall not be less than \$2,000,000 per occurrence. Tenant shall indemnify, defend and hold harmless Landlord from

and against any and all Loss (as hereafter defined) arising out of Tenant's entry, investigation and inspection of the Demised Premises, which obligation shall exclude any and all Loss resulting or arising from the negligence or willful misconduct of Landlord and its agents, representatives, employees, contractors, subcontractors, invitees and guests and shall survive the termination of this Lease.

(2) Tenant shall, at its sole cost and expense, restore the Demised Premises, to the extent such restoration is required as a result of Tenant's activities on the Demised Premises, to substantially the same condition immediately prior to the inspections, which obligation shall survive the termination of this Lease. Without limiting the generality of the foregoing, Tenant shall have the obligation to remove or remediate, at Tenant's sole cost and in accordance with all applicable laws, ordinances and regulations and the requirements of NJDEP, any Hazardous Substances on, at or with respect to the Demised Premises released, spilled, discharged or with respect to the items set forth in Exhibit D-I, negligently, recklessly or intentionally exacerbated or otherwise caused by Tenant or its agents or contractors (it being understood and agreed, however, that Tenant shall have no obligation to remove or remediate any Hazardous Substances that are merely discovered - but not released, spilled, exacerbated, or discharged - on the Demised Premises by Tenant or its agents or contractors). The provisions of this Section 1.6(b)(v)(D)(2) shall survive the termination of this Lease.

**25.1. Landlord Representations and Warranties.** Landlord hereby represents and warrants to Tenant that the following statements are true and correct as of the date hereof and shall be true and correct as of the Delivery Date, all of which warranties and representations shall survive the expiration or earlier termination of this Lease:

**(a) Environmental Representations and Warranties.**

(i) Except to the extent set forth in the environmental reports identified in Exhibit D attached hereto, which, to the knowledge of the Landlord, are true and accurate, but which documents were provided to Tenant without any representation or warranty as to completeness or accuracy (the "**Environmental Reports**"), the Center and the Demised Premises for the past three (3) years, have been in compliance in all material respects with Environmental Law;

(ii) Except to the extent set forth in the Environmental Reports, the soil and any surface water and ground water which are a part of the Center and the Demised Premises do not contain Hazardous Substances in concentrations or in such conditions that either violate Environmental Law or require special handling or disposal when excavated or that would prohibit or substantially increase the cost of Tenant's construction of a Grocery Store on the Demised Premises;

(iii) Neither the federal government nor the state or any other governmental or quasi-governmental entity has filed a lien on the Demised Premises, nor are there any governmental, judicial or administrative actions with respect to environmental matters pending, or to Landlord's knowledge, threatened, which involve the Center; and

(iv) Except to the extent set forth in the Environmental Reports, to the knowledge of Landlord, there are no soils or environmental conditions that could prohibit or substantially increase the cost of Tenant's Work.

### **HAZARDOUS SUBSTANCES**

**28.1.** (a) Landlord covenants that it has submitted to Tenant the Environmental Reports. If any Hazardous Substances, regardless of when released or disposed, are found on the Demised Premises in violation of Environmental Law, then except to the extent caused or exacerbated by Tenant or Tenant Parties, Landlord will, at its sole cost and expense, promptly investigate, remediate and/or remove such Hazardous Substances as required by, and in accordance with, Environmental Law as long as such remediation does not prevent or materially interfere with Tenant's use or the aesthetic quality of the Demised Premises for a Grocery Store.

(b) Tenant covenants that it shall not use the Demised Premises as an "industrial establishment" as such term is defined in New Jersey's Industrial Site Recovery Act, NJSA 13:1K-6, et. seq ("**ISRA**").

**28.2.** For purposes of this Lease, the term "Hazardous Substances" shall include any substance or material defined as a hazardous or toxic substance in Environmental Law. For purposes of this Lease, the term "Environmental Law" means any present or future law pertaining to the environment, environmental conditions and/or any Hazardous

Substances, including, without limitation, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., the Clean Air Act, 33 U.S.C. Section 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq., the Safe Drinking Water Act, 42 U.S.C. Section 300(f) et seq., the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6901 et seq., the Federal Water Pollution Control Act, 33 U.S.C. Section 1251 et seq., the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. Section 1101 et seq., the Occupational Safety and Health Act, 29 U.S.C. Section 651 et seq., any so-called "Super Fund" or "Super Lien" law, ISRA, the Spill Compensation and Control Act, NJSA, Section 58:10-23.11 et seq., the Site Remediation Reform Act, NJSA Section 58:10C-1., and other applicable New Jersey statutes (as each may be amended from time to time) and in any regulations adopted or publications promulgated pursuant to any of the foregoing.

**Case Study #2**  
**SHOPPING CENTER NEGOTIATED LEASE**

**THIRD-PARTY (GAS STATION/CONVENIENCE STORE) ENVIRONMENTAL INVESTIGATION ON THE CLIENT'S PROPERTY**

10. **ENVIRONMENTAL.**

(a) As used in this Lease:

"Environmental Laws" means any federal, state or local law, ordinance, rule, regulation, policy, order, permit, license, decree, common law, or treaty now or hereafter in force regulating, relating to or imposing liability or standards concerning materials or substances known or suspected to be toxic or hazardous to health or safety, the environment or natural resources, including without limitation, regulation of releases and disposals to air, land, water and groundwater.

"Hazardous Materials" means any hazardous or toxic chemical, waste, byproduct, pollutant, contaminant, compound, product or substance, including without limitation, asbestos, polychlorinated biphenyls, petroleum (including crude oil or any fraction or byproduct thereof), and any material the exposure to, or manufacture, possession, presence, use, generation, storage, transportation, treatment, release, disposal, abatement, cleanup, removal, remediation or handling of which is prohibited, controlled, limited or regulated in any manner under any Environmental Laws. The definition of Hazardous Materials does not include Existing Environmental Conditions (defined herein) or Existing Contamination (defined herein).

"Incidental Materials" means inventory held for sale, construction materials (other than asbestos or polychlorinated biphenyls), equipment, fixtures, fuel and similar products contained in vehicles, customary office and janitorial supplies and other maintenance materials that are or contain Hazardous Materials, to the extent they are incidental to, and reasonably necessary for, the construction, operation, maintenance and use of the Leased Premises and to the extent that they are in compliance with Environmental Laws.

"Release" means any spill, leak, emission, discharge or disposal of Hazardous Materials into the environment other than pursuant to and in compliance with valid permits issued under applicable Environmental Laws.

(b)(i) Tenant's obligations under this Lease are conditioned upon Tenant obtaining environmental and engineering studies, analyses, tests, surveys and inspections (collectively, the "Initial Environmental Site Assessments") satisfactory to Tenant in its sole discretion. Not later than ten (10) days from the Effective Date and continuing thereafter throughout the term of this Lease, Landlord shall provide Tenant, or whomever Tenant designates, copies of all previous environmental inspections, investigations, studies, audits, tests, reviews, governmental communications or other analyses relating to the Leased Premises that are in Landlord's possession or control. If any environmental assessment, including previous inspections, is not acceptable to Tenant, Tenant may terminate this Lease by written notice to Landlord given no later than five (5) days following the expiration of the Feasibility Period, time being of the essence with respect to the giving of such notice. If Tenant fails to timely provide notice of its termination of this Lease pursuant to this Section, then Tenant shall be deemed to have waived its right to terminate this Lease pursuant to this Section and this Lease shall continue in full force and effect, in which event there shall be no further liability hereunder between the parties, except for liabilities which specifically survive the termination of this Lease or for liabilities arising prior to the date of such termination.

Tenant hereby acknowledges receipt of the environmental reports listed on **Exhibit G** which, among other items, discloses the existing groundwater contamination, deed notice, approved CEA to be filed in the future and historic fill (the "Existing Environmental Conditions") (the "Existing Contamination") and access agreements with \_\_\_\_\_ (the "Access Agreements") pursuant to which the ground water is being monitored for natural ground water attenuation. Tenant agrees to repair any and all damage caused to the Leased Premises as a result of conducting the Environmental Site Assessments thereon, and to restore the Leased Premises to its condition prior to such Tenant's entry thereon to the extent reasonably practicable. Tenant agrees, at all times during the term, to allow access to the Leased Premises from time to time as may be permitted, required or desired pursuant to the Access Agreements or Environmental Laws, provided that any such access shall be conducted so as to not unreasonably interfere with Tenant's conduct of business, and to otherwise comply with the terms and conditions of the Access Agreements as same may be amended from time to time. In addition, Tenant hereby acknowledges that there are monitoring wells (the "Wells") on the Leased Premises and that such Wells may be relocated from time to time during the term of the Lease, or new Wells may be installed. Tenant hereby authorizes the installation of new Wells or the relocation of the Wells provided that such relocation of existing Wells or the location of new Wells do not materially and adversely affect Tenant's ability to conduct its business at the Leased Premises and Tenant agrees to cooperate at no cost or expense to Tenant in connection with any relocation of the Wells.

(ii) Notwithstanding anything to the contrary contained herein, Tenant's obligations hereunder are conditioned upon the fulfillment (or waiver by Tenant) of the conditions set forth in either (x) or (y) below:

(x) Within one hundred eighty (180) days prior to the Tenant's Construction Period Start Date, Tenant may, in its discretion, obtain updated test borings, analyses, tests, surveys and inspections ("Updated Environmental Site Assessments"), which show no New Environmental Conditions; or

(y) In the event that the Updated Environmental Site Assessments show any New Environmental Conditions ("Unsatisfactory Updated Environmental Site Assessments"):

A. Tenant shall have the right, at Tenant's election:

- i. to terminate this Lease and the parties shall have no further rights or obligations under this Lease; or
- ii. not to terminate this Lease, in which event this Lease shall remain in full force and effect.

Tenant shall provide Landlord with written notice of its election to proceed pursuant to Subsection 10(b)(ii)(y)A.i. or ii above within thirty (30) days following receipt of the Unsatisfactory Updated Environmental Site Assessments, but in no event later than Tenant's Construction Period Start Date, time being of the essence with respect to the giving of such notice. If requested by Landlord in writing, Tenant's notice shall include a copy of the Unsatisfactory Updated Environmental Site Assessments together with all back-up information. If Tenant fails to send timely notice of its election, then Tenant shall be deemed to have waived its right to terminate this Lease and this Lease shall continue in full force and effect. A "New Environmental Condition(s)" shall mean a discovery of a discharge or Release of Hazardous Materials in violation of Environmental Laws which discharge or Release occurred subsequent to the Feasibility Period and was not caused by the acts or omissions of Tenant or any Tenant Group.

Landlord may nullify Tenant's termination by sending written notice to Tenant within thirty (30) days of receipt of Tenant's notice of termination that Landlord will be responsible to remediate the New Environmental Condition in accordance with applicable laws and obtain a Response Action Outcome for such remediation, including use of engineering and institutional controls, consistent with use of the Leased Premises for the Permitted Uses set forth in **Exhibit B**.

(c) Except as otherwise set forth on **Exhibit G**, Landlord represents and warrants, to its knowledge, that (i) no part of the Leased Premises has ever been used as a sanitary landfill, waste dump site or for the treatment, storage or disposal of Hazardous Materials other than the storage of Incidental Materials, (ii) no underground tanks are present upon the Leased Premises, (iii) no Release of Hazardous Materials in violation of Environmental Laws has occurred from, under or upon the Leased Premises, and (iv) the Leased Premises do not contain any Hazardous Materials other than the storage of Incidental Materials in violation of any Environmental Law. Except as otherwise set forth on **Exhibit G**, neither Landlord nor, to Landlord's actual

knowledge, any other person has received any notice of any action or proceeding relating to any Hazardous Materials or Release thereof on, under, or at the Leased Premises, and neither Landlord nor, to Landlord's knowledge, any other person has transported or caused to be transported any Hazardous Materials other than Incidental Materials on, to, or from the Leased Premises other than in compliance with applicable Environmental Law.

(d) Landlord shall indemnify, defend and hold harmless Tenant and its officers, directors, shareholders, employees and agents (collectively, "Tenant Indemnified Parties") from any claims, judgments, damages, fines, penalties, costs, remediation costs (including any and all costs incurred in connection with any investigations of all or any portion of the Leased Premises or any cleanup, removal, repair, remediation, detoxification or restoration and the preparation of any closure or other plans required or permitted by any governmental authority), liabilities (including sums paid in settlement of claims) or loss relating to the Leased Premises, including reasonable attorney fees, consultant fees, and expert fees (collectively, "Claims and Losses") that arise during or after the term of this Lease to the extent arising from, on account of, or in connection with (i) the violation of any Environmental Laws by Landlord or anyone claiming by or through Landlord, unless such violation arises from the actions or omissions of Tenant or any of Tenant's licensees, invitees, contractors or subcontractors, agents or employees (collectively, the "Tenant Group"); (ii) the presence, use, generation, storage, or Release of Hazardous Materials in violation of any Environmental Law existing prior to Tenant's Construction Period Start Date in, on, under, or above the Leased Premises, unless arising from (A) the acts or omissions of Tenant or any Tenant Group, or (B) the Tenant's fuel dispensing facility; or (iii) any breach of the representations, warranties or obligations of Landlord contained in this Section.

(e)(i) Tenant acknowledges the Existing Environmental Conditions. To the extent that Tenant is required to excavate and remove soils to install its underground tanks and equipment, Landlord agrees to reimburse Tenant the Cost Differential for Soil Disposal (as hereinafter defined) if the excavated soils need to be sent to a special disposal facility due to contamination caused by the Existing Environmental Conditions or the Existing Contamination. The Cost Differential for Soil Disposal shall mean the incremental increase in cost to dispose of the soils because of the contamination caused by the Existing Environmental Conditions or the Existing Contamination over what the cost would have been had the soils not been contaminated. Tenant shall bid out the disposal cost by affording at least three (3) contractors, which contractors must first be approved by Landlord, the opportunity to submit sealed detailed bids covering the disposal with details for the Cost Differential for Soil Disposal. Landlord shall also have the right to select contractors to submit bids covering such work. Landlord shall also have the right to be present at the time the bids are opened, and Tenant will provide Landlord with adequate notice so that a representative of Landlord can be present. Tenant shall award the work to the lowest bidder.

Notwithstanding the foregoing, if the Cost Differential for Soil Disposal exceeds \$100,000 (the "Soil Cap Amount"), Landlord may elect to terminate this Lease by giving written notice thereof to Tenant, in which event there shall be no further liability hereunder between the parties, except for liabilities which specifically survive the termination of this Lease or for liabilities arising prior to the date of such termination. However, if Landlord terminates this Lease, Tenant shall have the right, upon written notice to Landlord given within fifteen (15) days of receipt of Landlord's termination notice, to void Landlord's termination of this Lease by agreeing to be responsible for all costs in excess of the Soil Cap Amount, in which case, this Landlord's termination notice shall be null and void and this Lease shall continue in full force and effect.

(e)(ii) As to any and all New Environmental Conditions discovered by Landlord or Tenant during the performance of Landlord's Work or the construction of the Tenant Improvements, Landlord shall remediate or correct such New Environmental Conditions, consistent with use of the Leased Premises for the Permitted Uses set forth in **Exhibit B**, and in accordance with the following: (i) such remediation or corrective action must be accomplished in accordance with all applicable Environmental Laws (the "Completed Environmental Corrective Action"), (ii) if applicable, Landlord must deliver to Tenant a Response Action Outcome (a "RAO") and (iii) the Completed Environmental Corrective Action shall not unreasonably interfere with or delay Tenant's construction of the Tenant Improvements. In the event the work or actions necessary to achieve the Completed Environmental Correction Action unreasonably interferes with or delays the construction of Tenant Improvements, the Tenant Completion Date shall be extended on a day-for-day basis for such delay until such delay or interference ends. In the event the work or actions necessary to achieve the Completed Environmental Correction Action unreasonably interferes with Tenant's use and enjoyment of the Leased Premises or delays Tenant in obtaining a certificate of occupancy, the Rent Commencement Date shall be extended on a day-for-day basis for delay until such delay or interference ends.



Notwithstanding the foregoing, if the cost of the Completed Environmental Corrective Action exceeds \$500,000 (the "Completed Correction Action Cap Amount"), Landlord may elect to terminate this Lease by giving written notice thereof to Tenant, in which event there shall be no further liability hereunder between the parties, except for liabilities which specifically survive the termination of this Lease or for liabilities arising prior to the date of such termination. However, if Landlord terminates this Lease, Tenant shall have the right, upon written notice to Landlord given within fifteen (15) days of receipt of Landlord's termination notice, to void Landlord's termination of this Lease by agreeing to be responsible for all costs in excess of the Completed Correction Action Cap Amount, in which case, this Landlord's termination notice shall be null and void and this Lease shall continue in full force and effect.

(f) Tenant agrees and covenants that:

(i) Neither Tenant nor the Tenant Group will engage in activities or operations during the term of this Lease that involve the generation, manufacturing, refining, transportation, treatment, storage, disposal, handling or Release of Hazardous Materials on the Leased Premises. The foregoing covenant shall not prohibit Tenant's operation of its fuel dispensing facility or any Incidental Materials on the Leased Premises that are used, sold or disposed of in compliance with Environmental Laws; and

(ii) At all times following the date Tenant takes possession of the Leased Premises, Tenant shall obtain, maintain in effect and comply with all permits, licenses and other requirements pursuant to any Environmental Laws relating to activities on the Leased Premises by Tenant and the Tenant Group.

(g) Tenant shall indemnify, defend and hold harmless Landlord, its officers, partners, directors, shareholders, employees and agents, from any Claims and Losses arising during or after the term of this Lease from, on account of, or in connection with (i) the violation of any Environmental Law by Tenant or the Tenant Group, (ii) the presence, use, generation, storage or Release of Hazardous Materials in, on, under or above the Leased Premises occurring after the Effective Date to the extent occurring as a result of (A) the acts or omissions of Tenant or the Tenant Group or (B) the Tenant's fuel dispensing facility including, without limitation, all structures, tanks, piping, containers, pumps or other appurtenances, or (iii) any violation of the obligations of Tenant contained in this Section.

(h) Tenant, at its expense and in accordance with the time limitations of the section captioned "Tenant Improvements", shall (i) dismantle and remove any and all structures associated with Tenant's fuel dispensing facility, including any tanks, piping, containers or other appurtenances, (ii) conduct any necessary environmental sampling and remediation associated with Tenant's fuel dispensing facility, and prepare and submit any necessary storage tank closure or other reports to the appropriate governmental agencies, in compliance with and as required by Environmental Laws, and simultaneously provide to Landlord copies of all documentation submitted to governmental authorities including all necessary approvals from the governmental authority confirming that the fuel dispensing facility has been properly decommissioned, removed and that any Hazardous Materials have been removed, and (iii) close any excavated areas resulting from the removal of the Tenant's fuel dispensing facility and fill with clean soils, compacted, seeded, graded in such areas and provide to Landlord documentation that such excavated areas have been filled with clean soils. Prior to the expiration or termination of the term, Tenant shall also deliver to Landlord an environmental report certified to Landlord (or a reliance letter from such engineering firm stating that Landlord may rely on such report) by a reputable environmental engineering firm that the fuel dispensing facility has been promptly decommissioned and removed in accordance with all applicable laws and that the Leased Premises is free of Hazardous Materials. Prior to the expiration or termination of the term, Tenant shall also deliver to Landlord a site wide unrestricted RAO.

(i) Tenant shall, at Tenant's own expense, make all submissions to, provide all information to, and comply with all requirements of any governmental authority having jurisdiction in connection with its business at the Leased Premises. Should applicable Environmental Law require preparation and implementation of a clean-up plan because of any spills, Releases or discharges of Hazardous Materials which occurred during the term of this Lease and for which Tenant has an indemnification obligation pursuant to Section 10(g) hereof, then Tenant shall, at Tenant's own expense, prepare and submit the required plans and financial assurances, and carry out the approved plans in order to obtain an unrestricted use RAO for the area of concern for such spills, Releases or discharges of Hazardous Materials.

(j) Tenant agrees to fully cooperate with Landlord and provide such documents, affidavits and information as may be requested by Landlord in connection with any requirements of Environmental Laws applicable to the Leased Premises and/or (x) to comply with any requirements of Environmental Laws.

(k) Landlord may, if Landlord reasonably believes that Hazardous Materials or other environmental condition violates or threatens to violate any Environmental Laws, cause an environmental audit of the Leased Premises or portions thereof to be conducted to confirm Tenant's compliance with the provisions of this paragraph, and Tenant shall cooperate in all ways with Landlord in connection with any such audit. Tenant shall pay all reasonable costs and expenses incurred in connection therewith in the event that the audit shows the presence of Hazardous Materials at the Leased Premises and such Hazardous Materials were caused by the acts or omissions of Tenant and/or the Tenant Group or the Tenant's fuel dispensing facility.

(l) Landlord shall be responsible, at its sole cost and expense, for compliance with all institutional and engineering controls ("Controls"), including posting any required financial assurance related to the Existing Environmental Conditions or the Existing Contamination or any other remediation that is the responsibility of Landlord as set forth herein. Tenant agrees to take the Leased Premises subject to, and to comply with, any conditions set forth in the Controls (other than posting financing assurances and filing biennial certifications with the New Jersey Department of Environmental Protection).

(m) Tenant shall promptly (i) notify Landlord in the event of any spill or other release of any Hazardous Materials at, in, on, under or about the Leased Premises which is required to be reported to a governmental authority under any Environmental Law, (ii) forward to Landlord copies of any notices received by Tenant relating to alleged violations of any Environmental Law and (iii) pay when due any fine or assessment against Landlord, Tenant or the Leased Premises relating to any violation of any Environmental Law at the Leased Premises during the term of this Lease, which fine or assessment is due to the acts or omissions of Tenant and/or Tenant Group.

(n) If a lien is filed against the Leased Premises by any governmental authority resulting from the need to expend or the actual expending of monies arising from an act or omission, whether intentional or unintentional, of Tenant and/or the Tenant Group or for which Tenant and/or the Tenant Group are responsible, resulting in the releasing, spilling, leaking, leaching, pumping, emitting, pouring, emptying or dumping of any Hazardous Materials into the waters or onto land located within or without the State of New Jersey, then Tenant will, within thirty (30) days from the date that Tenant is first given notice that such lien has been placed against the Leased Premises (or within such shorter period of time as may be specified by Landlord if such governmental authority has commenced steps to cause the Leased Premises to be sold pursuant to such lien) either (i) pay the claim and remove the lien, or (ii) furnish a cash deposit, bond, or such other security with respect thereto as is reasonably satisfactory in all respects to such governmental authority and is sufficient to effect a complete discharge of such lien on the Leased Premises.

(o) Notwithstanding anything to the contrary contained herein, Tenant shall not engage or permit any Licensed Site Remediation Professional (or any person who reports to or is supervised by a Licensed Site Remediation Professional) to conduct any investigation of the Property. "Licensed Site Remediation Professional" has the meaning specified in the Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq.*, the regulations promulgated thereunder, and any amendment to such legislation or regulations from time to time. All information obtained by Tenant or its representatives relating to the Leased Premises (including, without limitation, the environmental condition thereof) shall be treated as confidential information and Tenant shall not disclose any information obtained by Tenant (including, without limitation, the results of environmental inspections or analyses) to any party (including, without limitation, Landlord) without obtaining Landlord's prior written consent.

(p) Tenant's failure to abide by the terms of this Section shall be restrainable by injunction.

(q) The covenants and indemnities contained in this Section shall survive the expiration or termination of this Lease.

#### **Case Study #4**

#### **WAREHOUSE DISTRIBUTION CENTER** **(EXECUTION COPY)**

### **30. Environmental Requirements.**

**(a) Subtenant's Environmental Responsibilities.** Except for Hazardous Materials used by Subtenant in limited quantities for ordinary cleaning, for office purposes and warehouse maintenance purposes, for printing or for refrigeration equipment, any merchandise being handled by Subtenant in containers manufactured primarily for consumer use, materials used on minor maintenance of Subtenant's trucks and machinery, fuel for any trucks or generators, or Hazardous Materials contained in products stored and/or distributed during Subtenant's normal course of business in their original, sealed and unopened containers (all of which shall be handled by Subtenant in compliance with all Environmental Requirements) or otherwise with any Permitted Use, Subtenant shall not permit or cause its agents, employees, contractors, subsubtenants or invitees to bring any Hazardous Materials upon the Sublease Premises or transport, store, use, generate, manufacture or release any Hazardous Materials in or about the Sublease Premises without Sublandlord's prior written consent, which will not be unreasonably withheld, conditioned or delayed. Subtenant, at its sole cost and expense, shall operate its business in the Sublease Premises in compliance with all Environmental Requirements and any approved Controls (defined herein), and shall remediate in a manner required by Environmental Requirements, and reasonably acceptable to Sublandlord, any Hazardous Materials brought onto the Sublease Premises by Subtenant, its agents, employees, contractors, subsubtenants or invitees in violation of Environmental Requirements. Subtenant shall complete and certify to disclosure statements as reasonably requested by Sublandlord from time to time, relating to Subtenant's transportation, storage, use, generation, manufacture or release of Hazardous Materials on the Sublease Premises. The term "Environmental Requirements" means all applicable present and future statutes, regulations, ordinances, rules, codes, judgments, orders or other similar enactments of any governmental authority or agency regulating or relating to health, safety, or environmental conditions on, under, or about the Sublease Premises or the environment, including without limitation, the following: the Comprehensive Environmental Response, Compensation and Liability Act; the Resource Conservation and Recovery Act, and all state and local counterparts thereto, and any regulations or policies promulgated or issued thereunder and the Industrial Site Recovery Act, N.J.S.A 13:1K6 et seq. ("ISRA"), the New Jersey Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.) and the Site Remediation Reform Act (N.J.S.A. 58:10C-1, et seq.). The term "Hazardous Materials" means and includes any substance, material, waste, pollutant, or contaminant listed or defined as hazardous or toxic, under any Environmental Requirements, asbestos and petroleum, including crude oil or any fraction thereof, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). As defined in Environmental Requirements, Subtenant is and shall be deemed the "owner" of all Hazardous Materials brought on the Sublease Premises by Subtenant, its agents, employees, contractors or invitees, and the wastes, by-products, or residues generated, resulting, or produced therefrom (the "Subtenant-Generated Hazardous Materials") and shall be deemed the "operator" of the Sublease Premises only with respect to operations under its direct actual control at the Sublease Premises involving Subtenant-Generated Hazardous Materials. In all other respects, the Sublandlord is and shall be deemed the "operator" of the Sublease Premises, and the "owner" of all environmental conditions and Hazardous Materials in, on or under the Land and the Sublease Premises.

Subtenant shall indemnify, defend, and hold Sublandlord harmless from and against any and all losses, claims, demands, actions, suits, fines, penalties, liabilities, damages (including, without limitation, punitive damages), costs and expenses (including, without limitation, remediation, removal, repair, corrective action, or cleanup expenses), and costs (including, without limitation, reasonable attorneys' fees, consultant fees or expert witness fees) which are brought or recoverable against, or suffered or incurred by Sublandlord as a result of (i) any release of Subtenant-Generated Hazardous Materials which Subtenant is obligated to remediate as provided above; (ii) the violation of ISRA by Subtenant; (iii) the exacerbation of known conditions (as described in the Phase I and PA) caused by the negligence of Subtenant, or its agents, employees, contractors, subsubtenants, assignees or invitees; or (iv) any other breach of the requirements under Sections 30(a) and 30(c) by Subtenant, its agents, employees, contractors, subsubtenants, assignees or invitees, regardless of whether Subtenant had knowledge of such noncompliance. Nothing in this paragraph shall be interpreted as imposing any liability on Subtenant for any consequential damages including any lost sales or profits of Sublandlord.

Sublandlord shall have access to, and a right to perform inspections and tests of, the Sublease Premises to determine Subtenant's compliance with Environmental Requirements, its obligations under Sections 30(a) and 30(c), or the environmental condition of the Sublease Premises. Access shall be granted to Sublandlord upon Sublandlord's prior notice to Subtenant and at such times so as to minimize, so far as may be reasonable under the circumstances, any disturbance to Subtenant's operations and in accordance with Sublandlord's conditions of entry as set forth in Section 19. Such inspections and tests shall be conducted at Sublandlord's expense, unless such inspections or tests reveal that Subtenant has not complied with any Environmental Requirements, in which case Subtenant shall reimburse Sublandlord for the reasonable cost of such inspection and tests. Sublandlord's receipt of or satisfaction with any environmental assessment in no way waives any rights that Sublandlord holds against Subtenant.

**(b) Sublandlord's Environmental Responsibilities.** Sublandlord represents and warrants that, except for information contained in the Phase I, the PA and the Environmental Documents (as defined herein), to Sublandlord's knowledge, after reasonable inquiry, (1) there are no environmental conditions affecting the Project in violation of Environmental Requirements, and (2) there is no asbestos or asbestos-containing materials in the Sublease Premises, provided that any asbestos and asbestos-containing materials identified in the Phase I, the PA or the Environmental Documents will be removed as part of Sublandlord's Work and that the new building to be constructed will not contain asbestos or asbestos-containing materials. Sublandlord further represents and warrants that, as of the date hereof, Sublandlord has provided to Subtenant access to true and complete copies of all environmental documents related to the Project, including, without limitation, the Sublease Premises and the Land, in its possession or reasonable control, or in the possession or reasonable control of any affiliate of Sublandlord, including, without limitation, Prime Lessor ("Sublandlord Affiliate"), including, without limitation, reports, studies, data, sampling results, permits, and correspondence to and from governmental authorities ("the Environmental Documents"). During the Sublease Term, Sublandlord shall promptly provide Subtenant with true and complete copies of all additional Environmental Documents generated by or on behalf of Sublandlord or Sublandlord's Affiliate, or that otherwise come into Sublandlord's or Sublandlord's Affiliate's possession or within its reasonable control. Sublandlord further represents and warrants that Sublandlord has either completed or caused to be completed the activities described in Exhibit F. and no further action is required with respect to those activities, or such activities are no longer necessary as a result of the demolition of portions of the existing building.

Sublandlord shall at Sublandlord's own cost and expense comply with, and cause the Sublease Premises and the common access road identified in the Declaration to comply with, all Environmental Requirements during the Sublease Term except to the extent Subtenant is required to do so under Sections 30(a) and 30(c). Without limiting the foregoing, Sublandlord shall at its sole cost and expense (and not part of Operating Expenses), promptly and diligently, and in accordance with all Environmental Requirements, (i) investigate, remove, remediate, monitor and/or mitigate any and all Hazardous Materials located in, on or under the Land or Sublease Premises (other than the Subtenant-Generated Hazardous Materials for which Subtenant is responsible under Section 30(a) as may be required pursuant to Environmental Requirements and the terms set forth herein; (ii) prepare, maintain, and comply with an asbestos-containing materials operations and maintenance plan, if applicable; (iii) obtain, maintain, and comply with any and all environmental permits required with respect to the Sublease Premises under applicable Environmental Requirements, (except for such permits specifically required in connection with Subtenant's operations and not otherwise required for the Sublease Premises in the absence of Subtenant's operations); (iv) "remediate" (as such term is defined in N.J.A.C. 7:26E-1.8) or cause to be remediated by Prior Owner the groundwater contamination on the Sublease Premises (the "Known Area of Concern"), including, without limitation, the remediation, if required, of any and all source areas contributing to such groundwater contamination, obtain and deliver to Subtenant a "Final Remediation Document" (as such term is defined in N.J.A.C. 7:26C-1.3) relating to the Known Area of Concern (the "Sublandlord Environmental Clearance"), and comply with any and all conditions of the Final Remediation Document and post-Final Remediation Document requirements; (v) promptly and diligently undertake, or cause the Prime Lessor to cause the Prior Owner to promptly and diligently undertake all actions and comply with all requirements set forth in the Post-Closing Remediation and Access Agreement among \_\_\_\_\_ and \_\_\_\_\_, a copy of which is attached hereto as Exhibit J ("Remediation Agreement"); and (vi) perform such other obligations of Sublandlord as are set forth in this Section 30(b) (together, "Sublandlord's Environmental Responsibilities"). If Sublandlord is not diligently performing any of Sublandlord's Environmental Responsibilities, then Subtenant has the right, but not the obligation, to complete such obligations at Sublandlord's cost and expense, but only after Sublandlord has been provided notice and opportunity to cure such failure to perform in accordance with Section 25. Subtenant shall have the right to pay for all reasonable, third party costs paid or incurred by Subtenant to perform and complete such Sublandlord's Environmental Responsibilities, including consultant fees and attorneys' fees, ("Subtenant Environmental Costs") by deducting such Subtenant Environmental Costs from the Base Rent next due and owing under this Sublease until such costs are realized by Subtenant, if not paid by Sublandlord otherwise, but only after complying with the terms of Section 25 related to set off relating to receiving a Judgment. In addition to the foregoing, if the performance of

Sublandlord's Environmental Responsibilities relating solely to the environmental conditions existing prior to the date of this Lease or environmental conditions caused by Sublandlord or a Sublandlord Party (and not any other Sublandlord Environmental Responsibilities), including those activities by Prior Owner, materially and adversely interfere with Subtenant's normal business operations, and such interference is not cured within five (5) Business Days after written notice from Subtenant to Sublandlord, then Base Rent and Subtenant's Proportionate Share of Operating Expenses shall abate in proportion to the square footage of the Sublease Premises affected

by the interference. If the interference continues consecutively for more than one (1) year after Subtenant has provided written notice to Sublandlord of such interference and was not caused by Subtenant or any Subtenant Parties, then Subtenant shall have the right to terminate this Sublease by written notice to Sublandlord given at any time within thirty (30) days the expiration of such 1-year period and prior to the resolution of such interference as Tenant's sole remedy hereunder, at law or in equity, except to the extent of any (1) related indemnification obligations of Sublandlord, or (2) related offset claims of Subtenant to the extent already realized by deduction from Rent. The deadlines set forth in this paragraph shall not be extended for Force Majeure.

Sublandlord shall indemnify, defend, and hold Subtenant harmless from and against any and all losses, claims, demands, actions, suits, fines, penalties, liabilities, damages (including, without limitation, punitive damages and natural resource damages), remedial costs and expenses (including, without limitation, investigation, remediation, removal, repair, corrective action, or cleanup expenses), and costs (including, without limitation, reasonable attorneys' fees, consultant fees or expert witness fees) which are brought or recoverable against, or suffered or incurred by Subtenant arising from (i) any environmental condition in any way affecting the Project (regardless of whether (1) such condition existed prior to Subtenant's occupancy of the Sublease Premises or (2) such condition was caused by Sublandlord, Sublandlord's Affiliates, their respective agents, employees, contractors, other subtenants or subsubtenants, trespassers or any other third party (except to the extent such condition was caused by the release of Subtenant-Generated Hazardous Materials for which Subtenant is responsible as provided above, resulted from a breach of this Section 30 by Subtenant, or resulted from the exacerbation of known conditions (as described in the Phase I and PA) caused by the negligence of Subtenant, or its agents, employees, contractors, subsubtenants, assignees or invitees), (ii) the release of Hazardous Materials by Sublandlord, Sublandlord's Affiliates, their respective agents, employees or contractors in, under, on or from the Project in violation of Environmental Requirements, (iii) Hazardous Materials present or at any time existing in the soil or groundwater in, under, on or from the Project regardless of if such Hazardous Materials were initially released outside of the Project and spread, migrated or expanded into the soil or groundwater in, under, on or from the Project, except to the extent the initial release, or the subsequent spread, migration or expansion, were caused or exacerbated by the negligence of Subtenant, its agents, employees, contractors, subtenants, assignees or invitees, (iv) a breach by Sublandlord of its obligations under this Section 30. including without limitation the performance of Sublandlord's Environmental Responsibilities, and (v) the Subtenant's incurring of Subtenant Environmental Costs. Nothing in this paragraph shall be interpreted as imposing any liability on Sublandlord for any consequential damages including any lost sales or profits of Subtenant.

Sublandlord shall at its cost and expense comply with all Environmental Requirements and the then-applicable version of the New Jersey Department of Environmental Protection ("NJDEP") Vapor Intrusion Technical Guidance ("VI Guidance") regarding monitoring and mitigation of vapor intrusion or the risk of future vapor intrusion that may result from the presence of groundwater or soil contamination in, under, or around the Sublease Premises, regardless whether such contamination derives from an on-site or off-site source, including, without limitation, Freon 12 and chlorinated volatile organic compounds. In addition, and regardless whether such action is specifically required by Environmental Requirements or VI Guidance, Sublandlord shall install as part of Base Building Work, and thereafter operate and maintain (as required by law) (i) a passive subsurface depressurization system (that can be upgraded to an active subsurface depressurization system if necessary) covering the newly constructed portion of the Building, as shown on the figure included in Exhibit L. designed and installed by a contractor with the qualifications set forth in Section 6.3.1 of the VI Guidance (Version 3.1, March 2013), and certified by such contractor as being effective for addressing the potential vapor intrusion pathway at the Sublease Premises; and (ii) sub-slab vapor ports at locations to be determined by Sublandlord's consultant consistent with the VI Guidance (collectively, the "Vapor Mitigation System"). The Vapor Mitigation System shall include continuous monitoring of the airflow and will produce an automatic notification in accordance with the specifications set forth in the O&M Plan. No later than sixty (60) days prior to the Commencement Date, Sublandlord shall at its sole cost and expense prepare and deliver to Subtenant for Subtenant's review and approval (such approval not to be unreasonably withheld) an Operation, Maintenance and Monitoring program ("OMM Program") for the Vapor

Mitigation System prepared in accordance with the VI Guidance, and, Sublandlord shall thereafter implement the OMM Program at its sole cost and expense. Sublandlord shall, on an annual basis and at Sublandlord's sole cost and expense, perform indoor air monitoring and sub-slab sampling of soil gas through the sub-slab vapor ports in accordance with the procedures and protocols set forth in the VI Guidance; provided, however, in addition to the such annual sampling, Sublandlord shall perform such sampling monthly for the first three (3) months after Substantial Completion and quarterly during the ensuing nine (9) months, and perform an additional sampling every six (6) months for the next two (2) years of the Sublease thereafter; provided further,

that Sublandlord will perform more frequent sampling if required by VI Guidance. In addition to the foregoing, Subtenant may request Sublandlord to perform additional indoor air monitoring and sub-slab sampling at any time throughout the Term of the Sublease, and such costs may be passed through as Operating Expenses, without being subject to the cap on Controllable Operating Expenses. Nothing in this paragraph limits Subtenant's right to conduct its own indoor air monitoring at Subtenant's cost. In the event any indoor air monitoring or sub-slab sampling indicates the presence of vapors at levels exceeding NJDEP's non-residential soil gas screening levels, Sublandlord shall promptly conduct an indoor air investigation and, if necessary, further monitoring and/or mitigation in accordance with the VI Guidance, including without limitation, at Sublandlord's sole cost and expense, the conversion of the passive system to an active system, and the operation and maintenance of such system in accordance with the VI Guidance and the OMM Program.

Sublandlord's access to the Sublease Premises for purposes of performing Sublandlord's Environmental Responsibilities shall be governed by the access provisions of Section 19 of this Sublease. In connection with Prior Owner's performance of "Entrant's Remediation Obligations" (as such term is defined in the Remediation Agreement), Sublandlord shall cause Prior Owner to comply with the access provisions of Section 19 of this Sublease and Section 4 of the Remediation Agreement, except that notwithstanding anything contained herein to the contrary, the Prior Owner shall not be obligated to comply with the requirements set forth in the fourth paragraph of Section 10 of this Sublease, subsections (1), (2) and (4); provided, however, that Sublandlord shall send a written request to Prior Owner requesting that Prior Owner not perform work during the months of November and December. To the extent Sublandlord undertakes any activities related to or in the nature of Entrant's Remediation Obligations, and/or conducts remediation of the Known Area of Concern, Sublandlord shall be deemed the "Entrant" and shall comply with the obligations imposed on the "Entrant" pursuant to the access provisions of Section 4 of the Remediation Agreement. In addition, prior to any entry onto the Sublease Premises by Sublandlord or its agents or contractors for purposes of conducting Sublandlord's Environmental Responsibilities, Sublandlord shall secure and maintain, or shall cause its consultant to secure and maintain, insurance coverage in the following minimum amounts with respect to the performance of Sublandlord's Environmental Responsibilities: comprehensive general liability insurance in the amount of \$2,000,000 per occurrence and \$2,000,000 in the aggregate; excess liability insurance in the amount of \$5,000,000 per occurrence and in the aggregate; contractor's pollution legal liability coverage in the amount of \$3,000,000 per claim; automobile coverage in the amount of \$1,000,000 combined single loss; professional liability coverage in the amount of \$3,000,000 per claim; worker's compensation coverage (statutory); and employer's liability coverage in the amount of \$1,000,000. Prior to any entry onto the Sublease Premises by Prior Owner or its agents or contractors for purposes of implementing the Remediation Agreement, Sublandlord shall cause Prior Owner to secure and maintain, or cause its consultant to secure and maintain, insurance coverage in the following minimum amounts with respect to the performance of Sublandlord's Environmental Responsibilities: comprehensive general liability insurance in the amount of \$3,000,000 per occurrence and \$3,000,000 in the aggregate; contractor's pollution legal liability coverage in the amount of \$2,000,000 per claim; automobile coverage in the amount of \$1,000,000 combined single loss; worker's compensation coverage (statutory); and employer's liability coverage in the amount of \$1,000,000. Prior Owner or its consultant may use an excess or umbrella liability policy to satisfy these requirements. All such coverage shall be issued by insurance companies licensed in the State of New Jersey, on such terms as Subtenant may require in its reasonable discretion. Sublandlord shall deliver to Subtenant a Certificate of Insurance evidencing such insurance coverage and naming Subtenant and such other parties in interest as shall be identified by Subtenant as an additional insured on all insurance policies with the exception of the professional liability insurance policy, worker's compensation and employers' liability insurance policy.

Notwithstanding anything contained in the third paragraph of Section 3 to the contrary, any Final Remediation Document issued in connection with Sublandlord's Environmental Responsibilities, including without limitation the Sublandlord Environmental Clearance, may be conditioned on the establishment of institutional and/or engineering controls ("Controls"), including without limitation a Classification Exception Area ("CEA"), a deed notice, and/or an engineered cap, provided such Controls do not materially and adversely interfere with Subtenant's operations on the Sublease Premises. Sublandlord shall notify Subtenant prior to imposing such Controls and Subtenant shall have the right, but not the obligation, to comment on the nature and extent of such Controls before they are established. No fencing or signage shall be permitted to be utilized as a Control other than fencing that does not materially and adversely impact Subtenant's operations. If Sublandlord proposes to utilize fencing as a control, it shall notify Subtenant at the initiation of the design phase of the fencing control, and Subtenant shall have the right, but not the obligation, to provide comments on the fencing location and design prior to finalization of the design. Sublandlord shall use its best efforts to incorporate Subtenant's comments and address Subtenant's concerns in the design of the fencing control. Sublandlord shall be responsible, at its sole cost and expense, for conducting or causing to be conducted (1) all post-remediation monitoring and maintenance

required by such Controls, including without limitation biennial certifications, application for and compliance with Remedial Action Permits, provision of financial assurance, and end-point sampling; (2) any and all additional remediation required in the event it is determined that the Controls or initial remediation are not effectively protecting human health or the environment; and (3) any and all work required to respond to, and rectify deficiencies noted in, any audit of the Final Remediation Document conducted by the NJDEP.

Sublandlord shall promptly make available to Subtenant all material documents and all sampling results related to Sublandlord's Environmental Responsibilities, including without limitation any and all Site Investigation Reports, Remedial Action Work Plans, and Remedial Action Reports prepared in connection with the remediation of the Known Area of Concern, the Sublandlord Environmental Clearance and the implementation of the Remediation Agreement. Sublandlord shall deliver to Subtenant reliance letter(s) from any of Sublandlord's or Sublandlord's Affiliates' consultant(s) which generate or have generated such report(s), in form reasonably satisfactory to Subtenant, stating that Subtenant, its affiliates and subsidiaries, may rely on such report(s) as if such report(s) had been prepared on behalf of Subtenant, or otherwise include Subtenant, its affiliates and subsidiaries, in the reliance sections of such report(s). Sublandlord shall provide Subtenant with all non-privileged information in Sublandlord's or Sublandlord's Affiliates' possession or reasonable control related to Sublandlord's Environmental Responsibilities and Sublandlord shall promptly forward to Subtenant any material notices, summons or subpoenas or other correspondence relating to Sublandlord's Environmental Responsibilities, the Sublandlord Environmental Clearance, and the implementation of the Remediation Agreement.

Sublandlord shall use its best efforts, or shall cause Prime Lessor to use its best efforts, to (i) provide all legally required notices with respect to the discovery or release of any hazardous substances (as defined in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601(14)), that were disposed of at the Sublease Premises prior to Prime Lessor's acquisition of the Land ("Hazardous Substances"); (ii) take reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any Hazardous Substances; (iii) provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the Sublease Premises (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the Sublease Premises); (iv) be in compliance with any land use restrictions established or relied on in connection with the response action at the Sublease Premises, and not impede the effectiveness or integrity of any institutional control employed at the Sublease Premises in connection with a response action; and (v) comply with any request for information or administrative subpoena issued under CERCLA with respect to the Hazardous Substances. Sublandlord represents and warrants that to the best of its knowledge, all disposal of Hazardous Substances at the Sublease Premises occurred before Prime Lessor acquired the Land and prior to the Sublandlord obtaining an interest in the Sublease Premises, and neither Sublandlord, the Prime Lessor, nor Sublandlord's Affiliates is affiliated with any party that is potentially responsible for any previously released Hazardous Substance through any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the Land was conveyed or financed or by a contract for the sale of goods or services).

**(c) ISRA.** The business operations which Subtenant shall conduct at the Sublease Premises shall not constitute the operation of an industrial establishment as defined in ISRA, or, if it is or at any time shall become such an industrial establishment Subtenant will comply with all ISRA requirements applicable to Subtenant's operations and at the time of closing, terminating or transferring such operations. In the event that Subtenant's operations become subject to ISRA and Sublandlord then causes the triggering of ISRA, Sublandlord shall pay all administrative expenses related to the triggering event, and Subtenant shall otherwise comply in all other respects, at its expense, with ISRA in connection with Subtenant's operations. Notwithstanding the foregoing, nothing herein shall affect the Sublandlord's responsibility for Sublandlord's Environmental Responsibilities. In the event areas of concern within the scope of Sublandlord's Environmental Responsibilities are required to be remediated pursuant to ISRA, Sublandlord shall undertake such steps as are necessary to satisfy ISRA with respect to such areas of concern, regardless which party's actions triggered ISRA. No earlier than twenty (20) days prior to the end of the Sublease Term and no later than the last day of the Sublease Term, Subtenant shall deliver an executed affidavit (the "ISRA Letter") stating that to Subtenant's actual knowledge, at no time during the Term of this Sublease was the business conducted by Subtenant at the Sublease Premises for operations that constitute an industrial establishment as defined in ISRA, or in the alternative that all ISRA obligations related to Subtenant's operations have been satisfied. Failure to timely deliver the ISRA Letter, or if available, to request from NJDEP documentation confirming that Subtenant's operations were not subject to ISRA, after notice to Subtenant pursuant to Section 23(111), shall be deemed to be an Event of Default. If prior to the expiration or earlier termination of the Sublease, Subtenant fails to deliver the ISRA Letter and/or remediate

all Subtenant-Generated Hazardous Materials pursuant to the requirements of Section 30(a), and deliver to Sublandlord a Final Remediation Document with respect to such Subtenant-Generated Hazardous Materials, as applicable (the "ISRA Clearance"): then upon the expiration or earlier termination of the Sublease, Sublandlord shall have the option either to consider the Sublease as having ended or to treat Subtenant as a holdover Subtenant in possession of the Sublease Premises . If Sublandlord considers the Sublease as having ended, then Subtenant shall nevertheless be obligated to promptly obtain and deliver to Sublandlord the ISRA Clearance and otherwise fulfill all of the obligations of Subtenant set forth in Section 30, and Sublandlord shall provide Subtenant with a right of access to the Sublease Premises under terms reasonably agreeable to both parties so that Subtenant may complete its obligations under this paragraph. Sublandlord shall, at no cost to Subtenant, cooperate with Subtenant by supplying any information or signing any documentation that may be reasonably requested by Subtenant, and otherwise assisting Subtenant with respect to the ISRA. Notwithstanding the foregoing, if Subtenant is unable to obtain the ISRA Clearance solely on account of open environmental issues that are within the scope of Sublandlord's Environmental Responsibilities, the Sublease shall be ended and Subtenant shall have no further obligation to Sublandlord with respect to ISRA, and Sublandlord shall not have the option to treat Subtenant as a hold-over Subtenant in possession

If Sublandlord treats Subtenant as a hold-over Subtenant in possession of the Sublease Premises, then Subtenant shall pay, monthly to Sublandlord, one hundred twenty five percent (125%) of the Base Rent and all additional rent which Subtenant would otherwise have paid under the Sublease, until such time as Subtenant delivers to Sublandlord the ISRA Clearance and otherwise fulfills its obligations to Sublandlord under Section 30. and during the holdover period, all of the terms of this Sublease shall remain in full force and effect. The parties hereby agree to indemnify and to hold each other harmless from, of, and against any and all expense, loss and liability suffered by one party by reason of action successfully taken by that party to attain compliance due to any violation of ISRA by the other party, including but not limited to any and all reasonable expenses that party may incur in complying with ISRA, any and all fines or penalties assessed upon that party under ISRA and any and all reasonable legal fees and costs incurred by that party in connection with any of the foregoing.

**(d) Environmental Insurance.** Sublandlord's Affiliates have procured, at Sublandlord's Affiliates' sole cost, a Pollution Legal Liability insurance policy ("PLL Policy") covering the Sublease Premises and the Land, a copy of which is attached hereto as Exhibit K. As a condition precedent to the effectiveness of this Sublease, Sublandlord shall cause this Sublease to be included as an insured contract by endorsement, shall have Subtenant, and such other parties in interest as shall be identified by Subtenant, added as an Additional Insured, and shall have Subtenant's intended use of the Sublease Premises as set forth in Section 3 of this Sublease listed in an intended use endorsement and covered by the PLL Policy. Prior to binding coverage of any replacement PLL Policy, Sublandlord shall provide a copy of the proposed policy, including all endorsements and exclusions, to Subtenant for its review. Sublandlord's Affiliates shall maintain the PLL Policy (or equivalent coverage in a form reasonably acceptable to Subtenant) throughout the Term of the Sublease at its sole cost and expense. Prior to binding coverage of any replacement PLL Policy, Sublandlord shall provide a new copy of the proposed policy, including all endorsements and exclusions, to Tenant for its review. Upon issuance of the Final Remediation Document for the Known Area of Concern, Sublandlord shall promptly deliver a copy of the Final Remediation Document to the Company (as defined in the PLL Policy) and such other documents as the Company may require, and shall use its commercially reasonable efforts at its sole cost and expense, to cause, or cause Sublandlord's Affiliates to cause, the Company to delete Endorsement No. 24 to the PLL Policy (the "Pollutant Exclusion"), or (if, but only if, the Company refuses to delete the endorsement despite Sublandlord's commercially reasonable efforts) to modify Endorsement No. 24 so as to remove the Known Area of Concern from within the scope of the Pollutant Exclusion.

**(e) Survival.** The obligations of Sublandlord and Subtenant under this Section 30 shall survive the expiration or sooner termination of this Sublease.

#### **Case Study #5**

#### **BIG-BOX GROUND LEASE** **FINAL EXECUTION**

##### **1.1.1 Hazardous Substances.**

1.1.1.1 Attached to this Lease as Exhibit F is a list of all reports, correspondence or tests prepared for Landlord or in Landlord's possession or control with respect to the compliance of the Property



and the Development with Environmental Laws or the presence or use of Hazardous Substances on the Property or the Development (the “**Environmental Reports**”). All such Environmental Reports have been provided to Tenant for Tenant’s review, without representation as to the accuracy or completeness thereof.

1.1.1.2 Except as disclosed in the Environmental Reports, Landlord warrants and represents that:

(a) to the best of Landlord’s knowledge, the Property does not contain and, to Landlord’s knowledge, has not contained, any Hazardous Substance;

(b) neither Landlord nor, to Landlord’s knowledge, any prior owner, user or occupant of the Property has conducted or authorized the generation, transportation, storage, treatment or disposal at or from the Property of any Hazardous Substance;

(c) there is no pending, or to Landlord’s knowledge threatened, litigation or proceeding before any court or any governmental or administrative agency in which any person or entity alleges the presence, release, threat of release, placement on, in or from the Property or any adjacent property, or the generation, transportation, storage, treatment or disposal at the Property or any adjacent property of any Hazardous Substance;

(d) Landlord has not received any notice of, and has no actual or constructive knowledge that, any governmental authority or employee or agent thereof is investigating or has determined or threatens to determine (i) the presence of, release or threat of release from or placement on, in or from the Property or the Development or any adjacent property of any Hazardous Substance, or (ii) the generation, transportation, storage, treatment or disposal at the Property or the Development or any adjacent property of any Hazardous Substance;

(e) to the best of Landlord’s knowledge, there are no actions, communications or agreements with any governmental authority or agency (federal, state or local) or any private entity, including, without limitation, any prior owners of the Property, relating in any way to the remediation, presence, release, threat of release or placement on, in or from the Property or the Development or any adjacent property, or the generation, transportation, storage, treatment or disposal at the Property or any adjacent property, of any Hazardous Substance;

(f) Landlord has owned and operated the Property in material compliance with all Environmental Laws, has obtained all necessary permits under the Environmental Laws for Landlord’s operations on the Property and has not has incurred any liability under any Environmental Laws with respect to the Property; and

(g) to the best of Landlord’s knowledge, there are no underground storage tanks located on the Property or in the Development and no underground storage tanks have been removed from the Property or the Development.

1.1.1.3 Definitions. For purposes of this Lease, the following terms shall have the following meanings:

(a) “**Environmental Laws**” means all environmental, hazardous waste or substance, health and/or safety Laws issued by any governmental authorities and in effect as of the Effective Date with respect to or which otherwise pertain to or affect the Property or any portion thereof, the use, ownership, occupancy or operation of the Property or any portion thereof, or Tenant, as same have been amended, modified or supplemented from time to time prior to the Commencement Date, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 et seq.), the Hazardous Substances Transportation Act (49 U.S.C. § 1802 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), as amended by the Hazardous and Solid Wastes Amendments of 1984, the Water Pollution Control Act (33 U.S.C. § 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. § 300f et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.), the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11001 et seq.), the Radon and Indoor Air Quality Research Act (42 U.S.C. § 7401 note, et seq.), the Superfund Amendment Reauthorization Act of 1986 (42 U.S.C. § 9601 et seq.), the National Environmental Policy

Act (42 U.S.C. § 4321 et seq.), the Clean Water Act (33 U.S.C. § 1321 et seq.), the Occupational Safety and Health Act (29 U.S.C. § 651 et seq.), the New Jersey Industrial Site Recovery Act (N.J.S.A. 13:1K et seq.) and the regulations promulgated thereunder (collectively, "**ISRA**"), the Site Remediation Reform Act (N.J.S.A. 58:10C-1 et seq.) ("**SRRA**"), and the New Jersey Spill Compensation and Control Act (N.J.S.A. 58:10-23.11, et. seq.), comparable state and local Laws, and any and all rules and regulations which have become effective prior to the Commencement Date under any and all of the aforementioned laws.

(b) "**Hazardous Substances**" means all (i) electromagnetic waves, urea formaldehyde foam insulation and transformers or other equipment that contains dielectric fluid containing polychlorinated biphenyls ("**PCBs**"), (ii) any solid, liquid, gaseous or thermal contaminant, including, without limitation, smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, petroleum products or byproducts or fractions thereof, asbestos, asbestos containing materials, radioactive materials, PCBs, phosphates, lead or other heavy metals, chlorine, mold, radon gas and any indoor air contaminant, (iii) any solid or liquid wastes (including hazardous wastes), hazardous air pollutants, hazardous substances, hazardous chemical substances and mixtures, toxic substances, pollutants and contaminants, as such terms are defined in any Environmental Law, and (iv) any other chemical, material or substance, the use or presence of which, or exposure to the use or presence of which, is prohibited, limited or regulated by any Environmental Laws.

1.1.2 ISRA. The transactions contemplated by this Lease do not trigger ISRA, and no General Information Notice or other ISRA submittal is required in connection with such transactions.

## 2.1 Environmental Compliance.

### 2.1.1 Prior Occupant Contamination.

2.1.1.1 Landlord has disclosed to Tenant that monitoring, investigation and remediation of Hazardous Substances at the Development by \_\_\_\_\_ ("**Prior Occupant**") is ongoing (the "**Ongoing Remediation**") pursuant to the existing cases identified in the Memorandum of Agreement between Prior Occupant and the New Jersey Department of Environmental Protection ("**NJDEP**") dated \_\_\_\_\_, a copy of which has been provided to Tenant (the "**Prior Occupant MOA**"). Hazardous Substances covered by the Prior Occupant MOA, together with any additional Hazardous Substances discovered, at any time and from time to time, that relate to or result from the environmental contamination covered by the Prior Occupant MOA, including, without limitation, breakdown products, are referred to herein as the "**Prior Occupant Contamination**". Landlord has advised Tenant that, pursuant to the Purchase and Sale Agreement between Prior Occupant and Landlord dated May 5, 2003 (the "**PSA**"), Prior Occupant remains obligated to Landlord to complete the Ongoing Remediation in accordance with the Prior Occupant MOA. The disclosure under this Section 2.7.1 shall in no event relieve Landlord of any of its obligations under this Lease.

2.1.1.2 From and after the Effective Date, including throughout the Term, Landlord shall, at its sole cost and expense, enforce Prior Occupant's obligations under the PSA relating to the Prior Occupant Contamination. Notwithstanding the foregoing, Tenant shall hold Landlord solely responsible for performing and completing, or causing the performance and completion of, the Ongoing Remediation, and for the monitoring, removal or other remediation of the Prior Occupant Contamination to the standard required by the PSA, and in any event in a manner and to the standard(s) that (a) allows for Tenant's Intended Use on the Property, and (b) results in (i) a No Further Action Letter from the NJDEP or (ii) the issuance of a Response Action Outcome by a Licensed Site Remediation Professional ("**LSRP**") ((a) and, either (b)(i) or (b)(ii), collectively "**Regulatory Closure**"), at no cost or expense to Tenant. If, to achieve Regulatory Closure, Prior Occupant or Landlord elects to employ any engineering and/or institutional controls ("**Post-Closure Controls**"), including, without limitation, Classification Exception Area(s) and/or Deed Notice(s) (as such terms are defined by the NJDEP), then (yy) all Post-Closure Controls shall allow for Tenant's Intended Use on the Property and be reasonably acceptable to Tenant; and (zz) Landlord shall undertake (or cause Prior Occupant to undertake) and be responsible for any and all monitoring, reporting, filings and fees associated with the Post-Closure Controls, including without limitation, monitoring, reporting, filings and fees associated with any biennial certifications, remedial action permits and/or any modification or termination submittals associated with the Post-Closure Controls (the foregoing collectively "**Post-Closure Control Requirements**"). In the event that Landlord shall fail to perform as required under this Section 2.1.1.2 prior to the Commencement Date, Tenant may, in Tenant's sole discretion, send a Notice to Landlord of its intention to terminate this Lease, whereupon, in the event that Landlord does not remedy its failure to perform to Tenant's reasonable satisfaction within thirty (30) days of receipt of Tenant's aforesaid Notice, this Lease shall terminate and thereafter neither party shall have any further

rights or obligations hereunder except for those which are expressly stated to survive the termination of this Lease. Further, in the event that Landlord shall fail to perform as required under this Section 2.1.1.2, whether before or after the Commencement Date, Tenant may, in addition to any other remedies Tenant may have at Law, in equity, under this Lease, under the Holdback Agreement or otherwise, perform, in its own name or as agent of Landlord, the remaining remediation, any required Regulatory Closure activities and/or any Post-Closure Control Requirements associated with the Prior Occupant Contamination, at Landlord's sole cost, expense and risk.

2.1.1.3 Pre-Commencement Contamination. In the event that Tenant or Landlord determines, or otherwise becomes aware, prior to the Commencement Date, that the Property is impacted by Hazardous Substances that are not part of the Prior Occupant Contamination (the "**Pre-Commencement Contamination**"), then, subject to Tenant's right to terminate this Lease at any time during the Feasibility Period, Landlord shall be obligated to monitor, remove or otherwise remediate the same to achieve Regulatory Closure, at its sole cost and expense in accordance with Environmental Laws and pursuant to a remediation plan and schedule prepared by Landlord and approved by Tenant (which approval shall not be unreasonably withheld, delayed or conditioned) and all applicable authorities. In the event that monitoring and/or remediation shall be required, Landlord agrees to proceed diligently and in good faith to obtain all applicable approvals and to promptly commence and thereafter achieve Regulatory Closure prior to the Commencement Date. Tenant may, in its sole and absolute discretion, extend the Commencement Date under this Lease to accommodate the approved remediation schedule. If, despite Landlord's good faith efforts, Regulatory Closure cannot be achieved with respect to groundwater impacts from the Pre-Commencement Contamination (the "**Pre-Commencement Groundwater Contamination**") prior to the Commencement Date, then Landlord shall achieve Regulatory Closure with respect to soil impacts from the Pre-Commencement Contamination by the Commencement Date and shall prepare a Remedial Action Workplan (in accordance with NJDEP regulations and guidance) to address the Pre-Commencement Groundwater Contamination (the "**Pre-Commencement Groundwater Contamination Remedial Action Workplan**"). The Pre-Commencement Groundwater Contamination Remedial Action Workplan shall be provided to Tenant as soon as reasonably practicable, and, in any event, at least twenty (20) days in advance of the Commencement Date, shall allow for Tenant's Intended Use on the Property and shall be reasonably acceptable to Tenant, and Tenant shall provide comments, if any, within ten (10) business days after receipt of the Pre-Commencement Groundwater Contamination Remedial Action Workplan. Tenant's review and approval of the Pre-Commencement Groundwater Contamination Remedial Action Workplan shall not be unreasonably withheld or delayed; provided, however, the Commencement Date shall not occur until Tenant has approved, in its reasonable discretion, the Pre-Commencement Groundwater Contamination Remedial Action Workplan. Landlord shall, at its sole cost and expense, diligently pursue and thereafter achieve, Regulatory Closure with respect to the Pre-Commencement Groundwater Contamination, even though such activities may take place after the Commencement Date. If Landlord elects to employ any Post-Closure Controls to achieve Regulatory Closure (either with respect to soil or groundwater), then (a) all Post-Closure Controls shall allow for Tenant's Intended Use on the Property and be reasonably acceptable to Tenant; and (b) Landlord shall undertake and be responsible for any and all Post-Closure Control Requirements. If Landlord elects to employ any Post-Closure Controls to achieve Regulatory Closure with respect to soils, Landlord may, subject to Tenant's review and reasonable approval, and at no additional cost to Tenant, use Tenant's Improvements as all or a portion of the Post-Closure Controls, in which case Regulatory Closure for soils shall be deemed satisfied for purposes of determining the Commencement Date when all soil remediation is complete except for installation of Tenant's Improvements that will serve as the Post-Closure Controls, and implementation of a deed notice related thereto. Landlord specifically acknowledges and agrees that if Tenant's Improvements are used as Post-Closing Controls as aforesaid, such use shall not interfere with Tenant's Intended Use, and Tenant will not be liable or responsible for any obligations or costs related to Landlord's use of Tenant's Improvements therefor, including, without limitation, responsibility for inspection and repair of pavements or other surfaces in connection with Landlord's use of Tenant's Improvements as Post-Closing Controls. In the event that Landlord shall fail to perform as required under this Section 2.1.1.3 prior to the Commencement Date and if the estimated costs to achieve Regulatory Closure for the Pre-Commencement Contamination ("**Pre-Commencement Contamination Costs**") are greater than Two Million and No/100 Dollars (\$2,000,000.00), then Tenant may, in Tenant's sole discretion, send a Notice to Landlord of its intention to terminate this Lease, whereupon, in the event that Landlord does not remedy its failure to perform to Tenant's reasonable satisfaction within thirty (30) days of receipt of Tenant's aforesaid Notice, this Lease shall terminate and thereafter neither party shall have any further rights or obligations hereunder except for those which are expressly stated to survive the termination of this Lease. Further, in the event that Landlord shall fail to perform as required under this Section 2.1.1.3, whether before or after the Commencement Date, in addition to any remedies Tenant may have at Law, in equity, under this Lease, under the Holdback Agreement or otherwise, Tenant may perform, in its own name or as agent of Landlord, the remaining remediation, any required Regulatory Closure activities and/or any Post-Closure Control Requirements associated with the Pre-Commencement Contamination, at Landlord's sole cost, expense and risk.

2.1.1.4 Landlord's Work Contamination. In the event that Landlord or Tenant determines, or otherwise become aware, prior to the completion of Landlord's Initial Work, that the Property is impacted by Hazardous Substances that are not part of the Prior Occupant Contamination or the Pre-Commencement Contamination (the "**Landlord's Work Contamination**"), Landlord shall be obligated to monitor, remove or otherwise remediate the same to achieve Regulatory Closure, at its sole cost and expense in accordance with Environmental Laws and pursuant to a remediation plan and schedule prepared by Landlord and approved by Tenant (which approval shall not be unreasonably withheld, delayed or conditioned) and all applicable authorities. In the event that monitoring and/or remediation shall be required, Landlord agrees to proceed diligently and in good faith to obtain all applicable approvals and shall promptly commence and thereafter achieve Regulatory Closure prior to the expiration of Landlord's Initial Work Period. Tenant may, in its sole and absolute discretion, extend the date of the expiration of Landlord's Initial Work Period under this Lease to accommodate the approved remediation schedule. If, despite Landlord's good faith efforts, Regulatory Closure cannot be achieved with respect to groundwater impacts from the Landlord's Work Contamination (the "**Landlord's Work Groundwater Contamination**") prior to the expiration of Landlord's Initial Work Period, then Landlord shall achieve Regulatory Closure with respect to soil impacts from Landlord's Work Contamination by the expiration of Landlord's Initial Work Period and shall prepare a Remedial Action Workplan (in accordance with NJDEP regulations and guidance) to address the Landlord's Work Groundwater Contamination (the "**Landlord's Work Groundwater Contamination Remedial Workplan**"). If Landlord elects to employ any Post-Closure Controls to achieve Regulatory Closure with respect to soils, Landlord may, subject to Tenant's review and reasonable approval, and at no additional cost to Tenant, use Tenant's Improvements as all or a portion of the Post-Closure Controls, in which case Regulatory Closure for soils shall be deemed satisfied for purposes of determining the date of the expiration of Landlord's Initial Work Period when all soil remediation is complete except for installation of Tenant's Improvements that will serve as the Post-Closure Controls, and implementation of a deed notice related thereto. Landlord specifically acknowledges and agrees that if Tenant's Improvements are used as Post-Closing Controls as aforesaid, such use shall not interfere with Tenant's Intended Use, and Tenant will not be liable or responsible for any obligations or costs related to Landlord's use of Tenant's Improvements therefor, including, without limitation, responsibility for inspection and repair of pavements or other surfaces in connection with Landlord's use of Tenant's Improvements as Post-Closing Controls. The Landlord's Work Groundwater Contamination Remedial Action Workplan shall be provided to Tenant as soon as reasonably practicable, and, in any event, at least twenty (20) days in advance of the expiration of Landlord's Initial Work Period, and allow for Tenant's Intended Use on the Property and be reasonably acceptable to Tenant, and Tenant shall provide comments, if any, within ten (10) business days after receipt of the Pre-Commencement Groundwater Contamination Remedial Action Workplan. Tenant's review and approval of the Landlord's Work Groundwater Contamination Remedial Action Workplan shall not be unreasonably withheld or delayed. Landlord shall be responsible for, at its sole cost and expense, and shall diligently pursue and thereafter achieve, Regulatory Closure with respect to the Landlord's Work Groundwater Contamination. If Landlord elects to employ any Post-Closure Controls to achieve Regulatory Closure (either with respect to soil or groundwater), then (a) all Post-Closure Controls shall allow for Tenant's Intended Use on the Property and be reasonably acceptable to Tenant; and (b) Landlord shall undertake and be responsible for any and all Post-Closure Control Requirements. In the event that Landlord shall fail to perform as required under this Section 2.1.1.4, then, in addition to any other remedies Tenant may have at Law, in equity, under this Lease, under the Landlord's Closure Agreement or otherwise, Tenant may perform, in its own name or as agent of Landlord, the remaining remediation, any required Regulatory Closure activities and/or any Post-Closure Control Requirements associated with the Landlord's Work Contamination, at Landlord's sole cost, expense and risk.

#### 2.1.2 Holdback Escrow.

2.1.2.1 On the Commencement Date, Landlord shall deposit with Title Company Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) from the proceeds of the Base Rent for activities related to the Regulatory Closure of, and the Post-Closure Control Requirements associated with, the Prior Occupant Contamination (the "**Holdback Amount**"). The Holdback Amount will be held in escrow and deposited in an interest-bearing account (the "**Holdback Escrow**") pursuant to the terms of an escrow agreement between Landlord, Tenant and Title Company (the "**Holdback Agreement**"), the form and substance of which Tenant and Landlord shall have agreed upon on or before the expiration of the Feasibility Period pursuant to Section 2.4.6 above. As more particularly set forth in the Holdback Agreement, the Holdback Amount shall be held in the Holdback Escrow as security for Landlord's breach of its covenants under Sections 2.1.1.1 and 2.1.1.2 and its indemnities under Section 11.2.4, of this Lease, and the Holdback Amount shall be distributed in accordance with the terms of the Holdback Agreement to Landlord, or in the event of Landlord's breach of its covenants under Sections 2.1.1.1 and 2.1.1.2 to Tenant upon the performance by or on behalf of Tenant of remediation, any required Regulatory Closure activities and/or any Post-Closure Control Requirements associated with the Prior

Occupant Contamination. As further set forth in the Holdback Agreement, as of the date of the Regulatory Closure for the Prior Occupant Contamination, any Holdback Amount then remaining in the Holdback Escrow that is greater than one hundred and twenty-five percent (125%) of the estimated cost to complete any remaining Post-Closure Control Requirements related to the Prior Occupant Contamination shall be returned to Landlord and the balance of the Holdback Amount shall remain in the Holdback Escrow for a period of twenty (20) years from the date of the public opening of the Facility.

2.1.2.2 If Landlord is pursuing Regulatory Closure of the Pre-Commencement Groundwater Contamination after the Commencement Date or Landlord's Work Groundwater Contamination after the expiration of Landlord's Initial Work Period, and/or has elected to employ Post-Closure Controls to achieve Regulatory Closure with respect to any Pre-Commencement Contamination and/or Landlord's Work Contamination, then Landlord shall deposit on or before the expiration of Landlord's Initial Work Period an amount equal to one hundred and twenty-five percent (125%) of the estimated cost to complete (i) Regulatory Closure of any Pre-Commencement Groundwater Contamination and/or Landlord's Work Groundwater Contamination and (ii) Post Closure Control Requirements associated with the Pre-Commencement Contamination and/or Landlord's Work Contamination for a period of twenty (20) years ((i) and (ii) collectively, the "**Landlord's Closure Amount**"), with Title Company, to be held in escrow and deposited in an interest-bearing account (the "**Landlord's Closure Escrow**") pursuant to the terms of an escrow agreement between Landlord, Tenant and Title Company (the "**Landlord's Closure Agreement**"), the form and substance of which Tenant and Landlord shall have agreed upon on or before the expiration of Landlord's Initial Work Period. As more particularly set forth in the Landlord's Closure Agreement, the Landlord's Closure Amount shall be held in the Landlord's Closure Escrow as security for Landlord's breach of its covenants under Sections 2.7.1.3 and 2.7.1.4, and its indemnities under Section 11.2.4, of this Lease, and the Landlord's Closure Amount shall be distributed in accordance with the terms of the Landlord's Closure Agreement to Landlord, or in the event of Landlord's breach of its covenants under Section 2.7.1.3 or 2.7.1.4, to Tenant upon the performance by or on behalf of Tenant of any measures undertaken to achieve/maintain Regulatory Closure and/or Post-Closure Control Requirements associated with the Pre-Commencement Contamination and/or Landlord's Work Contamination. As further set forth in the Landlord's Closure Agreement, the balance of the Post-Closure Control Amount shall remain in the Post-Closure Control Escrow for a period of twenty (20) years from the date of the public opening of the Facility. Notwithstanding the foregoing, any and all costs included within Landlord's Closure Amount that have been granted coverage under the Environmental Insurance Policy shall be distributed in accordance with the terms of the Landlord's Closure Agreement to Landlord upon proof of coverage reasonably acceptable to Tenant.

2.1.3 Cost Estimates. Tenant and Landlord agree that with respect to the determination of the Pre-Commencement Contamination Costs and/or Landlord's Closure Amount (either one of the foregoing a "**Cost Estimate**"), Landlord's Licensed Site Remediation Professional ("**LSRP**") shall submit a preliminary Cost Estimate to Tenant's LSRP for approval. If approval is not granted, Tenant's LSRP shall submit written comments and/or its own Cost Estimate to Landlord's LSRP. Landlord's LSRP and Tenant's LSRP shall cooperate and use all reasonable efforts to resolve any conflicts between their submittals and arrive at a mutually agreeable Cost Estimate. In the event that Landlord's LSRP and Tenant's LSRP are unable to agree upon the Cost Estimate, the submittals of the Landlord's LSRP and Tenant's LSRP shall be submitted to a neutral LSRP (reasonably agreed to by both Landlord and Tenant) and the Cost Estimate shall be determined by such neutral LSRP. The costs incurred to employ the services of the neutral LSRP shall be split equally by Landlord and Tenant.

#### 2.1.4 Release and Assumption.

2.1.4.1 The Landlord Indemnified Parties shall, and hereby do, (A) waive, release and discharge the Tenant Indemnified Parties, from any and all Costs now or hereafter arising from or related to any Landlord's Hazardous Substances, and (B) assume all risk, responsibility and liability for any and all matters relating to any Landlord's Hazardous Substances, including, without the limitation any and all Costs, risk, responsibility and liability associated with any audit or enforcement action initiated by NJDEP in connection with the Landlord's Hazardous Substances. "**Landlord's Hazardous Substances**" means all (i) Prior Occupant Contamination, (ii) Pre-Commencement Contamination, (iii) Landlord's Work Contamination, and (iv) all other Hazardous Substances at, on, in, under or emanating from the Development (excluding the Property), except to the extent caused or exacerbated by the Tenant Indemnified Parties.

2.1.4.2 From and after the expiration of the Landlord's Initial Work Period, the Tenant Indemnified Parties shall, and hereby do, (A) waive, release and discharge the Landlord Indemnified

Parties, from any and all Costs now or hereafter arising from or related to any Tenant's Hazardous Substances, and (B) assume all risk, responsibility and liability for any and all matters relating to any Tenant's Hazardous Substances, including, without the limitation any and all Costs, risk, responsibility and liability associated with any audit or enforcement action initiated by NJDEP in connection with the Tenant's Hazardous Substances. "Tenant's Hazardous Substances" means all Hazardous Substances at, on, in, under or emanating from the Property first discovered after the expiration of the Landlord's Initial Work Period, but specifically excluding all Landlord's Hazardous Substances.

2.1.4.3 The obligations of the parties under Sections 2.1.5.1 and 2.1.5.2 above shall in no way limit the indemnification obligations of the parties under Section 11 of this Lease.

2.3 Landlord to Indemnify Tenant. Notwithstanding that joint or concurrent liability may be imposed upon Tenant by Law, Landlord shall, upon demand, indemnify, defend, hold harmless and reimburse Tenant, its parents, subsidiaries, affiliates, shareholders, officers, partners, members, employees and agents, and their respective heirs, successors and assigns (individually, a "Tenant Indemnified Party" and collectively, the "Tenant Indemnified Parties") from and against and for any and all Costs which may be imposed upon or asserted against any of the Tenant Indemnified Parties, as a result of, on account of or arising from:

2.3.1 Landlord's Breach. Any breach, violation or non-performance by Landlord of any covenant or agreement in this Lease required by the terms of this Lease on the part of Landlord to be fulfilled, kept, observed or performed, or any breach by Landlord of any representation or warranty of Landlord made herein;

2.3.2 Prior to Commencement Date. Any obligation, claim, suit, liability, contract, agreement, debt or encumbrance created, arising or accruing on or prior to the Commencement Date, regardless of when asserted, relating to the Property or its operations (including, without limitation, any and all liabilities, including penalties, for federal or state income taxes or other taxes, which are not assumed by Tenant in writing), except to the extent such Costs arises by, through or under any of the Tenant Indemnified Parties;

2.3.3 The Development. Any obligation, claim, suit, liability, contract, agreement, debt or encumbrance relating to the Development (excepting the Property) or its operations, except to the extent such Costs arise by, through or under any of the Tenant Indemnified Parties;

2.3.4 Hazardous Substances. The presence of the Landlord's Hazardous Substances and remediation of the same (including, without limitation, the Ongoing Remediation), including, without limitation: (i) any claims by any third party for bodily injury or property damage (whether actual or alleged); (ii) any claims for natural resource damages; and (iii) any costs to respond to any New Jersey Department of Environmental Protection audits or enforcement actions related to the Landlord's Hazardous Substances

Case Study #6

## **GROUND LEASE – CONTAMINATED SITE**

### **Mixed-Use Development**

#### **Ground Floor Retail**

#### **DEFINITIONS**

"Environmental Statutes" means all federal, state and local laws, rules and- regulations, whether now existing or hereafter enacted or promulgated, regulating, relating to or imposing liability or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material or the protection of the environment, including, without limitation: (a) Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq. (known as CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (known as SARA); (b) Solid Waste Disposal Act, 42 U.S.C. §6901 et seq. (known as SWDA) as amended by Resource Conservation and Recovery Act

(known as RCRA); (c) National Environmental Policy Act, 42 U.S.C. §4321 et seq. (known as NEPA); (d) Toxic Substances Control Act, 15 U.S.C., §2601 et seq. (known as TSCA); (e) Safe Drinking Water Act, 42 U.S.C. §300(t) et seq. (known as Public Health Service Act, PHSA); (f) Refuse Act, 33 U.S.C. §407 et seq.; (g) Clean Water Act, 33 U.S.C. §1251 et seq. (known as Federal Water Pollution Control Act, FWPCA); (h) Clean Air Act, 42 U.S.C. §7401 et seq. (known as CAA); (i) The Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §1101 et seq. (known as EPCRTKA); (j) the Occupational Safety and Health Act, 29 U.S.C. §651 et seq. (known as OSHA); and (k) the New York Environmental Conservation Law, §1-0101 et seq. (known as ECL).

"Governmental Authority (Authorities)" means the United States of America, the State of New York, City of New York and any agency, department, commission, board, bureau, instrumentality or political subdivision of any of the foregoing, now existing or hereafter created, having jurisdiction over the Premises or any portion thereof.

"Hazardous Materials" means....The term "Hazardous Materials" shall not include reasonable quantities of the foregoing substances used or stored at the Land and the Building in compliance with all Environmental Statutes and in the ordinary course of operating and maintaining a Class A residential/mixed-use project (including common cleaning supplies located at the Land and the Building). Notwithstanding the foregoing exclusion from the definition of Hazardous Materials of reasonable quantities of substances used or stored at the Premises in strict compliance with all Environmental Statutes and in the ordinary course of operating a Class A residential/mixed-use project (including common cleaning supplies located at the Land and the Building), any claim or disposal relating to such substances excluded from the definition of Hazardous Materials shall nevertheless be deemed to be a disposal with respect to which Tenant shall be obligated to notify Landlord and indemnify, defend and hold harmless Landlord.

"Land" means the land described in Exhibit A annexed hereto and known as [address redacted], exclusive of the Unleased Premises (as hereinafter defined).

"Remedial Work" has the meaning set forth in Section 41.8 hereof.

"Site" means the Land.

"Unleased Property" means the westerly 72.4 feet of [address redacted] which is not being leased to Tenant and is intended to be occupied by Landlord after [condition redacted].

## HAZARDOUS MATERIALS

Section 41.1 Tenant hereby agrees that all operations or activities upon, or any use or occupancy of the Land or any improvements now or subsequently located thereon, or any portion thereof by Tenant or any Tenant Party throughout the term of this Lease, shall be in all respects in compliance with all Environmental Statutes. Tenant covenants to Landlord that it will not use, or allow to be used, generated, manufactured, produced, stored, transported, treated, disposed or released on, in or about the Land, any Hazardous Materials except as may be reasonably required in connection with the operation and maintenance of the Premises, such as cleaning and maintenance supplies and fuel related to emergency power generation needs, and then only in full compliance with all Environmental Statutes and other applicable laws.

Section 41.2 Landlord reserves the right to enter the Land upon prior notice at any reasonable time, and at any time without notice in exigent circumstances, for the purpose of visually inspecting and examining the Land for the presence of any Hazardous Materials. If the results of such inspection or examination reveal the presence of Hazardous Materials in, on or about the Land, or if Landlord has reasonable cause to believe that they are present in, on or about the Land due to Tenant's failure to be in compliance with Section 41.1, then Tenant shall reimburse Landlord for its reasonable cost incurred in undertaking such inspection and examination.

Section 41.3 Tenant shall hold Landlord (and each of the Landlord Indemnitees) harmless from, and protect, defend and indemnify Landlord (and each of the Landlord- Indemnitees) against any and all claims, actions, administrative proceedings (including informal proceedings), judgments, damages, punitive damages, penalties, fines, costs, liabilities, interest or losses, including reasonable attorneys' fees and

expenses, consultant fees, and expert fees, together with all other costs and expenses of any kind or nature that arise during or after the Term of this Lease, directly or indirectly (including the orders of any regulatory agency) whether foreseeable or not for any injury or damage to any person or property caused by the presence, suspected presence, release or suspected release of any of Hazardous Materials into the air, soil, surface water or groundwater at, on, about, under or within the Land or any improvements now or subsequently located thereon or any portion of either by any Person other than Landlord. The provisions of this indemnity shall remain in full force and effect and shall not be affected or impaired by any termination of this Lease and shall survive any such termination. Neither the consent by Landlord to the use, generation, storage, release, disposal or transportation of Hazardous Materials as set forth in Section 41.1, nor Tenant's strict compliance with all Environmental Statutes, shall excuse Tenant from Tenant's indemnification obligations hereunder. Any defense of Landlord pursuant to this indemnity shall be by counsel reasonably acceptable to Landlord. The indemnity shall apply to any diminution in the value of the Land.

Section 41.4 Tenant shall at all times maintain or cause to be maintained current permits required for all of its operations on the Land, including those required for the use, storage, or disposal of Hazardous Materials in, on or about the Land and any improvements now or subsequently located thereon; provided, however, that nothing in this paragraph shall imply Landlord's consent to Tenant's storage, use or disposal of any Hazardous Material in, on or about the Land except as provided pursuant to Section 41.1.

Section 41.5 If Tenant shall become aware of or receive notice or other communication concerning any actual, alleged, suspected or threatened violation of any Environmental Statute or any Disposal, Tenant shall deliver to Landlord, within ten (10) days of the receipt of such notice or communication by Tenant, a written description of said violation, liability, correcting information or actual or threatened event or condition, together with copies of any documents evidencing same. Receipt of such notice shall not be deemed to create any obligation on the part of Landlord to defend or otherwise respond to any such notification.

Section 41.6 Upon the termination or expiration of this Lease, for whatever reason, Tenant shall promptly (a) remove any and all Hazardous Materials placed, or allowed to be placed, in, on or about the Land by Tenant to the extent required to return the Land to a condition in full compliance with all Environmental Statutes and other applicable laws, and (b) remove and replace any fixture, mechanical or other system, or improvement in and to the Premises which was involved in Tenant's use, storage or disposal of Hazardous Materials and which cannot otherwise be returned to a condition in full compliance with all Environmental Statutes and other applicable laws.

Section 41.7 Tenant shall not deposit or allow to be deposited in, on or about, or allow to remain in, on or about the Land, or any other property of Landlord, any waste material or debris of any nature whatsoever except as such is generated by Tenant's normal operation of the Land, and then only temporarily pending proper ultimate disposition thereof off of the Land.

Section 41.8 In the event any investigation or monitoring of site conditions or any clean-up, containment, restoration, removal or other remedial work (collectively, the "Remedial Work") is required under any Environmental Statute, by any judicial order, or by any Governmental Authority then Tenant shall perform or cause to be performed the Remedial Work in compliance with such law. All Remedial Work performed by Tenant shall be performed by one or more contractors, selected by Tenant and approved in advance in writing by Landlord, and under the supervision of a consulting engineer selected by Tenant and approved in advance in writing by Landlord. All costs and expenses of such Remedial Work shall be paid by Tenant, including, without limitation, the charges of such contractor(s), the consulting engineer, and Landlord's reasonable attorneys' fees and costs incurred in connection with monitoring or review of such Remedial Work.

Section 41:9 Each of the covenants and agreements of Tenant set forth in this Article 41 shall survive the expiration or earlier termination of this Lease.

#### **Case Study #7**

### **RETAIL LEASE – BROWNFIELD SITE – MIXED USE DEVELOPMENT**



*Section 2.1. Premises.* In consideration of the mutual covenants and agreements herein contained, Landlord hereby leases to Tenant the premises of approximately 16,200 Leaseable Square Footage (as hereinafter defined) (the "Premises") which is designated as "PREMISES" on **Exhibit A** and is located at the Premises Address, together with all appurtenances and the rights granted with respect to the Common Facilities.

*Section 2.3. Common Facilities.* Landlord grants to Tenant, its employees and invitees, the non-exclusive right and easement to use all of the sidewalks, driveways, alleys, service areas including loading and unloading facilities (other than the loading area, if any, which is designed for use with the Premises or other premises with the Project), ... landscaping, if any, septic systems, cesspools and other facilities of the Project designed for use by all occupants of the Project (the "Common Facilities"). Landlord grants to Tenant the exclusive right to use that portion of the service area, including loading areas, designed for use with the Premises and the exclusive use of the parking spaces located with Tenant's Protected Area shown on **Exhibit A** (including exclusive control over the roll down door serving the parking garage). ....

*Section 2.4.2. Date of Delivery.* Landlord will use commercially reasonable efforts to substantially complete Landlord's Work and to have Delivery of Possession occur by the Delivery Date. ...

*Section 2.4.3. Condition of Premises.* Landlord warrants that upon Delivery of Possession (i) Landlord's Work shall be substantially complete (including construction of the parking garage in accordance with **Exhibit E**); (ii) the sprinkler system, electrical system plumbing system, all other mechanical systems of the Premises and the roof and structural components of the Premises will be in good order and condition; (iii) the Premises will be weathertight; (iv) the Premises will be free from asbestos; (v) the Premises and Common Facilities will be free from unused fuel tanks. (including any existing tanks which Tenant does not intend to use), contaminated soil and other Hazardous Materials (as defined in Section 7A.3); ... (viii) all contingencies required by governmental authorities as a condition to Tenant obtaining permits and approvals for Tenant's Work shall have been fulfilled; ... (x) Landlord shall have theretofore delivered to Tenant all of the agreements required under Section 13.3, hereof; ... For the purposes hereof, "substantial completion" of Landlord's Work shall mean completion in accordance with the Final Specifications except for Punchlist items (as defined below) which are capable of completion within 30 days and which will not materially interfere with Tenant's Work; provided, however, regardless of whether or not Tenant has theretofore opened for business within the Premises, in no event shall Landlord's Work be deemed substantially completed until Landlord entirely completes all items which would materially interfere with the operation of Tenant's business in the Premises. ....

*Section 2.5. Landlord's Work.* Prior to Delivery of Possession, Landlord shall perform the work described in this Section 2.5 as follows ("Landlord's Work"):

*Section 2.5.1. Environmental Report.* Notwithstanding the foregoing (but without limiting Landlord's obligations under Sections 7.4.3 and 8.2(c) hereof), Tenant hereby acknowledges receipt of that certain (i) Brownfield Site Cleanup Agreement, dated [redacted], and prepared by New York State Department of Environmental Conservation, and (ii) Subsurface Investigation Findings Report, dated [redacted] and prepared by [environmental consultant], and Tenant agrees that such reports are satisfactory to Tenant for the purposes of this Section 2.5.1.

*Section 7.4.3. Environmental Indemnities.* Landlord shall defend, indemnify and save harmless Tenant, its agents, employees and contractors, against all loss, liability or expense relating to personal, property or economic injury (including any costs incurred by Tenant in Landlord's or Tenant's name in connection with the correction of any violation of Environmental Laws if Tenant is required by law to perform such correction) arising from the presence of Hazardous Materials located within the Project (other than any such Hazardous Materials introduced by Tenant, its agents, employees or contractors). Tenant shall defend, indemnify and save harmless Landlord, its agents, employees or contractors, against all loss, liability or expense relating to personal, property or economic injury (including any costs incurred by Landlord in connection with the correction of any violation of Environmental Laws if Landlord is required by law to perform such correction) arising from the presence of Hazardous Materials located within the Project if introduced by Tenant, its agents, employees or contractors. The provisions of this Section 7.4.3 shall survive the expiration or earlier termination of this Lease. For the purposes of this Lease, the term "Environmental Laws" shall be defined to include all present or future laws or regulations regarding the use, storage, removal or abatement of hazardous, toxic and/or environmentally controlled materials. As used herein, "Hazardous Materials" shall mean all hazardous, toxic and/or environmentally or statutorily controlled materials.

## **Article VIII. Maintenance, Repairs and Utilities**

*Section 8.1. Tenant's Obligations.* From and after Delivery of Possession, Tenant, at Tenant's sole expense, agrees to:

...

(e) be responsible for and pay the cost of removal of Tenant's own trash. ... Tenant covenants that all trash shall be kept in proper containers, ... and kept within the Premises until after 6:30 p.m. each evening, when Tenant shall remove all trash for caring away by Tenant's carting contractor. All such removing and carting away of trash shall be at Tenant's sole cost and expense ....

*Section 8.2. Landlord's Obligations.* Landlord, at Landlord's sole expense, agrees to:

...

(c) perform all work required to comply with all Environmental Laws in connection with Hazardous Materials that may be on or introduced onto the Premises or the Project (other than such Hazardous Materials which are introduced by Tenant, its agents, employees or contractors).